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9-11-2014

### Statement by Rebecca Irving collected by Rachel George on September 11, 2014

Rebecca Irving

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## General Information

**Private or Public Statement?** - Private

**Statement Provider:** Rebecca Irving

**Date:** September 11, 2014

**Location:** Machias, Maine

**Previous Statement?** No

**Statement Gatherer:** Rachel George

**Support Person:** N/A

**Additional Individuals Present:** Gail Werrbach, Sandy White Hawk

**Recording Format:** Audio

**Length of Recording:** 1:15:03

## Recording

**RG:** Alright, it is September 11th, 2014, and we're here in Machias, Maine. My name is Rachel George and we're here today with...

**RI:** Rebecca Irving.

**GW:** Gail Werrbach.

**SWH:** Sandy White Hawk.

**RG:** Fantastic. And the file number is ME-201409-00092. Rebecca, have you been informed, understood and signed the consent form?

**RI:** Yes, I have.

**RG:** Fantastic. And I have to let you know that if at any point during this recording you indicate that there is a child or elder currently in need of protection, or that there is imminent risk of serious bodily harm or death to an identifiable person or group, including yourself, that this information may not be protected as confidential.

**RI:** I understand.

**RG:** Ok, do you feel ok going forward?

**RI:** Yes, I do.

**RG:** Excellent. Is there anything you want to say starting off, or do you just want me to jump into the questions?

**RI:** No, you can just jump in. I'm honored to be asked to, um, be here today, though.

**RG:** We are very honored to have you. Um, can you tell me about your employment as a judge?

**RI:** Yes. I have been employed by the Passamaquoddy tribal court as their chief judge since 1994. Prior to that I worked with the tribe its tribal prosecutor since 1983. So I've worked for the tribe for quite a few years.

**RG:** Throughout your time working with the tribe, um, have you worked with a lot of child welfare cases?

**RI:** Yes, in fact and I don't know if – if we're going to follow the format of these questions but my very first case as a tribal prosecutor was a child welfare matter that I can discuss with you in terms of its impact. The tribal court had just gotten off the ground, so to speak, from the Land Claims Settlement Act and I was asked to become the tribal prosecutor because the tribe felt -- and still feels its necessary -- to have a legal background in child welfare matters and all matters actually. So, I accepted and the first case I had, I was 9 months pregnant -- but it was an emergency situation and I said, if you're willing to have me, I will do. And so we went to court and it was night court because not all of the parties could be there and the case involved a situation that frankly has taken a number of years to resolve in terms of jurisdictional acceptance of the Passamaquoddy tribal court. The tribal court was initially -- and I don't think that I am speaking out of turn here--uh, I think very poorly respected by not only tribal members at the time but more importantly, by the state. The state judiciary and the state bar. It was a joke. It was considered a joke and as a result, it's taken years to -- in my opinion -- obtain the legitimacy through education and frankly, through a will not to give up -- that has allowed the court to expand. I know I'm off--

**GW:** No, no, no, you just go--

**RG:** No, not at all.

**RI:** --subject here but to me, everything important with the tribe begins with jurisdiction -- and I don't even like to use that term because it implies that the tribe does not have inherent rights to speak and act for itself -- but we are stuck with the realities of what the courts and the state have done so that I think that a strong tribal court system, irrespective of who's the judge, is absolutely necessary to protect children and tribal members. Period. And I think that the tribal court has attained a level of legitimacy today but can only keep it if jurisdiction is maintained. So. Back to my first case with the tribe back in 1983.

**SWH:** Can I ask--

**RI:** Yes, interrupt -- it was November. I know because I was due to give birth in 3 weeks. It was November of 1983. It was night court. The court had just been, I think, structured in a way that allowed it to continue. There was, and I understand there had been a tribal court in existence prior to the enactment of the Lands Claim Act and the Settlement Act. However, I'm not familiar with that.

I went to Law School in Montana and was in Montana studying Indian Law which is vastly different, I'm sure you know, out west--with the federally recognized tribes at that-- from that area versus the state of Maine. But, Maine was be-- I studied about the Maine land claims act while I was in Montana because frankly, it was the first. It was just an unheard of judicial proceeding involving the tribe and I-- the tribe, the tribes here in Maine had a lot of support, all over the country but at least, I know they had it in Montana.

So, back to November, 1983: This was a situation where we had a number of tribal children and a tribal mother and a non-tribal father living together. The tribal father was abusive, a lot of domestic violence, and maintained a home both at Pleasant Point as well as in Cherryfield, Maine off the reservation. The domestic violence would be reported to both the mom and the children -- both places -- but the father of the children would take the family and run off reservation if things got too tough there and then run back to the reservation, if the state took custody. So the tribe was able to serve the family with a petition for emergency child protection, which was the first time, I think, that it had been done since the enactment of the, of the new tribal court system. I don't want to say it was the first but at least, it's the first I was involved in, and we had a very lengthy, very lengthy court hearing and it was ultimately determined that there was no abuse which was very disappointing.

I want to say as a positive, however, that the state child welfare caseworkers involved with the family were more than willing to support the tribe at that time with the action in tribal court. Part of the reason the tribe at that time, I think, did not win probably because their prosecutor was green but also because I think, and it continues to be a situation where the tribe has very little funds to hire experts, across the board with respect to many issues involving these kinds of cases. So one of the things that arose though from that very first case was the fact that the state recognized the tribal court's jurisdiction over tribal children and it has grown from there. You know, that was a long answer to that question.

**GW:** No, very helpful.

**SWH:** Yeah, great answer, don't worry, don't edit yourself.

**RI:** I tend to talk so just shut me up.

**GW:** No, it's helpful.

**RI:** Alright.

**RG:** There are really just a guideline: um, areas that we just want to touch on, but quite frankly, we love it when it happens like this, it's so much more.

