

Child Welfare Information Gateway Podcast
Tribal Courts and Child Welfare: Revising Your Children’s Code
TRANSCRIPT

Presenters: Female Narrator; Tom Oates, Child Welfare Information Gateway; Judge T. David Eisenberg, Taos Pueblo; Judge David Voluk, Sitka Tribe of Alaska

[00:00:00]: [Music Introduction]

FEMALE NARRATOR [00:00:02]: This is the Child Welfare Information Gateway Podcast, a place for those who care about strengthening families and protecting children. You’ll hear about the innovations, emerging trends and success stories across child welfare direct from those striving to make a difference. This is your place for new ideas and information to support your work to improve the lives of children, youth, and families.

TOM OATES [00:00:33]: We’re continuing our series looking at how courts – tribal courts in particular – are building capacity and strengthening programs to take on or improve their role in child welfare; that’s deciding questions surrounding child abuse and neglect, how temporary care should be provided, and permanent custody of tribal children who have been placed in out-of-home care.

[00:00:54]: Hi everyone, Tom Oates here and welcome to the Child Welfare Information Gateway podcast. This series on tribal courts and Child Welfare features work performed by grantees of the Children’s Bureau’s Tribal Court Improvement Program.

[00:01:08]: Now, our series will be looking at some diverse issues and challenges and how some tribal courts and tribal child welfare have addressed them. Check out the first in this series to hear how some courts built their capacity and adapted to take on child welfare cases. Now, in this episode, we dive into the daunting task of reviewing and updating a tribal court’s Children’s code – sometimes called the Juvenile code. Now, these codes deal with more than just child welfare and they direct the actions and proceedings of various service providers from law enforcement to child welfare.

[00:01:42]: If the codes aren’t clear, if they’re not relevant to current challenges or the environment where the court has jurisdiction, well, the work courts are charged to perform can get sidetracked, which negatively impacts not only the children and families involved, but the service providers who are working to help them. Some of the Tribal Court Improvement Program grantees determined one of the best ways to utilize the grant was to dedicate the time, the energy and resources to revising and updating their Children’s Code.

[00:02:13]: So, we’ll start off with the Taos Pueblo Tribe of New Mexico. As they reviewed their Children’s Code and determined what they wanted a future code and court proceedings to include, they did something unique, in that they applied feedback from those directly affected by the court. You’ll hear who they worked with and how feedback taken from surveys given to families and family service providers influenced the Code’s development. Judge T. David Eisenberg of the Tribe’s Family Court joined us to discuss all of this and we started by asking him just to walk us through his first impression of the Tribe’s previous Children’s Code and how that led him to revise and update it.

T. DAVID EISENBERG [00:02:54]: Certainly, I came on the bench in July of 2014 and in the process of getting on the bench I had to familiarize myself with all the existing codes that we had, and I got around to the Children’s Code, Juvenile Offender Codes and even upon the first reading, I just found that it was confusing and not very user friendly.

Child Welfare Information Gateway Podcast
Tribal Courts and Child Welfare: Revising Your Children's Code
TRANSCRIPT

[00:03:25]: So, that was my initial impression and as I started to hear Children's Court cases, as well as Juvenile Offender cases, it was really hard to find any kind of a scheme that I could separate from Children's Code as opposed to a Juvenile Offender Code, it was all, both sections were integrated. So, the process of Children's Code would all of a sudden be talking about Juvenile Offender proceedings and vice versa, so it was, it was very hard to figure out where the Children's Code proceedings went and where they left off and where they were going because they would eventually dovetail into the Offender Code - and same way with the Offender Code to Children's Code matters.

[00:04:24]: So, that was, and at some point in time within that first year, the police department asked me to - because they were equally as confused and they'd been working with the Offender Code portions of the code for many years, for the five of six years that it was in effect, and were having difficulties finding a clear process of how the filings of Offender proceedings were, how to file them and how the proceedings went.

