Child Welfare and Alaska Native Tribal Governance: A Pilot Project in Kake, Alaska

Report of Findings

Prepared for the
National Science Foundation

by

Lisa Rieger
Justice Center
University of Alaska Anchorage

and

Randy Kandel
John Jay College of Criminal Justice

October 1999
JC 9910

Child Welfare and Alaska Native Tribal Governance: A Pilot Project in Kake, Alaska

Report of Findings

Prepared for the
National Science Foundation

by

Lisa Rieger
Justice Center
University of Alaska Anchorage

and

Randy Kandel
John Jay College of Criminal Justice

October 1999
JC 9910

This work was supported under award #9815331 from the National Science Foundation. Points of view expressed or implied are those of the authors and do not necessarily represent the views of the National Science Foundation.

Contents

Child Welfare and Alaska Native Tribal Governance: A Pilot Project in Kake, Alaska

Report of Findings

OVERVIEW

This research was undertaken under a Small Grant for Exploratory Research to refine the issues for a planned larger project on child welfare discourse and decision making in four Native communities (respectively Tlingit, Athabaskan, Yupik, and Inupiat) and their related administrative hubs under the umbrella of the Indian Child Welfare Act (ICWA) – a federal statute that, by conferring jurisdictional and substantive preferences on Native communities specifically allows for the expression of cultural differences. ICWA was chosen as a lens for studying the ways in which diverse cultures negotiate local autonomy and sovereign to sovereign legal relationships.

The specific research project investigated child welfare decision making in the Tlingit Indian village of Kake in the context of a proposed ordinance for the establishment of an Organized Village of Kake [OVK] Tribal Court. The research took place at a critical juncture in the changing relationship of federal, state, and Native legal authority in Alaska. The United States Supreme Court in *Venetie*, 118 S.Ct. 948 (1998) had seriously eroded territory as a basis for Alaska Native sovereignty claims, while the State of Alaska appeared to be mitigating its opposition to Native communities' exercise of their child welfare decision-making rights under ICWA (*John v, Baker*, 982 P.2d 738 [1999]), enhancing the possibilities of membership as a basis for expressions of sovereignty.

We hypothesized that tribal court institution building and child welfare decision making would both explicitly and obliquely reflect sovereignty and membership issues, and the cultural meaning of children as tribal members, culture bearers, and cultural resources. The SGER was critically situated not only at during a moment of change in legal status for Alaska Native villages, but also timed to coincide with the intense season of statewide conferencing that facilitates village, state and federal interactions. In fact, the tribal court did not come into being, or generate much unsolicited discussion during our fieldwork period. However, when solicited for their views about a tribal court during extensive interviews, interviewees were ambivalent about the functions of a tribal court, and their

views towards the tribal court reflected both their abstract concepts of justice (e.g. socially contextualized versus abstract, punishment versus healing as forms of redress) their personal experiences, and their positions (status, role and reputation) within Kake society. For the most part, interviewees' statements emphasized the role of a tribal court in maintaining the local social order rather than addressing the tribe's relationship with the state and federal governments and associated sovereignty/local control issues. Instead of the tribal court, we were able to follow the development and burgeoning of an unexpected, different local decision-making body, circle sentencing, which was introduced to Kake at the beginning of the research period. [See below].

Our research results revealed a more nuanced process than hypothesized. Issues of sovereignty and identity were embedded in concerns about local autonomy and peace keeping; welfare issues and "trouble cases" were handled through a variety of informal and formal methods that reflected distinctive Tlingit cultural emphases; and "global" ideas and resources (such as ICWA and circle sentencing), often first introduced at the numerous Alaska state conferences, were selectively and strategically adopted, adapted, or ignored, for local purposes. Key findings are described in summary in the paragraphs below.