**GW:** This is like our reminder list.

**RI:** Okay. Okay.

**RG:** Can you tell me a little bit more about what it was like working in the tribal court in the very early years?

**RI:** Right, in the very early years, and I'm going to say the very early years probably included the first ten or twelve, maybe even fifteen and probably is continuing on today. It required, oh, it required a lot of people committed to consistency with the tribal court structure itself, that means, learning to-- learning the process, the clerks. It was a, a tremendous job to find and keep clerks who were willing to go through the training for purposes of maintaining the tribal files, for purposes of issuing subpoenas, and serving summonses, and filing complaints. It was all new and it was all new in a way that required a great deal of training. The tribe, and I'm speaking now for the Passamaquo-- my work with the Passamaquoddys--was committed to tribal court. I'm, I'm just so pleased that it was because again, it took years and years for lawyers and judges in the state court system to take us seriously.

I'm just going to give you an example: in the 1980s, the state child support system changed and I again -- I was gonna say, don't quote me, but I guess I'm being quoted. I believe it was in the 80s. Part of the change included the fact that someone who was owed child support could take a form -- a document -- to an employer and ask that the person who owed the child supports wages be attached, and under state law, that employer was required -- mandated -- to attach a person's wages and pay the person who was owed the child support, the child support. And it was ignored by virtually everyone who was presented off-reservation with one of these orders, these tribal court orders. That's changed, but it took years and it's so frustrating for everyone involved in the process, to have a process, to use the tribal courts to obtain a remedy and then not have that remedy enforced off-reservation, because it did two things: it continued this concept that tribal court was a second-class citizen and it also caused tri-- legitimately caused tribal members to use state courts instead of tribal court because they didn't have the remedy.

We've had that same problem and I've been working with it. The state legislature and others, for years, to try and make --well, have a reciprocity type of, of situation with subpoenas. If somebody is a witness to a domestic assault or a child welfare proceeding and that person is a necessary witness for a tribal court proceeding, a subpoena is served. Now, it's gotten better but it still is in a situation where if you ignore the subpoena, I can arrest that person for contempt because if that person's a non-member, I just don't have that authority. Well, I think I have that authority, but the state court and the federal court probably wouldn't, but so we're been working with the state on that kind of a process so it's all of these internal processes that

allow remedies because if tribal members can't get the remedy in tribal court, why go to the tribal court?

Now, with child welfare cases, that's a different story and I find that there really is not a lot of, of problem in those cases. Now that's new – not new, that's within the last fifteen years or so, I would say. But, we have-- the first time I had an attorney, assistant attorney general appear in tribal court, I thought, "We've reached some modicum of success here." We've got a state attorney general here in tribal court, seeking relief in some fashion for a tribal or a non-tribal member, frankly, but again it's a recognition of the legitimacy of the tribal court that I found to be refreshing. And I think it has grown to the extent now that the state court judges really defer to tribal court when it involves tribal children. Now, I'm not going to be speaking from the standpoint of a parent whose child is placed off-reservation in certain situations, but I-- I really find that the Passamaquoddy tribe's child welfare system works tremendously for tribal children, and that the only barriers, the only barriers are the money necessary to train for special needs kids so that they can remain on reservation, because if, if the state court system could be as empathetic as the tribe's child welfare departments are with tribal children, I think we-- we'd see a great deal of improvement in families across the state. So, ah...

**GW:** And do you—and are you the tribal judge for the whole tribe, for both reservations?

**RI:** Yes, yes, and we have –I, I saw the question here: How many child welfare cases did you work with? Hundreds. Hundreds of child welfare cases. Early on as a prosecutor, um, the child welfare cases took priority over almost anything else. Ah, one of the things that I've noticed and like is the fact that we have very few termination of parental rights cases. And that's, again, thanks to the strong family commitments and the, you know, extended family commitments that tribal members have with their children which I just think is wonderful. There are off-reservation placements of children, and those are children--I can think of several--are children that suffer the repercussions of fetal alcohol syndrome, or mostly-- fetal alcohol syndrome where they've been born with a lot of disabilities and special needs--can't find the, a foster home available on either reservation for that child, so they are fostered out into those foster homes in the state that can handle it. But, we then handle, if necessary, their long-term placements, if it's necessary, because of funds, to have an adoption occur, the tribe only will consider -- the tribe, me -- I will only consider an adoption decree if it contains very specific, concrete attachments to the tribe so that--

**SWH:** For example?

**RI:** Attend, uh, Indian days. I mean -- not, you don't have a choice, you have to! You-- maintain contacts with extended family on both reservations, you have too—and if, each case is a little different but, the child's language and heritage have to be taught in some fashion given the child's needs. And it's, it's left open should that, should an extended family member

think that's not happening. So we've never had--or I've never seen any problems with that being accepted by the adopting family.

**SWH:** What would have been the consequence had they not done it?

**RI:** You know, I don't know. What kind of remedy that court would have other than... the adoption's closed, their the legal parent

**SWH:** Except that they agreed—

**RI:** --except that they agreed, it was conditioned on that and I suspect the most that I could get away with is to find them in contempt or something along that line, or to give them a stern lecture, but I haven't had that happen and I'm just hoping it doesn't for a couple of reasons: the tribe has, and I think it was done just to get the court system off the ground, it adopted the majority of state laws as applied to adoption and child welfare initially. The initial child welfare code was adopted. It hasn't changed in years which I think is helpful to the tribe. But, um, criminal laws, most civil laws with the exception of hosing and evictions. That's different. My major concern is not enough culture and heritage has crept back into the laws, but that's the Joint Council's responsibility. I can't do anything about it except constantly make comments that, you know, I-- it would be helpful if this happened for that happened. I can use tribal remedies to a-- tribal culture, healing circles--that type of thing up to a point but until the joint counsel gives me the authority to, until they amend the current laws to mandate that that happen, I'm kind of stuck. Now, the reason I bring that up is because we have adopted the adop-- the probate, the Maine probate adoption act, as the tribes, and haven't amended that, but I don't -- in my opinion -- have to pay attention to state courts that say the only way you can have an open adoption is if the state legislature changes the law. I say, yeah, under tribal law, we can have open adoptions. So the court has-- does not necessarily follow to the letter, the laws of the state of Maine, if I think children are suffering as a result or that tribal children are, so that's a major change, I think from what the state does.