[00:05:01]: So I volunteered to outline the Children's Code as well as the Offender's Code and talk about an exercise in futility, I just reached a point where I could not, it just wasn't working, there was just no way to outline it all without having arrows going in and out and cross referencing. I was just kind of like, this is not, this is, I'm confused. And the last place is, the first place that the people that have to work with the Children's Code and Offender Code go to to make sense of it is the judge - and when the judge can't make sense of it, you know, it's, it's really difficult.

[00:05:46]: So, the other item that I find the Children's Code that I found problematic was the, a mixing of standards of proof. For example, in our termination of parental rights proceedings under the Children's Code, the standard of proof in these terminations proceedings was clear and convincing evidence beyond a reasonable doubt. So, they mixed the two standards of proof together and I said, well, that's certainly not going to work for me, I don't know if I have to, if I have to preside, preside over a termination of rights case, what standard of proof am I supposed to be using? Because it's combining both standards of proof. So, that was just, that's how the whole idea came to bear with regard to we need to revise our Children's and Offender Codes.

TOM OATES [00:06:48]: So, it sounds like at first when you tried to create the outline, you may have found yourself saying, alright, where do I begin? At least, that's the question that comes to my mind, is, instead of trying to revise or edit, it sounds like you had to start from scratch, am I right?

T. DAVID EISENBERG [00:07:07]: I was using the existing code and then following the, you know, the outline process is here's the beginning and here's the next step. So, I could do an additions file and then what's the next thing that happens and then how, how are investigations handled and who handles investigations. And so, it started off alright, it's when you got into the mid sections of proceedings that all of a sudden offender proceedings were, were also integrated in the middle of Children's, Children's Court cases. So, it was very hard to come with a very clear step by step outline that followed logical steps.

TOM OATES [00:07:57]: So, at that point, were there any, I mean, I'm trying to figure out where do you go for reference, where do you go to, kind of, build this along the way knowing that not only do you have to understand this, but this is going to be used as a tool to then communicate to others that you will come in contact with, like law enforcement, to kind of, direct the operations. So, where do you start from when you say, okay, well what do I want this to look like when it's all said and done?

Child Welfare Information Gateway Podcast
Tribal Courts and Child Welfare: Revising Your Children's Code
TRANSCRIPT

T. DAVID EISENBERG [00:08:24]: So, realizing that we have these issues the New Mexico Legal Aid Native American Programs Division and I had - the director, Lisa Chavez and I - had a discussion about it and saw that there was the grant opportunity through the Administration of Children, Youth and Families and said, well you know what, this would be a good place to see if we can get grant funding so we can revise the Children's Code, as well as the Juvenile Offender Code.

[00:09:05]: So, that was kind of, well let's, let's go that route - it's because we, we had to go that route because the current code was unworkable. So, that was, so I came on 2014, went to legal aid on the grant in April 2015, so it was, it happened fairly quickly and I felt that it had to happen quickly because we just couldn't, we just couldn't go about doing business as usual with an unworkable code.

TOM OATES [00:09:39]: So, when you find yourself going through this process and, you know, as you mentioned, you know, you had jumped on the bench just a few months, really, prior to that - what did you find about, not only the process itself that the court was going through, but, what did you find out about maybe the results or the interaction or the way child welfare cases were handled by the court, knowing that you had some codes that left a lot of ambiguity?

T. DAVID EISENBERG [00:10:09]: So, what happened - and this is counter to how actually a judge should handle cases when they have a code, follow the code - I just, I improvised. I improvised certain portions of the code to best fit the proceedings but not necessarily following the black letter code, because if I did then we would end up in deep confusion. I just kind of had to wing it in other words until we got the new code going. That's not the way that a judge should be doing things, but if you have unworkable codes, you have to improvise and I think make do with what you have until you can fix it.

TOM OATES [00:11:02]: So, when you walk into these situations, you know, being only on the bench for the first, you know, number of months and you are trying to improvise because the code really isn't, may not be the strongest guide for you - what did you find about the environment that you had walked into in terms of cases coming to you, cases being adjudicated regarding child welfare that you said, alright, knowing how we currently do things at the time, here's what we may want to include within the code to help either make the processes more efficient, make them more transparent, provide better outcomes - did those first few months give you anything that you used for fodder when then you were developing the code?