From a methodological perspective, the pilot project specifically set out to answer important questions regarding access, numbers of cases, what precise local issues were at stake in the implementation of ICWA, and which of the theoretical questions posed by the larger proposal were most salient. The pilot project accomplished those goals. 1) Although we did not gain access to confidential proceedings, we did have free discussion with all the parties involved in those proceedings, which permitted a full view of the relevant cases; 2) During the pilot period, three major cases and ten to fifteen other cases occurred in the village, and the material was rich for narrative analysis; 3) we were able to determine which specific local issues were of concern to the tribe (see below); 4) the tribal court proposal was seemingly rejected in favor of the circle sentencing option; and 5) the most salient questions for Kake centered on the notion of community, rather than culturally different concepts of the family, procedural conflicts or contested expressions of ethnicity. We were able to assess the impact of globalization through observing the operation of a centralized legal system in a diverse local community. We noted a selective incorporation spearheaded by legal, tribal,

and economic leadership, which were sometimes at odds with each other. Significantly, the selective incorporation included unique adaptations to the demands of local clan identity.

RESPONDING TO CHILDREN'S CASES

Methods of child welfare decision making regarding children resident in Kake

Many child welfare issues are settled informally and intrafamilialy, when a sibling of the child's parent assumes custodial and residential care of the child. Some, but not all of the situations in which a child is living with an uncle follow the traditional matrilineal avuncular Tlingit pattern. For example, in one case following a mother's suicide, her parents were given legal custody of her son. The child was actually living with and informally adopted by the mother's sister and her husband who regarded the boy as his son and his heir. When the couple divorced, the maternal aunt moved out of Kake, taking the boy with her. In some instances, the tribal social worker (a non-Native whose adoptive son is the biological child of her Native partner's maternal first cousin) becomes involved in the process of transferring custody. After the informal decision is made as to who shall take the child, the social worker calls in the state social worker to approve and finalize the custodial arrangement. This appeared to be as much to initiate state funding streams as to recognize the authority of the state. She also reported intervening more directly and informally - for example, throwing a man out of a house of single mother who was turning tricks to pay the heating bill, and then finding funds (including a church contribution) to pay for a more efficient heater. These cases do not implicate ICWA directly. Rather, ICWA creates a space for the local resolution of child welfare issues, with the state, via the state social worker, who enters the process only by local invitation. This amicable result may be due to the personal relationship between the DFYS and OVK social workers; the OVK social worker considered the DFYS social worker to be one of her best friends.

Although everyone views local children as a local matter, not everyone we interviewed was happy with the handling of cases and their consequences – in a community where everyone knows, or thinks they know, who did what do whom. People complained that sexual abuse went unpunished for lack of evidence or interest, that members of powerful families (at least those people who had not been

abandoned by their families) got off lightly or that others – persons with bad reputations or members of families without political clout, are unjustly targeted. By the same token, persons in positions of institutional power like the local magistrate, worried that unwarranted rumors circulated in Kake about what went on in the magistrate's court and through the tribal social worker. Through the local handling of children's cases, and the perception of how such cases are handled, the formal institutions of power (the magistrate, the tribal social worker) become intertwined with typically Tlingit family power politics in ways that require more ethnographic research.

Methods of child welfare decision making regarding children not resident in Kake

OVK has no generalized practice or policy of intervening, assuming jurisdiction over, or "bringing home" children of Kake origin, unless a particular Kake resident has a particular interest in and/or relationship to the child. Rather, the practice seems to be that the tribal social worker gets involved, and then makes a report to the tribal council and requests the tribal council's approval for her actions. Although in the cases reported to us, foster parent placements do not generally seem to be with Native families, the arrangement includes some affiliative relationship with Kake. For example, the tribal social worker related that, in one case, she was contacted by an out-of-state social worker about a baby, whose grandfather was from Kake. The baby's parents had arranged for a private adoption with a non-Native couple. The tribal social worker brought the case to the tribal council, and asked whether anyone in Kake was interested in adopting the child. No one was. The tribal social worker met and approved the adoptive family, and obtained an agreement that the child would be enrolled as an OVK member, taught his Tlingit identity and Tlingit values.

Methods of decision making where children's offenses are involved

The Kake magistrate's court has jurisdiction over certain offenses, including emergency children's cases, domestic violence, violations of municipal ordinances, state traffic infractions, search and arrest warrants, extradition and state misdemeanors if the defendant consents in writing. Thus, offenses committed by children (such as underage consumption of alcohol) often come first to the lay