**RG:** You had mentioned a shift, with regards to child welfare about fifteen years ago, and having the AAG appear in tribal court. I'm wondering if you can talk about that a little bit more, what that shift was? And what the circumstances I guess were, were—were in the instance where there was an AAG--

**RI:** Well, I'd be happy to, and I think that that is to the credit of the tribal court judges that preceded me. I think that -- and that was retired, district court judge, John Romei, followed by Jill Shibles Tompkins, who you may know...

**SWH:** Yeah, I know Jill.

**RI:** And Jill was instrumental in pulling the Passamaquoddy tribal court together in terms of process and her incredible knowledge. I-- she is still the Passamaquoddy's appellate court judge. Thank goodness. She-- she's still working, I believe, out in Colorado. Um, her knowledge and help to the Passamaquoddy tribal court is, I think, the shift that changed the way the state court system and all the way across the board--the district, superior, and supreme court judges view tri-- view tribal court. She was instrumental in working with the Joint



Council. I was the prosecutor during this time. The time that both and she and Judge Romei were the tribe's judges. But she was instrumental in working with the tribal -- Joint Tribal Council to enact statutes, laws, system involving juveniles, just really she, she really just did such a super job. So it's very easy for me to step in when she, she moved on to, to her other duties but having come into that, I think that we've had a number of cases that have been appealed and so we've kept, kept trying to keep a reporter of sorts with, ah, Passamaquoddy appellate decisions and there was at least one civil case that was a-- on a concurrent track in state court. In other words, the same case was being heard in state court, was started in state court. It was appealed five times to the Maine Supreme Court about number three time, the third time it was appealed, they filed--one of the parties filed in tribal court. I decided that tribal court had exclusive jurisdiction, and I didn't care what was happening in state court, and so I decided this case, it was appealed to--it was appealed to the Passamaquoddy appellate court, which upheld the tribal court's decision. At the same time, that decision was then taken to state court and it became what will the state court do now? And to its credit, the state court said, yes, the tribal court has exclusive jurisdiction and kicked it all out of state court, so that was huge.

The federal Law and Order Act, I know, isn't in-- maybe necessarily involved in the child welfare matters, but it's another, another case where Maine is the only state in the union that hasn't been granted automatic federal-- automatic jurisdiction over certain major crimes, felonies. And it hasn't be-- even though the congress has said all tribes shall, you know, be allowed to accept this juris-- take this jurisdiction if they want. I was in contact with the man in Washington DC who was sort of the ombudsman with respect to that act and I said, have you read the Maine Indian Land Claims Settlement Act? And he didn't have any idea what I was talking about. So I sent him copies and he said, I don't know what to say. I've never seen this animal before. And I said, well I'm not sure Maine can-- the Maine tribes can accept jurisdiction, but I think we can and I think we should. And I think the tribe would--money is always the rea-- jurisdiction's easy for me to say. Accept jurisdiction. It's hard to put that jurisdiction into effect if you don't have the money to do so. And that's why I think a lot of the child welfare matters stay outside of tribal court just because of the lack of funds, you know, necessary, but...

**RG:** When did you first learn about the Indian Child Welfare Act?

**RI:** It was mentioned, early on in my career as the tribal-- as the tribal prosecutor and when I say prosecutor, you, you're-- the job was as a prosecutor for the criminal end of things as well as the tribe's attorney for the child welfare matters so one person did both of those jobs. But nobody paid much attention to the Indian Child Welfare Act, and part of the reason is: is if it doesn't --if a child is in state custody somewhere, it's --that child's not in tribal court so that if you're working in tribal court, the Indian Child Welfare Act really doesn't have a whole lot to do with you until that child is brought within the jurisdiction of the tribal court --the child



welfare department during the times that I worked as the tribe's prosecutor, which was for quite awhile, again, didn't have the funds to send me anywhere to intervene in these cases involving Passamaquoddy children. Frankly, I didn't realize for years and years and years, how devastated the people of the Passamaquoddy tribe were, by being removed as children. I didn't-- I knew out west it happened, but I had no idea because no one spoke about it. I had a man stand up, and I think he was not justifying, but describing, the reasons another person had gotten into some trouble, criminally, and he, and he-- he started, he was much too... stoic to break down and actually cry but his voice kept catching and he was on the verge of tears, discussing how this man had been removed from his family, and what happened to him after that in the--I'm gonna say it was in the late 50s-- my recollection was, and aft-- and I can only take information. I can't prosecute. I can't defend. I just have to listen but afterwards, I asked -- asked him if he could stay, you know, and he did not want to talk about it but he just said, there are so many people in his position, so that when this commission was garnered -- and I know Denise Altvater, well, in terms of her work with the housing authority, I see Denise a lot. But until she interviewed in that piece that was--I don't know if it was public, uh, TV.

**GW:** Yeah, on the TV.

**RI:** I was just was--it was so closed--that aspect of trouble, life. So, and I can tell you this. I guess I will tell you this: the state bar overall has no idea--has no clue. I've spoken at the bar or I don't know at a couple of bar functions and continuing legal education seminars that have been given, over the last probably five or six years, at various parts around the state and I was shocked, just shocked that a number of lawyers, a huge number of lawyers, didn't know about tribal court, didn't even, just didn't know about tribal court. Had no idea what the jurisdictional parameters of tribal court were. Didn't know about the history of the Passamaquoddy tribe and I, again, I don't mean to eliminate the other tribes in the state of Maine, I'm just speaking from my own experience. About Indian's rights to vote in the state of Maine as opposed to federal--nobody knows the history and people are fascinated by it, are-- absolutely have their eyes opened by it, but I'm thinking, you know, you all are pretty old. You know, you're not teenagers out there. Why wouldn't you have? I just couldn't conceive. (*Loud beeping noise.*) I ran the battery.