T. DAVID EISENBERG [00:11:48]: Yeah, I mean it gave me a better sense of how I wanted the code to be, so any time we had hearings or proceedings with the old Children's Code, I would try to figure out, okay, this is where we need to go, but the code's not very clear about how to get there. And, I would tell the parties - we have this code and here's where we're at within the code, but the code directs us into an area that will not get us to the result that we want.

[00:12:28]: So, here's what I've been doing, here's what I'm going to do. I'm not going to follow the code, necessarily, but this is what I think works best with regard to this specific proceeding. So, I would let the parties know, because I, you know, again, it's part of the new process that they know what I'm following, what code, what law I'm following and then there's a deviation from it they have a right to know.

Child Welfare Information Gateway Podcast
Tribal Courts and Child Welfare: Revising Your Children's Code
TRANSCRIPT

TOM OATES [00:12:56]: So, what were the key steps that you and the American Indian Law Center, Ms. Chavez, kind of went through to, kind of, go from, from no code, or a code you really need to work on, to where you are today?

T. DAVID EISENBERG [00:13:09]: Well, we, we had meetings, when we decided to do the grant it was, you know, there were time constraints because there was a due date in April, so, I think it was February and March that we started to look in earnest at the code and had several meetings with Lisa about the current code and finding the problems areas, which there were many and deciding, well these will be the focus, the focus areas about how we, the deficiencies within the code and how we want to correct them, and how do we go about doing that.

[00:13:49]: So, that's where the discussion came in about, well, this is a community code, this is Taos Pueblos' code, so, and, the family services providers for Taos Pueblo rely on the code, as well as the community. So, how do we, how do we, it's important - because it is a community code - to get feedback from them. So, that's where the idea to do a family survey provider, family service provider surveys came into being, as well as family surveys.

[00:14:26]: The families that were actually, we intended to serve with our new code. And then, so that was outlined in the grant, as well as, well, once we have the survey, what do we do with the results? And, so there was a discussion and inclusion in the grant about evaluating and doing an analysis of what the survey results were and then having a, a meeting at the Pueblo, a focus group meeting with all the family service providers to - because they had, they were all part of responding to the survey - to have a meeting with them over a two day period, morning and afternoon session, over two days where we went through the results.

[00:15:20]: We had very long discussions about the survey results and basically charting where we wanted, how we wanted to use the, the analysis, as well as the recommendations that were coming out of the focus group discussion in terms of what we wanted in the code and how we wanted the code to be organized.

TOM OATES [00:15:46]: Did you find that that survey provided you with a lot of the, kind of, the answers to when you come to a question of, hey, should we go in this direction, should we go in this direction, that you're able to kind of have, well, what's the community's voice - how important was that?

T. DAVID EISENBERG [00:16:02]: It was very important. I mean, this is not my code, this is not David Eisenberg' code, it's not Stacie Waters' code, this is the, this is the public community's code, so it's very important that we, we integrate and use the feedback as much as possible - not only from the service provider angle, but also the family side of it.

[00:16:24]: One of the things that I realized in doing this initiating the project and then doing the grant and going through the process of surveys and the focus group was I wasn't getting a whole lot of Children's Court case filings and I know that there's cases out there, why are we not seeing them in tribal court. So, the surveys answered, the surveys born out my concerns, because what the survey showed was there was a lot of contact between families and family service providers, but there was no follow up from the family service provider agencies with regard to cases - they handled them in house - they handled the cases within their respective divisions without a whole lot of, of collaboration between agencies and divisions.

Child Welfare Information Gateway Podcast
Tribal Courts and Child Welfare: Revising Your Children's Code
TRANSCRIPT

[00:17:37]: So, police department would have a case and they would handle it without filing anything. Social services would have a case and, and handle it without seeing that there was a need to file it in Children's Court. And the same with juvenile offender cases, there was contact but no follow up filings in tribal court.

