

General Information

Private or Public Statement? Private

Statement Provider: Paul Thibeault

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Statement Gatherer: Rachel George

Support Person: N/A

Additional Individuals Present: Gail Werrbach, Sandy White Hawk

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Recording

RG: Okay, it is September 11, 2014. We're here in Machias, Maine. My name is Rachel George and I'm here today with:

PT: Paul Thibeault.

RG: Wonderful. And the file number is ME-201409-00090. Paul, have you been informed, understood and signed the consent form?

PT: Yes.

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

PT: Understood.

RG: Fantastic. And Gail Werrbach and Sandy White Hawk will be joining at some point during this interview. So I'm wondering if there's any specific area you want to start off talking about?

PT: Sorry, (*cough*) I may be coughing a little, but — well, I think it makes sense probably for me to just give a little background in terms of who I am, what I do.

RG: Excellent.

PT: Why I would have involvement with this. I'm an attorney. I've been a legal aid attorney for most of my career. Even when I wasn't a legal aid attorney I was involved with similar populations as a public defender or volunteer attorney. I currently work at Pine Tree Legal Assistance but I've worked in Indian Country for about 24 years now, um, in Maine and also in Minnesota and some other places in the country. So my involvement with um, child welfare issues directly has been as an attorney and also as a member of different groups at various towns that were dealing with child welfare issues, and I was formerly a member of the Tribal State Commission here in Maine. Then I was chosen — I think I was their representative to the selection panel. Somebody put me on the selection panel for the TRC. I think it was the Tribal State Commission. So I served in that role on the selection panel for the TRC. I was active before that with the Tribal State Commission and then supporting the developments of the TRC. It's something I totally support. I think it's been a great idea. I hope it's successful.

RG: How long have you been working as an attorney in Maine?

PT: Well, that's a long answer because I've been a lawyer for 39 years and the majority of those years have been in Maine, but not all of them. I'm at — I guess about 25 of those years, maybe 20 of those years have been in Maine. I've worked in Maine now for most of the last ten years.

RG: Throughout your work as an attorney, have you worked with many child welfare cases?

PT: Yeah, quite a few. I mean it's never been the primary focus of my work. I've never done exclusively child welfare issues. But both as a legal aid lawyer and as a public defender and as a private attorney, I've had a fair amount of involvement in both Indian and non-Indian child welfare.

RG: Are there any cases that stand out to you as notable? Of course, without giving details about the —

PT: Well, I mean, in my own experience probably the most notable things that I've been connected with would be cases involving the Indian Child Welfare Act in Minnesota. We did — my program there was pretty involved with Indian Child Welfare Act issues. In Minnesota we did some appellate [00:4.22] cases on child welfare issues including some that are still reported when people cite cases and that sort of thing, so that's probably the most legally



significant work that I've had. My work here in Maine has not been in state courts regarding Indian Child Welfare issues primarily. Yes, I have been appointed to a few cases where there were Indian children involved in a state court proceeding, but primarily my involvement with Indian Child Welfare issues in Maine has been in the Tribal court. So it's been a different context dealing with the Tribal social services agencies and that sort of thing. I've represented a number of grandmothers who — um, when I was working for Pine Tree in the last few years, we would generally not become directly involved as the attorney for the parents because there were court-appointed attorneys that were doing that, but we would sometimes represent other family members including aunts or grandmothers who wanted to participate. In some times they were seeking the placement and other times they were just trying to have a voice and to retain their relationship with their grandchildren or their nieces and nephews.

(cell phone rings)

PT: Sorry about that.

RG: That's okay.

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

PT: *(sighs)* Indian Child Welfare Act. Well, I guess I first learned about it when it was passed in, I think that was 1978, maybe a little bit before that in terms of hearing about it when it was being proposed um, and hearing about the problems that it was designed to address. But in the late '70s I wasn't really directly involved in Indian Child welfare issues. I was involved in some other things like prison litigation and things very different. But I do remember hearing about it and, and thinking it was a good idea. *(laughs)* As far as getting really knowledgeable about it, that would have been early '90s.