*[Recorder was turned off due to technical issues, and then turned back on again.]*

**RG:** Now we have eight hours battery, just so you know, no rush. This is part 2 of ME-201409-00092.

**RI:** Alright, and I was--

**RG:** Thank you.

**RI:** That's okay. I was just speaking about how surprised I was at the lack of knowledge -- and it isn't because people weren't interested, it wasn't because they thought tribal court was not worthy of understanding. They just really didn't know, so. So that's changed I think, quite a bit, and I have to say that Chief Justice Saufley with the Maine Supreme Court has been a huge help in that regard, because she has invited the tribal court judges down, um, when she gives her state of judiciary address every year. And I've made it several times, not every year can I

make it down, but she introduces the tribal judges on a par with the state court judges. I am in a constant fight with the Bar Association to waive my, my attorney fees for joining the bar and my continuing education fees by claiming that I am a judge, but they haven't felt that it was necessary to do it for tribal court because they think of the tribal court as a foreign court as opposed to a state court which allows them to waive fees.

**SWH:** Wow, isn't that amazing?

**RI:** It isn't that much. The fees aren't that great but I get my nose out of joint sometimes when the tribal court is treated, you know, so differently from state courts.

**SWH:** Well, it says, it says everything about what they think.

**RI:** Yes.

**SWH:** Can I ask a question--you mentioned that you-- you didn't have funds to travel to intervene, so at this time, were there, um, tribal social workers or tribal, you know, representatives--

**RI:** Yes.

**SWH:**--maybe they weren't social workers but they were the, the tribal liaisons?

**RI:** Th-- yes.

**SWH:** So there was no money to send them either to represent in person in court, so was--so that was a funding issue, so could and did it ever happen that they could appear by phone?

**RI:** It, it has changed.

**SWH:** Did it finally?

**RI:** It has changed. Now, there's still limited funds when the call comes in, but because, you know, the, uh, Adoption of the Safe... Adoption...

**GW and SWH:** (*Speaking simultaneously.*) Adoption and Safe Families Act.

**RI:** And right, because other state courts are now cognizant of the Indian Child Welfare Act, they do more investigation and will contact the child welfare departments, and we have in the last probably, oh, 10 or 12 years intervened in the majority of cases I know about. Now I'm not saying I know about all the cases because if the tribe decides not to intervene, I don't hear about it. It's those cases where the tribe intervenes in an out-of-state court, or a state court

holds a hearing on whether to transfer jurisdiction--that's when I hear about it.

But again, I don't make the decision about when to intervene. It's my pol-- it's my position, and child welfare knows this, they should intervene. Whether they transfer jur-- want jurisdiction transferred or not, that they should intervene and in every single case that they know about. That was my position as the tribes' attorney for the child welfare department when I was there. But again, sometimes the tribe's attorney's the last person to know -- it's not something that you would need to know about. I'm going to suggest that we had our current district court judge in Washington County is David Mitchell, and Mr. Mitchell was the former tribe's attorney--until he took over his new job. I'm going to say he's been a judge now... for six months, seen months, maybe longer. But for, for-- I was, maybe eight or nine years-- I do apologize with my years and my dates because I just haven't really compartmentalized how long he was working with the tribe.

He had a, a very important ICWA case determined by Justice Anne Murray who was a district court judge at the time. I don't know if it was out of mid-coast Maine or Portland but it was a situation where the tr--, the Indian mother, and perhaps even the Indian father, did not want the case transferred to the tribal court and the tribe did. So, there was a big hearing in state court and it ended up that the state court judge said no, that the Indian Child Welfare Act, based on a number of different legal points, mandates that the matter be transferred because of-- and made, made quite a decision. And those decisions are not public. So that's another problem with training under the Indian Child Welfare Act and the Passamaquoddy tribe does not share its decisions, and this is a Joint Council decision with non tribal members unless you're a party. So it's not something that can be disseminated. I did fi-- get approval, though, to strike out all necessary names and whatever because the law in that case was so, in my opinion, important.

So that case was decided perhaps four or five years ago. It resulted in a child placed with non-tribal members, being eventually adopted. But adopted, again, with real specific provisions about maintaining contacts with the tribe. And that-- the child, or children, involved in that case had very strong familial ties. On one or both reservations. So, I just felt as though it was really important that that continue, but again these children had really difficult special needs.

**SWH:** Do you know why the parents didn't want to be in tribal court?

**RI:** It was, uh, because of the possibility, I believe, that other family members would become-- would interfere. It was an inner-family dispute as opposed to really, the best interest of the children. And some, some of the children of that same couple were in --there were a number of children. These two happened to be off reservation and the others were on reservation, but these two had, as I recall, had really special needs. But I was gratified that the state court judge decided in favor of the tribe, because I think, I think that should always be the case.

**RG:** Sorry.

**GW:** That's ok.

**RG:** So I'm gonna ask you-- I'm gonna go through this list, I guess--

**RI:** Sure. Sure.

**RG:** --of ICWA, um, areas. And if you could tell me about your experiences in that area and any challenges that you've witnessed -- or strengths that you've witnessed -- in dealing with each individual area. If you don't have any experience in that, that's totally fine, just let me know, we can move on.

**RI:** Okay.

**RG:** So could you describe your experience in working with initial identification of a child as Native American?

**RI:** Right, that occurs more often than not in state court proceedings where I represent parents, because I also represent parents in state court proceedings. And my radar is up for any member of a-- tribal member -- because I withdraw from that case. I really feel strongly that I should not have anything to do with any tribal child, whether that child is Passamaquoddy or not. I just, I just won't-- don't want to be involved. However, in that particular situation, I haven't had a blood quantum issue arise, so it's been fairly easy to say, you know, it's clearly a tribal child.