[00:18:04]: So, and that was because, I think people just found it easier to just go ahead and do it their way because the code was so hard to deal with. It's just like, the code is unworkable because it just doesn't make sense to us, it's easier for us to do it from our, from within our offices and divisions rather than deal with that stupid code which doesn't make any sense, it just doesn't make sense to us, it's easier for us to do it from our, from within our offices and divisions rather than deal with that stupid code which doesn't make any sense.

TOM OATES [00:18:38]: So, was this more of an issue of process and procedure as opposed to, listen I don't want to report this, I'm worried about escalating this.

T. DAVID EISENBERG [00:18:47]: That's one of the findings that was born out, Tom, was do the surveys as well as the - we'll probably get into this in a little more detail later on, but - when the American Indian Law Center did it's community meeting, before they stated really working in earnest on the drafts, what they, what the surveys found out and what the community meeting of the American Indian Law Center found out was people were reluctant to make, to file cases, because they didn't want to get involved in the court system.

[00:19:31]: They didn't want to come to tribal court, they didn't want to get involved, they didn't want to get involved with other families' issues, even though they felt there was a need to let Social Services and police department know, there was a reluctance, a huge reluctance on community members to get involved because, again, they just didn't want to have to come to court and provide affidavits or testimony against family members, other community members.

[00:20:04]: So that born out the need to, we discussed that in length and one of the key components of the revised Children's Code and Offender's Code is we have, we developed a pre-adjudicative process and procedures whereby upon the filings and reporting of children's cases, families, there's an investigative process that happens within social services, they make a determination whether that's a child in need of care and if it is a child in need of care, then a family service plan is developed and with certain thresholds and deadlines that the family has to meet to avoid coming to court.

[00:20:51]: So if they meet all their thresholds within the deadlines and they get the services that they need, they never get to see me. However, on the other hand if they don't meet the deadlines and thresholds within the deadlines, then social services has the option to then file a petition.

TOM OATES [00:21:10]: Now the Judge started to describe the pre-adjudicative process that Taos Pueblo instituted which increased the number of cases brought to the Tribal Court. Now, in an upcoming episode, we will dive into that with greater detail as an example of how Tribal Courts are taking a family-centered approach. We'll hear from Tribal Court Improvement Program grantees that work in conjunction with service providers to strengthen and heal families, not just pass down decisions. But that is for another episode.

Child Welfare Information Gateway Podcast
Tribal Courts and Child Welfare: Revising Your Children's Code
TRANSCRIPT

[00:21:39]: We're gonna continue here and move up to Alaska, where the Sitka Tribe also found their Children's Code caused a bit of confusion. David Voluk, the chief judge of Sitka's Tribal court found himself leading the charge to review, edit and update the code. Now, just like the experiences from Judge Eisenberg with Taos Pueblo, making simple tweaks and refining the code proved to be a bit more difficult than it sounds. For Judge Voluk, as you'll hear, he looked at the work of refining more like overall restoration and repair.

DAVID VOLUK [00:22:12]: Well, you know, we looked at it and it was drafted in 1977, so our Children's Code is just enjoying its 41st birthday and, as you might imagine, things change over time. And then, I had the benefit of being both the tribal judge - so I looked at the Children's Code from the bench - and also assisting our Social Services Department to bring cases in Child Court. So, I also got to look at it from, you know, presenting to the court and also from the bench.

[00:22:53]: And there were parts of the code that were clunky. People weren't sure what the interpretation was. People weren't sure about timelines, who was responsible for service upon parties and any number of things that ended up clunky. I use the metaphor of a car a lot when it comes to a Children's Code. So, our car needed a tune-up and it was obvious to those of us who work on both sides of the bench that there were these parts that were leading to miscommunication between the court and the judiciary and our social services workers.

[00:23:26]: And so, it was time for a tune-up and so we put that project into our Tribal Court Improvement project and when it was funded it was a great motivator to get started, to bring this 1977 jalopy into the new millennium.