magistrate (who is a Native, community leader, neo-traditionalist, and member of the OVK staff). These are resolved in both formal and informal ways as the following three examples show. (1) One evening, a local teenage boy who was living with his grandparents, was picked up by a Kake town police officer for smoking marijuana. The boy was rumoured to be responsible for much of the local "drug" supply to the high school students. The magistrate called the boy's grandparents, who agreed to get him out of town on the ferry that very night to live with out-of-state relatives; (2) In the summer of 1997, in an effort to eliminate underage alcohol abuse, the lay magistrate, Kake police department, and Native health services drug and alcohol counselors coordinated a "safety net" that resulted in twenty junior and senior high school students (out of a total number of sixty) being sent to rehabilitation during summer vacation. The police arrested the teenagers on minor consuming charges, the lay magistrate ordered them to the alcohol counselors, and the alcohol counselors (letting the parents know they might be subject to neglect charges) encouraged agreement and cooperation from the children's parents. Thereafter, underage drinking arrests practically vanished. (3) In the third case, a teenage girl, herself involved with drugs and alcohol, was caught between a repeatedly violently abusive father and an older alcoholic boyfriend. In the girl's narative [the researchers interviewed everyone involved], the police and magistrate "threw the book at her" for her "own good," to get her away from her abusive father and into rehabilitation. Her mother was then living in Anchorage. The mother intervened telephonically through counsel, and drawing upon ICWA, sought her custody.

In Anchorage, both daughter and mother underwent counseling, which helped the immediate situation, but did not halt the periodic eruptions of violence in the family. In fact, these continued will into the research period, where the researchers had an opportunity to observe the lay magistrate in court handling a domestic violence charge against the father.

These cases illustrate a mix of concerns for "our children" - a phrase frequently heard in the rhetoric of Kake and implying a local preference - protecting those who need it; helping those who can be helped; and sometimes banishing those who can't - and implicating issues of local autonomy and harmony.

CHOICE OF FORUM

Village attitudes towards a tribal court

Kake has a tribal court ordinance proposed to the tribal council. However, the tribal council has not voted on this ordinance, in spite of the fact that the tribal court is listed as a priority on the OVK annual report. The tribal historian drafted the ordinance and has been conducting research on constitutional amendments to incorporate the tribal court into governance. Several years ago, OVK arranged for a tribal court training in which Sitka tribal court personnel and a tribal court trainer conducted a mock hearing with tribal members.

The tribal historian viewed the tribal court as an important and integral part of tribal governance. However, the lay magistrate clearly valued a community court over a tribal court in order to incorporate all of Kake's residents rather than distinguishing between the Native and non-Native population.

In our interviews of tribal council members, city council members, OVK staff and other Kake residents, a variety of views emerged. Some expressed that a tribal court would have an emotional and moral meaning, that would have greater significance and impact by demonstrating that the offense had hurt the tribe. Some viewed the tribal court as a means to exercise their own power, and others saw it as a means of having decisions imposed unwillingly upon them.

Some saw tribal court as a local court for solving local problems, and others wanted a tribal court for applying substantive Tlingit law over land, property, inheritance, and intellectual property instead of state law. Some people saw the tribal court as most relevant for fish and game management in the face of state or federal authority, or for handling misdemeanors rather than serious felonies.

What is most apparent from these interviews is that for most people, the notion of a tribal court is neither a high priority nor part of the local discourse.

Selective incorporation of the "global"

In negotiating issues of sovereignty and identity within the global/local dialogue, the system of Alaska state conferencing plays a vital role. Due to the remoteness of the state and the degree of state and federal funding for most jobs in the state, Alaska experiences a multitude of statewide, regional and federal conferences where program people interact with funding and governmental agencies. Between October 5 and December 11, tribal government personnel attended ten statewide and federal conferences on issues related to local governance, tribal operations, and/or child welfare (of which the researchers attended seven). These conferences included: the Alaska Federation of Natives (largest congregation of Alaska Natives of the year); a statewide ICWA conference, a statewide Environmental protection Agency conference; a statewide BIA providers conference; a statewide magistrate's training conference; national tribal governance conference training; regional Alaska Native Brotherhood and Sisterhood conferences; regional Forest Service meetings; statewide Native Law conference; and a statewide school board members conference.