Our probate court judge here is really sensitive to adoptions. If there is any issue -- any issue -- that a child might be a Passamaquoddy, or a tribal member, he'll contact me. I contact the census office for both reservations and the clerks, who if they don't have the information, will work to get it and everything's on hold 'til that issue is resolved. But I haven't had to, in my capacity as the tribes' attorney or as a parents' attorney, ever been confronted with a--a, an issue of: is the child a member of the tribe? You know, based on blood quantum. It's just a matter of what tribe and notifying the proper people.

**RG:** And how about, um, state notification of Native children to tribal child welfare?

**RI:** It's becomi-- now, of course, I can only answer this from my perspective and that's probably better addressed to the child welfare directors. But, I think it's gotten much better, much much better. State caseworkers now--actually the form for a state child protection petition, requires the state to inquire about that and notify the appropriate agency. So, that's gotten much better. Washington County, Maine --I think we've got everybody trained pretty well to recognize that if it's a-- if it's a tribal child, or if there's any issue that they've gotta really check that out.

**GW:** Was that always the case?

**RI:** No, no. And I think it mostly was due to a lack of education. I'm not speaking to the caseworkers with the Department of Human Services, because frankly the more I hear from the

interviews of the people that are-- were involved with the child-- the state child welfare system, you know, I just have no excuses. I don't know. But I think it's-- from my perspective, gotten better. And we have state child welfare caseworkers often times at witnesses in tribal court-- state experts often times in tribal court and they're very willing. There's no question-- I don't know who pays them, but it's not tribal court, so, you know, they appear.

**RG:** What do they have-- what are they expert witnessing on?

**RI:** Oh, a lot-- mostly a lot of it's mental health issues. I would say the majority are mental health experts. Um, uh... medical doctors and mental health experts would be the two that I can just think of off the top of my head.

**RG:** Um, I think that we've talked about this a little bit already, but in determining jurisdiction or residence of a Native American child?

**RI:** It's-- far as I am concerned, if it's a tribal member. If a child's on the census, even if the child's not on the census, it depends. On the factual situation. I think the tribe has jurisdiction. I have-- happen to have a situation now where I have to have a... a judicial conference with a state court judge out of Portland because a non-member is claiming that the Portland district court has jurisdiction, and the husband, or the tribal husband -- I think -- member, is claiming tribal court has jurisdiction. And I think tribal court has jurisdiction, so I'll make that known and the reasons for that when we have our conference. But the fact we're having a conference -- in my opinion -- is huge. I mean, the outcome is the outcome, and you know, frankly if we both take jurisdiction, I don't know what would happen. Would be a first. But, I think that most of the time, district court judges and other judges in the state will honor the jurisdiction of the tribal court.

**RG:** And in child custody hearings? Experiences, challenges, strengths?

**RI:** The child custody hearings, uh... In th--in the aspect of child protective proceedings. Is that what you are asking? Within the child protective proceedings, we have --we have many child custody hearings. And uh, I'm uh... can tell you that family members are very involved and are allowed to intervene routinely in the state court system--grandparents can intervene as a matter of right, but in tribal court, I mean, I suppose if you're the tenth cousin twice removed maybe or maybe not. But if you have had a significant connection with the child or children at issue, you're in, as far as I'm concerned and the more people concerned about a child, the better as far as I'm concerned. So we often have very lengthy placement hearings and custody hearings.

But, again, I can tell you that the tribal family members who step up to the plate when there's a child in tribal custody are remarkable people and are there. Are supports beyond--strong supports. Just very strong supports. And they're respectful to the court, they're respectful to the court's decisions. They may not like them but understand that at least, I try to work in the child's best interest and keep the child within the community, and it seems to be working. At least I haven't heard of a lot of complaints that way. Once in a blue moon, the chief, one of the chiefs, may get involved in a case but have learned that I just will not get involved in politics.



Which is both good and bad, I suppose. It prevents me from be-- from becoming too knowledgeable about anyone and I really like so many people but I can't-- I really don't socialize. I really-- I, I may go to Indian Days or I may, but it-- it's really such a... It--it's, it's keeping arm's-- I have to keep at arm's length. That's hard for me sometimes because I so enjoy so many people that I, I have a hard time. But my office is in Machias so I'm physically distant and I try to stay out of politics, but I think that the tribal rep-- population understands that I just don't care about politics, and so, I don't take telephone calls from the chiefs, whoever they may be, or anyone related to a case-- say, "I'll go through the clerk's office." That's taken a-- that's taken a lot of years, and I've taken a few lumps, from, you know, persons for, for that because I'm seen-- sometimes I think I'm seen as distant and cold and I, it isn't that, I just can't. I just can't. And I would rather not be distant and cold, but that's the way.

**SWH:** To not get enmeshed.

**RI:** Yeah, yeah. Um, and I have a, a wonderful capacity for not remembering names or who's related. (*Laughing.*) I can't-- my own family, so, uh, it hasn't-- isn't a real problem there. I don't know who you are when --you know, and, I know you but I certainly don't know your connections and so that's helpful. That's my own deficit not, not because I want to.

**RG:** How about the use of heightened evidentiary standards to establish the need for involuntary out-of-home placement of a Native child?

**RI:** I'm very cognizant of that and it doesn't happen, often. It's--uh, uh... out-of-home placement... out-of-home placements happen-- when I say out-of-home, I mean off reservation. I don't mean out of the home where the jeopardy might be found. I think of that as being off reservation, and that does not happen very often from my perspective. It-- and it's very-- it's a very big issue in those cases where it, it may or may not happen. Parents and the tri-- other tribal members are really concerned if that's what's going to happen and there has to be a-- it has to be a high evidentiary standard before that happens.