TOM OATES [00:23:58]: So, I'm gonna follow this analogy for a little while here and ask you about the mechanics that you helped bring in. Once you partnered with, you know, I'm assuming you didn't just sit down, that David didn't just sit down in the corner and revise everything - so, who were the folks that you partnered with and what did you tell them that you wanted to get out of a revised Children's Code?

DAVID VOLUK [00:24:20]: Well, we kind of created a work group and that included all the, kind of, interested parties that practiced in tribal court and - because we wanted those partners at the table to inform us - so it was not only what David saw wasn't working, but what did other people see could use improvement.

[00:24:44]: So, for sure the judiciary and the court was an essential party to have there. I don't know if other tribes have this, but I've noticed in my 23 years here with the Sitka Tribe of Alaska that there's always been a strange disconnect between the court and our Social Services Department. So, we really viewed this as an opportunity to start ironing out those wrinkles. From one set of leadership to another, the disconnect between the court and the social services kept propagating itself. So, we really viewed this revision process as a way to iron out our wrinkles.

[00:25:25]: So, we had the court there and the chief judge. We had the director of social services and those who practiced in tribal courts and social services. And then, we invited an outside expert from our legal services corporation - it's called Alaska Legal Services Corporation. And we have a fantastic attorney here based out of Juneau who has a lot of experience with tribal courts and we invited her in and she had her own grant that allowed her to bring legal services to rural areas and to native tribes. And so, she participated as a guest "mechanic", as well, while we went through this process.

Child Welfare Information Gateway Podcast
Tribal Courts and Child Welfare: Revising Your Children's Code
TRANSCRIPT

TOM OATES [00:26:09]: Did you find that you used any current existing codes maybe from either other tribes or other regions? Was there anything that you turned around and said, you know what, we like what they're doing over here?

DAVID VOLUK [00:26:21]: Yeah, I think, if I had the chance to do things over again, I would've started there and, you know, those of us who work in Indian Country, we have to guard against something that we could call "templateism", where templates get circulated among tribes and its plug and play and you just fill in the name of your tribe at the top and adopt this template code or a code from another tribe - and that's a big mistake, because every tribal community is very unique.

[00:27:00]: And so, the template's a great place to start, so you're not reinventing the wheel - sorry for the car metaphor again - but, and we didn't do that as carefully. You want to try to find tribes that are similar, ideally culturally to you - or at least in size or demographically - so that you're starting with somebody who's like a kissing cousin kind of tribe. And then we did eventually look at a number of these codes.

[00:27:33]: Like I said earlier, I think if I could've done things differently, I would've started there. And so, why I say that is we kind of ran into a problem of spending about a year under the hood of our 1977 Children's Code, fixing this valve and adjusting that fluid. And after a year, we were left with the inescapable feeling that we were fixing a broken-down car. And, what were we duct taping this old jalopy together for, when really, kind of, we were ready for a new car.

[00:28:15]: And so, that's when I went out shopping at these other tribes to look at what they were doing. And it's been a breath of fresh air to let go of our old code and be open to the idea of just starting over fresh. And so, we kind of labored for about a year trying to fix up our 1977 car before we finally came to the realization, you know, we could start over. Let's look at some other models. And so, we did, we've borrowed from about five or six other tribes, things we thought were the best part of their code.

[00:28:55]: And the nice thing about tribal governance is, it's not like you're violating any kind of intellectual property rights. Every tribe says in Yiddish gezunterheyt, go in health, we want you to be successful, and so we all share our models freely. And then, of course, you have to remember to adjust it to your community, so that when you're done, this car is something that your community is comfortable riding in and you're not importing something from another state or another village.

TOM OATES [00:29:28]: But now, to follow, so you've got this roadmap in front of you as you're getting your wheels moving and, and kind of moving on your own judicial highway, what are the challenges that you see ahead?

DAVID VOLUK [00:29:40]: You know, I think the largest challenge that any tribal government wrestles with is taking a traditionally oral culture and oral laws that have been handed down since time and memorial, and then trying to trap them in a written language. And not only is that hard, but it's a language not necessarily that is traditional, you know, for good or for ill, the United States transacts mostly in English.