At both city and tribal council meetings following these conferences, the researchers were able to observe the selective incorporation, and translation of ideas and opportunities presented in the larger forum to Kake. At two of these conferences, the magistrates training and the BIA providers, representatives from the Carcross Circle Sentencing/Justice Committee project in the Canadian Yukon made presentations regarding an alternative method of resolving criminal cases currently in use in Interior Tlingit communities in Canada. The lay magistrate was very motivated by these presentations, and as a result, Kake became the first Alaska Native village to engage in a week long training on implementing restorative justice principles contained in Circle Sentencing. The OVK council resolved to invite the circle sentencing trainers from Carcross to provide the four day training session, at the council meeting immediately after the Carcross presentation at the BIA Providers' Conference. Predictably, those individuals most involved in anti-social behavior control in the village (drug and alcohol counselors, the magistrate, the chief of police, the Presbyterian and Salvation Army ministers and OVK staff) represented the majority of those who attended the training.

The particular method of conflict resolution presented in Circle Sentencing seemed to resonate for the Kake residents who participated. The lay magistrate reported that he and others in his

generation (he is in his 40s) had memories of sitting in a circle to resolve family problems long ago. Members of the circle were forthcoming and emotional in their comments. There was very little "justice" talk; rather, the focus of those present was to help troubled individuals and families to better respond to their alcohol and drug problems. Significantly, the group altered the model that the Canadians presented to them to more closely reflect local priorities of the Raven and Eagle moieties and their responsibilities.

Since the training in early March, fifteen circles with at least two follow-up circles have taken place. All involved misdemeanor activity or maternal alcohol abuse. The tribal historian, who was the field research assistant for the project said, "each circle makes its own shape." All the cases that have gone through the circle have been "successful" in the lay magistrate's eyes. As a result of recent law enforcement personnel changes and interference by the state district attorney, the lay magistrate has experienced some limitations and restrictions on the cases he can refer to the circle. In contrast to the past, domestic violence, driving offenses and other assaults are no longer allowed to be resolved by the Circle. Although this appears to undermine local authority, neither the lay magistrate nor the tribal historian seem to view the current status of the circles as anything but positive. For example, tribal staff avoided a jurisdictional conflict when the District Attorney objected to a domestic violence case going to the circle, by deciding that this particular case was not appropriate for the circle after all. However, these cases highlight an underlying jurisdictional tension between state and tribal legal systems on the one hand and on the other hand placing community harmony and cultural values as a highest priority. Because they have chosen a non-tribal forum, they are more vulnerable to detailed regulation by the state. This raises the very important question of what impact placing locality over sovereignty will have now that Kake has chosen a more syncretic dispute resolution technique as an aspect of the state lay magistrate's court in lieu of a tribal court based on political sovereignty.

Observations in state court

Observations in the state court in Anchorage, preliminarily reveal that lawyers and legal arguments substitute for familial and social relationships – for example, a legal argument concerning

whether a social worker had used "active efforts" (an ICWA legal standard) to provide the services (including transportation and warm clothes) necessary for an addicted mother to enter rehab. This contrasts with the action of the tribal social worker in Kake, who kicked a mother's potentially sexual abusive boyfriend out of her house, and substituted the money he was providing by figuring out a way to cheaply replace a broken heater and then justified general assistance for the mother. Native identity, too, is treated as a matter of legal standards – conceptualized in terms of giving notice to tribes and seeking foster families that comply with ICWA (preference for native families) – standards that are breached as much as complied with. At the same time, like in Kake, in state court proceedings there is a primary concern with the immediate welfare of the child and the participants who are physically present. Much decision making is made at the pre-trial conferences (which were not observed during this research), where public defenders and GALS and assistant attorneys general who often know one another work out children's placements. To some extent, the working-out of children's issues is embedded in social relationships (a GAL told a mother at a hearing that she was also the GAL for the mother's sister's children – she asked after the mother's sister, was told she was doing well, and asked for a contact number to set up visitation). But these are relationships between a state bureaucracy and its client population, rather than family and clan based relationships that are on-going.

The study examines the extent to and ways in which national, statewide and local discourses of law and justice find expression at the village level. Through extensive interviews and observations of local governance and community activities, state and magistrate court sessions, conferences and task force meetings, the research creates an ethnography of law, power and identity as they are distributed among traditional, matrilineal and bilateral families, tribal and city government, regional organizations, tribal staff, and the Native lay magistrate. This pilot project verifies the feasibility for the proposed larger study comparing Tlingit, Athabaskan, Yup'ik and Inupiaq villages.