**RG:** And how about the requirements for the use of active, remedial and rehabilitative efforts to prevent the break up of Native families before out-of-home placement occurs.

**RI:** You know I think that that's-- I think both child welfare departments on both reservations work very, very hard to see that happen, because the numbers of cases that I seen haven't increased. And so that's, I'm assuming to their benefit -- that they take care of the situation and I only see the really-- the, the unhappy situations. So, um, there-- the numbers have not increased. In fact, it would be interesting if we ha-- we probably could do it, is to see what the numbers are. But I, I don't see an increase in child protective matters. A lot of emergency situations, um, arise where a child doesn't have a place to stay or, you know, something terrible happens and they'll get a temporary order. But by the time the case comes to court for a

hearing, it gets resolved and it gets resolved not in a way that would endanger the child but in a way that keeps, you know, that they find placement or resolutions to cases that wouldn't happen in state court. Well--not as nearly as often anyway, so, yeah.

**RG:** Um, I'm gonna skip the last one on here. Once notice has been received, how often does the tribe intervene in tribal custody proceedings covered by ICWA?

**RI:** I know that the tribe intervenes a lot--all the time if it's within Washington county, this is Washington county state, state--within the state of Maine. I'm trying to think. Judge Mitchell, when he was the prosecutor, I know was involved in just a number of interventions. I don't know that he physically traveled to too many, but by phone. So I'm really not the person to ask. I know of, of a lot of interventions within the state because those cases are generally transferred to tribal court. Not-- I expect there's probably four or five a year maybe -- maybe more maybe less, depending on the year, but.

**RG:** And how often does the tribe request the transfer of a child custody proceeding covered by ICWA to tribal court?

**RI:** The only cases I'm aware of are those cases where the tribe does not have the funds to meet the needs of the child being transferred, and they'll intervene just to know where the child is, but no transfer occurs and again, it's generally because of money.

**RG:** In your time as a judge in tribal court, this kind of builds off of the last question and your answer, particularly. Were there any child welfare cases covered by ICWA where the state did not transfer, transfer the case?

**RI:** The, the only-- no. I know of none. I know of none. If the tribe intervenes, again I-- speaking of those cases where the, if the tribe wants jurisdiction transferred, I don't know of any case where it hasn't been transferred. Again, um, I think that's thanks to the local judges, state court judges being aware that they have to app-- you know, comply with ICWA. I think that-- and I don't know what the training is for state court judge-- judges under ICWA. I do know that our current district court judge is very well aware of ICWA and I know that Justice Mead on the Maine Supreme Court, who used to work for the Penobscots, is very aware, and cognizant of that. I think probably Justice Saufley is as well. I'm not saying the other judges on the Supreme Court aren't aware, but in terms of actually being involved with it, I think that we're very fortunate in Washington County that our judges are. And they do transfer. And our probate judge too. Because we get transfers out of probate court, for adoptions, as well.

**RG:** Does your tribe ever use its own expert witness in child custody proceedings under ICWA that remain in state court?

**RI:** The experts that I see are ex-- experts out of Indian Health Services most of the time. Although, the tribe uses state court experts in tribal court proceedings. If the child is being seen in some capacity by that expert. And again we're talking mostly about-- well, we're-- we can talk about teachers and mental health experts, and doctors. Um, those are again, the type of experts that I see, out of state court and the tribe will use those, the child welfare department will use those.

**SWH:** You've never seen a tribal elder as an expert witness?

**RI:** Yes, I have seen--yes I have. I'll tell you I see-- I've seen those in several cases where tribal custom has been used by a parent as a basis for some kind of discipline, or... And I, and I've seen that in a case where we had a, a young girl who had been sexually abused-- had her family, or a member of her family, who wanted to become involved in a healing circle with the abuser, and the issue that arose from that was A, whether that was a method, culturally, that was used in cases like sex abuse, and if it-- if it was, would it be helpful to this child to be in a circle with her abuser. And we used elders --we used a number of elders. They weren't in conflict with one another, but we used a number of elders for that. That-- we used elders in terms of--sometimes, I don't mean to--it, it was a disciplinary... I was gonna-- sounds like a cat of nine tails kind of a situation, where a switch was used to discipline this child, as I recall and the and the, uh, parent who used that, said that that had been a long term tradition with the tribe, and I remember we had elders for that. We've had elders come in as interpreters before for folks and yeah, we do use elders. In fact I like to, I like to use elders. I have to say elders are reluctant to come to court. And so sometimes those conversations occur outside of the courtroom but still, you have to protect the parents' rights and you know, all of that so --but any information elders can give us is really helpful in those kind of situations. Yes.

**SWH:** Have you seen the in an ICWA case where they are testifying to what the loss would be for the child?

**RI:** Yes, when I was a tribe's attorney, that-- I have seen it, but that was a long time ago and frankly, when I was the tribe's attorney, the amount of intervening, ICWA was used much -- used isn't the right word, but I think maybe it is -- um, people really were ill-informed about ICWA. How to use it, what it meant. There was no guidance, really, from anywhere. But yes, yes.

**RG:** How often is the existing family exception applied in cases involving a proceeding otherwise covered by ICWA?

**RI:** You know, I don't, I don't know the answer to that. I, I can tell you that was one of the issues in the case I described out of Midcoast with Justice Murray, but uh, and I've read that decision, so that was a decision she made. But most of those kind of decisions come out of state court during the hearing regarding whether or not to transfer jurisdiction.

**RG:** In what ways do you see the Indian Child Welfare Act and the Adoption and Safe Families Act working together and in what ways do you see them not working together?