[00:30:21]: So, that's a foreign language to Indian tribal governments, so taking an oral tradition and trying to put it in writing and trying to translate it into a foreign language is a yeoman's task, it's huge.

Child Welfare Information Gateway Podcast
Tribal Courts and Child Welfare: Revising Your Children's Code
TRANSCRIPT

And every tribe wrestles with this, I know, wherever I go we're all struggling. How much do we try to capture in writing? What's uncapturable in writing?

[00:30:53]: And then, the last piece that I will talk about is we talked about templateism that can sometimes afflict Indian Country and I can say this because I'm a recovering attorney, there's also lawyerism that can afflict Indian Country. And so, a lot of the codes that we've looked at are too verbose and take, you know, with all kinds of words of lawyer art and they take the code impenetrable to the layperson or in Latin, we call it "pro se litigant".

[00:31:38]: These are people who are not using attorneys and our tribal court is 99.8% everyday people trying to common use a more user-friendly justice system to solve their problems. And so, when you hand them a code that, I call it a ten gallon, that uses ten-gallon words it makes it hard to access and this leads to the monopoly of attorneys over the law, which we're really trying to break down that wall here at Sitka. So, simplifying - and I'm not sure we can say this, but - I had a gym teacher who used to ascribe to the KISS principle: Keep It Simple Stupid.

[00:32:26]: And, you know, the truth of the matter is if you can't say it succinctly and simply and shortly, then try again. And I think a lot of codes suffer from being way too long, they're two inches thick and they explain, you know, for instance, a definition of mistreatment or child maltreatment and they'll give you 25 examples and at the end of the day, we're all left with eyes hazed over because we just got lost in a definition.

[00:33:04]: And so, we're really struggling to make a code that's user friendly. If a third grader can't understand what you're saying, then you're probably not saying it well. So, and I think that's a big struggle that we have throughout Indian Country to make our laws accessible, to try to capture the customs and the traditions of the tribe in writing when they've been oral for millennia and to keep it simple.

TOM OATES [00:33:33]: The big lesson when revising or drafting these codes or really any processes and procedures – and this really isn't just a lesson for courts – is to remember you're writing instructions that will apply to different groups of people each with their own perspective, so there's a balance between making the code - or, really, any instructions - clear enough for everyone to understand but also not too detailed that a reader gets lost in the weeds.

[00:34:00]: Now, as this series featuring the work of the Tribal Court Improvement Program grantees continues, we will hear more from both the Taos Pueblo and Sitka tribes. We've got upcoming episodes focusing on building productive relationships with both state child welfare and state courts, along with how tribal courts are working closely with their tribe's social services departments.

[00:34:20]: So, head over to the podcast's web page, that's www.acf.hhs.gov/cb and search podcasts. On this episode's page we'll point you to other resources and materials for courts, along with information for working directly with tribes and tribal families, along with ICWA-related content as well. So, as always, you can check out updated information available on Child Welfare Information Gateway at www.childwelfare.gov.

Child Welfare Information Gateway Podcast
Tribal Courts and Child Welfare: Revising Your Children's Code
TRANSCRIPT

[00:34:48]: You can also reach out directly to our team at info@childwelfare.gov if there's something specific you're looking for or wish to order any of our publications and available materials, we'll help you out -all those materials are free of charge and we ship them to you for free, as well.

[00:35:06]: So, my thanks to Judge T. David Eisenberg from the Taos Pueblo court and Judge David Voluk from the Sitka Tribe of Alaska's court for their time and their insight to share their experiences with us here on the Child Welfare Information Gateway podcast. I'm Tom Oates, thank you for your time and we'll talk to you next time.

FEMALE NARRATOR [00:35:28]: Thanks for joining us for this edition of the Child Welfare Information Gateway podcast. Child Welfare Information Gateway is available at www.childwelfare.gov and is a service of the Children's Bureau, U.S. Department of Health and Human Services Administration for Children and Families. The views and opinions expressed on this podcast do not necessarily reflect on those of Information Gateway, or the Children's Bureau.