RG: When you mention that you had been appointed to a couple cases with native kids in state court, what was the context of those cases? Why were those kids in state court as opposed to Tribal court?

PT: Well, they were in state court either because the Tribe did not have the primary jurisdiction or in some cases it was because the Tribe didn't really have a functioning Tribal court. That's been something that I've witnessed. You know, now that you mention it it's probably the most significant thing that I've personally witnessed over the years, in my work, is the real development of the Tribal courts. I mean, Maine has had a Tribal court since the early '80s after the settlement that the Passamaquoddy's have and perhaps, Penobscots. But in Minnesota I really had the opportunity to witness, from the ground up, the development of some of the Tribal courts. Their first efforts to really exercise their jurisdiction regarding their children. And that was pretty interesting and exciting work to see that. So my involvement

with the state cases has been where, for one reason or another, the case is not in the Tribal court, uh, either because it's been removed or because the Tribe is not actively seeking to remove it.

RG: Have any of those cases been in Maine or have they been in Minnesota primarily?

PT: Yes, some of those cases have been in Maine — both Maine and Minnesota. For the last ten years or so, most of my involvement with child welfare cases has been Tribal court cases rather than state cases.

RG: Can you tell me a little bit more about your experience with dealing with Tribal court cases?

PT: *(in-drawn breath)* Well, one of the big differences I see — again, I come from the perspective of having practiced in other Tribal courts in other places in addition to Passamaquoddy court, and um, one of the real big differences is it's kind of obvious when you walk in — and this is not meant as a criticism, but it is simply a fact that I don't think I ever practiced in another Tribal court where the judge was not an Indian. I'm trying to think if there might have been one, maybe one other situation where the judge was not an Indian, but generally the Tribal courts that I've been in in Minnesota and the Dakotas, the judges are Native American. In most cases they're members of the Tribe, you know, that has the court. So that's a difference right there. Now, I have a high opinion of Rebecca Irving, the Passamaquoddy judge. So that's not really meant of a criticism of her, but it is striking when you've practiced in a Tribal court setting where virtually — you know, out in 'the west' or whatever, where virtually everybody you see in the courtroom *(laughs)* is a Native American including the judges and the lawyers, the advocates, the social workers, and then you come into the setting in Maine where many of the people that you're seeing in the system are not Native American. That's a function of the circumstances here in Maine and I don't think it's unique to Maine, but it is different than what my own experience was with Tribal courts in Minnesota and the Dakotas. I think in a lot of subtle ways that has an impact on how the courts function.

RG: Can you elaborate a little more on what you mean by that?

PT: Well, I say it's subtle and it's hard to really put a finger on some of it but um, when you're dealing with a judge who is from that community who is Indian, and in fact a number of the judges that I dealt with, or I had preside in cases in other places, were Native women. Lawyers, judges. They weren't all lawyers, but a number of them were and I think they brought perspective not only of Maine Tribal members and people from the community but they all often brought the perspective of being mothers. So, when you put that all together, that they were from the community, they were Native themselves, they had their own children and sometimes grandchildren, some of whom were — you might even — unfortunately, being involved in proceedings of that nature I think you just have the judges — the Tribal judges tend to just be more connected. That can have its negatives as well as its positives because sometimes they're too connected. But it's just different. They have a personal stake, you know, maybe that a non-Indian judge who comes in from outside just doesn't have in the whole situation, which in some cases I think is good. But in other cases maybe I think it's not

good. I don't know if I'm explaining that very well. That's my perspective on it. And it is the biggest — if I was to identify one thing that has struck me, or that I noticed about the Tribal court here and the Tribal courts in other places is that. That the personnel including most often the judge are not as connected to that Tribal community as they are other places.

RG: I have a number of questions about working within the Indian Child Welfare Act. If you don't have experience with all of them just let me know.

PT: Sure. Sure.

RG: What are your experiences in working within the Indian Child Welfare Act and what challenges have you noticed with, the first one is initial identification of a child that's Native American?