**RI:** In terms of notice to tribes, they work together, and I-- it's getting, it's getting probate courts to understand ICWA that I think, I'm not-- and I can't speak to any probate court



throughout the state outside of the Washington County probate court and our judge is very cognizant, but he's also been the probate judge for enough years to have learned about it, and I'm not sure being that probate judges are elected, I don't know how much education they've had in ICWA, and I would hope that, I would hope that that-- if there is a deficit that that is taken care of, because that's really important and I think also the open adoption aspect of tribe-- I think that the State, and I know that most attorneys I've spoken to are just adamant that open adoptions would be helpful in state court as well. But that hasn't, hasn't made it through.

**GW:** It hasn't been happening?

**RI:** No, it doesn't hap--

**GW:** There's no such animal in Maine?

**RI:** No such animal, no.

**GW:** None at all?

**RI:** None at all.

**SWH:** There's no open adoption?

**RI:** No open adoption. No, none. Period. We had an open adoption done in Washington County. It was when I represented a -- no tribal members -- I just represented a mom who had a great deal of intellectual disabilities but was very bonded with her child, really bonded with her child. And, her rights were terminated by court, voluntarily, on the condition that she continue to have contact with her child and that case went through adoption and the Washington county probate court and the judge approved it, the adoption occurred and as far as I know it's the first and only time that that has happened because the state judiciary -- probate court judiciary -- determined that they had no jurisdiction to do that. It has to come out of the state legislature. So that if a child is not-- if, if the tribe doesn't intervene, the case isn't transferred to tribal court, that child is going to lose his or her tribal connection as far as I'm concerned. And that's why--

**SWH:** Because of the-- Maine's a closed adoption state as well.

**RI:** Yeah.

**SWH:** It's sealed.

**RI:** Yeah.

**SWH:** And do you know of any cases where a tribal person is looking for their, um-- that's adopted, and have come to tribal court to ask you to s-- ask the state on their behalf?

**RI:** To see if...

**SWH:** To open records.

**RI:** To open records.

**SWH:** So they can identify their families.

**RI:** I'm trying to think if I've had one or not. I, I-- there's... I may have had one, but it was so long ago. The problem is that you really do lose the child if the tribe had no connection and it's closed and there's been no notice. So, I think ICWA -- I think enough state court judges, at least something goes off when you-- they hear the word ICWA and they may not understand it totally, or really know, but I think that state child welfare workers and state court judges are all pretty well educated that a tribal member means something pretty important and they better find out what they're supposed to do. Probate courts, I can't say. And I would think that would be an area that the tribes would want to explore in terms of educating probate judges.

**GW:** This may be something that you don't feel like you can speak to or whatever, but one of the things that, that I've been learning about since we've started this process is just some of the differences between the tribes with tribal courts and the tribes without tribal courts. And for me those-- the, the tension between ICWA and Adoption Safe Families shows up with those tribal communities that don't have a tribal court. I don't know, do you have any-- I mean, if you can't comment on it, or whatever, but do you have any sense for some of those differences--

**RI:** Yes.

**GW:** --and what happens and, anything I guess you can inform us about, would be helpful.

**RI:** What, what I know is that the Maliseets and the Micmac wanted to have a reciprocity agreement with the Passamaquoddys for child welfare cases -- at least I, I know that it was for child welfare cases, perhaps more particularly, I think, because of that. Now, I don't know why it didn't happen. I thought it was going to happen. I thought it was sort of a fait- accompli, and that was-- it would be a way to set up a... a tribal court procedure so that their children would be protected -- when I say protected, I don't mean from abuse necessarily--

**GW:** No, I know what you mean.

**RI:** --I mean from being sent somewhere. And I don't know what happened. I do think that that's something that the Councils hold responsibility to address. As a-- I think it's important. I have also, a concern, although it may be baseless, that the tribes don't cooperate as well as they perhaps could between one another. I don't know -- and again I stay out of politics -- but I get the sense that politics may be an impediment to the Passamaquoddy and the Penobscots working together as tribes, with one another, and with the Micmac and the Maliseets and anyone else. I just really feel strongly that, you know, the more intertribal relationships can improve, the better it will work. And I think there's strength in numbers. And I think some of these issues that the state has ignored or continues to negate, should-- I think there could be a

real strong basis for changing that, but. I don't see as much, I, I'm-- again, I'm not involved, but I don't see as much cooperation as I would hope. That's sort of an aside, yeah.

**GW:** I mean one of the things was just the difference in how termination of parental rights handled in tribal court versus, versus state court.

**RI:** Oh that huge! State court, you've got a year after jeopardy and nobody who deals with substance abuse -- or all of us who deal with substance abuse -- know that a year is just this arbitrary time. I mean, you lose your child in state court. You do not lose your child in tribal court. I'm-- you know, that in and of it-- you know. You do not. In fact, the self worth of parents, I think -- I get the sense -- is maintained in tribal court, irrespective of the their individual problems. Their sense of self is not destroyed in the way it is as a parent in state court. That's the way I see it, I...

And the value of a person -- I could go on about this because I think it's huge! And I, I tend to be vocal about it sometimes. But I think that the tribe recognizes that a person -- especially I'm talking about substance abuse -- that the value of a person is still present even if they have a substance abuse issue, or they've, you know, slipped or whatever in terms of their wellness regarding substance abuse. But everybody has a certain dignity that's recognized by everyone and the value of that person isn't lost because of substance abuse. And it-- they're not discounted as a, a-- someone less than, you know, who they should be. So, I just think that the tribe's concept of people is so much healthier than in state court.

**RG:** What strengths and weaknesses do you see the state possessing in working with the tribes to ensure ICWA compliance?

**RI:** I'm going to say that I-- locally, locally, they work very well together. I don't see any problems. That's really quite a statement. I'm talking not about, um, I'm talking about notice. Notice and transfer. I really don't see a conflict there. So, statewide, I-- I have to know about it, I guess, before I know whether there are any strengths or weaknesses. But I've had cases transferred to tribal court from all over the state, so I'm hopeful that most state court judges get it. Weaknesses, I'll go back to probate courts. I don't know about that, and I get concerned about that. Really concerned about that. Because really, two tribal members can come in and both consent to a, an adoption in a state court and that's it. You know?

**GW:** In the probate court.

**RI:** In the probate court, yeah, in the probate court. Right. That's where I'd be concerned.

**RG:** Mmhmm. And what strengths and weaknesses do you see Wabanaki tribes, in this case Passamaquoddy-- applicable to the two Passamaquoddy tribes, possessing in working with the state for ICWA compliance?

**RI:** I think, um, that I have... I don't know that I am aware of any case, except for perhaps one, rather recently, where the tribe did not intervene in a case. And again, I don't have the authority to intervene, so I'm very curious as to why they chose not to. I am aware that there was at least one case, say within the last two or three years, that that happened. And I haven't been able to find out why because, if it were up to me I would intervene in every case, just to be notified if



nothing else. Just to have notice and kept informed, even if there weren't the funds to transfer and all of that. But, I would say fund-- I think, I think most of the time, though, intervention happens. So, that's good. That's a strength.

**RG:** And any weaknesses that you notice?

**RI:** Money. Lack of. That, that's it. I don't think there's any weakness in terms of caring or wanting children to be cared for on reservation by tribal members. I think that's, that's a, a very strong commitment by both reservations.

**RG:** Can you talk about the importance of state attorneys learning about and having knowledge of Native American family structure and culture?

**RI:** Yes, now again, I'm fortunate. We have such a small bar and they're getting older and older, in Washington County, that they've worked with the tribe since it's inception. I'm, I'm gonna say the majority of attorneys who practice in tribal court, at least here. The new attorneys, who come in to town seem to be, um, eager to become part of the Passamaquoddy tribal, tribal bar. I don't see the, um, flippancy that used to come in to court, the, the, you know, kind of "Oh, this is-- I don't have to prepare, I don't have to file my motion to continue - - this isn't real court" which I used to see all the time. And if I see that boy, they get told (*Laughing.*) they get-- they get told in no uncertain terms it won't be tolerated!

So, ah, now that I've taken my lumps on that too! But, I think that the tribal bar here is, is very committed. Very committed. And I think they understand ICWA and will be the first person to raise that as an issue if they're in tribal court. Or, I mean, if they're in state court and they want it transferred. But, they're very good.

**RG:** And can you talk about the importance of, for a Native child who's placed in out-of-home care to be placed within reasonable proximity to his or her biological family?

**RI:** I wish it were possible, but it-- many times it's not. Many times it's not. A lot of the kids get placed, oh... Ellsworth, Bangor. Which is a long way from the reservations. There are a few therapeutic foster homes in the area. There's a transitional home for young teens where a lot of tribal kids get placed, and I'm not a huge fan of it, but some kids do well there. The Cherokee program in, um...

**GW:** Yeah, North Carolina.

**RI:** In North Carolina gets used occasionally, and with some success, occasionally. There's a program in New York too, but I'm not certain if, if that's still running. I do know that, again, it's funding -- for those children that are older. And I sure wish there were... closer homes, but we do our best. And that's certainly an area we're cognizant that nee-- I'm mean, we're very

aware of that, how far. And I think tribal members are always aware of that, but. Thank goodness is doesn't happen too often.

**RG:** The next question is about having a child participate in his or her, um, traditional tribal events and customs and social activities, which I, I feel like you've talked about. So I'm wondering if there's anything else you want to add.

**RI:** No, I leave it to, um, the tribe to tell me what the -- dancing, drumming, all of that -- I leave it to them to tell me what they feel is important and I do use elders for that. You know, what if you had to list, what is important in your life, as a community, what would it be? And I try and include that as a mandate. *(Laughs a little.)*

**RG:** Do you think ICWA does enough to protect the rights of Native American children and Native tribes?

**RI:** Well, if the Supreme Court would decide things the right way, maybe. I don't-- I think that it's a start. I think it's a start. I think that it's so important to hear the stories that you're all involved with, and I think, I don't know how anonymous or non-anonymous those stories will be -- but I'm hopeful, I'm hopeful that will help. Because, I just would-- I just, I think it's so important.

**RG:** How could state child welfare improve in terms of ICWA?

**RI:** Locally, again, I don't have any complaints. I haven't seen a lot of, of adversity to ICWA, I -- locally -- so, I don't have anything beyond that. I can't speak to the rest of the, to the state child welfare agencies, but I, I think the attorney general's office does a pretty good job with that too. So, I would say that they're doing a fairly decent job.

**RG:** If you could change anything or make anything happen for Native American children involved in ICWA, what would you do?

**RI:** Well, I'm going to assume those kids are off reservation, in other states and far away, and I think that it's not just the State of Maine, but the federal government that needs to provides funds to the tribes and the tribal family members involved with that child to get-- and again, it depends on the child, the age of the child, and child's connections with other states, all of that, but, I think it's important enough that every tribe should have enough money to travel to that child and deal with that child in a way that ICWA supposes it should be doing. And, you know, again, ICWA is only as good as the money that's there for the tribe's to enforce it. We don't have any, so, it doesn't do much good to have a bunch of requirements and laws to protect someone if that someone can't be protected because there isn't enough money. That-- you know, is just paper, but...

**RG:** Are there any questions that you'd like to add, Gail? Or Sandy?

**SWH:** I asked. I think I asked.

**GW:** No, it was really very helpful. Is there anything else you think we--

**RI:** Oh, no, I just -- I just really admire this work, so thank you all for (*inaudible*) -- I just, as an, as an aside, have you read the Portland articles, you know?

**GW:** Yeah, yeah I've been reading them.

**RI:** Those are pretty remarkable too, aren't they?

**GW:** Yeah.

**RI:** That doesn't need to be-- you can erase that. Thank you so much folks. It's awfully nice to meet you. Thank you for all your work, oh--

**GW:** Thank you very much and thank--

**[END OF RECORDING]**