PT: Well, I mean everybody who deals with the system I think has had some experience regarding identification issues. I think it's — that's been an issue — it's not just an issue here, I mean it was an issue in other places. So —

RG: What about it in particular it's an issue?

PT: Well, I think people that aren't used to dealing with, you know, if you're immersed in it and you're dealing with an Indian population all the time, well then it shouldn't be a big problem. But when you're dealing with state courts that have an Indian population somewhere or a transient Indian population, they're not accustomed to even thinking about the Indian Child Welfare Act. So I think the issues are probably more pronounced. The identification problems are probably more pronounced in places. I personally have worked pretty much in places that have a lot of Indians. *(laughs)* The Indian Child Welfare Act, in my experience, hasn't been a peripheral thing or something that the local court staff or the local attorneys really didn't know about. I mean, I think it's been pretty much something that they're aware of so I wouldn't say that in my experience, except maybe there's been identification issues —

GW: Hello. I'm sorry we're late. Hi, Gail Werrbach.

PT: Hi.

SWH: Hi. Sandy White Hawk.

PT: Hi. I met you both when you were being interviewed by the selection panel.

GW: That's what I understand.

RG: So we were just talking about initial identification of a child.

PT: Yeah. And I guess to summarize, I was saying that because of the nature of the communities that I've worked in, that really hasn't been a big issue because I've worked in areas where there is a substantial Native population, court staff and attorneys and social workers that are pretty aware.

RG: What do you notice about that particular aspect in the context of Maine or is that an area you've had experience with since working?

PT: Again, I haven't really had any cases where identification of an Indian child really had been an issue.

RG: That's all right. How about state notification of children to Tribal child welfare? So when um, the state becomes aware that a child needs to be protected um, and they realize the child is Native American, what are your experiences in that process of the state notifying the Tribe that a child has come to their attention or any challenges in that process.

PT: Again, I don't really think that's been much of an issue. As I said, most of the work I've done in Maine in Indian Child Welfare has been in the Tribal court. So it's kind of a non-issue.

GW: So you may have already said this, I'm sure to Rachel but, just so we make sure we understand. So you've been the attorney for parents —

PT: Sometimes.

GW: — within the Tribal court system —

PT: I have for some. I've also been in — I've — Maine is not the only place where I've practiced in Tribal courts. I'm licensed in a number of Tribal courts. And I've worked quite a bit in Minnesota and the Dakotas as well as here.

GW: All right!

PT: But, ah, so, anyway, where were we?

RG: Have you noticed any challenges or any — if you want to elaborate on your experiences, in determining jurisdiction over Native American children? Maybe perhaps in cases where the cases remained in state court.

PT: Yeah. I've had some involvement with jurisdiction issues in Minnesota. In the program I worked in there we did have several — we had a number of jurisdictional disputes that we got involved in. And they weren't always based on the Indian Child Welfare Act. There were a number of different jurisdictional issues that we were, (*inaudible*) [18:57] issues, and so forth. In Maine, um, I can't say that I've actually had a case where we were battling over, over



jurisdiction. It's been my impression in some cases that the Tribes here, or at least the Passamaquoddy Tribe, um, have deferred jurisdiction to the state in some instances where if I had been the decision-maker for the Tribe, I would have been pressing for the case to be in state court — I mean to be in Tribal court, but they haven't necessarily done that. There have been a couple of cases, in particular, where I — it was striking, I thought that the Tribe was allowing the case to proceed through state court. I mean, they were participating but they weren't bringing the case, and I don't think it was a question of really a jurisdictional dispute, I think it was a question of Tribe not exerting its authority to bring the case to the Tribe.

SWH: Any sense why? Or what — I know you can't talk specifically, but — specific cases but —

PT: Yeah. And it's been awhile so I wouldn't want to get into too many details about it but I think they were both cases where there were some very complicated circumstances. There were some real strong special needs um, that the children in the cases had. For one reason or another, determination was made — it might have been in at least one of those cases there was a lot of conflict within the Tribe about the case. A sense that maybe the Tribal court wasn't the optimum forum. But my personal view is that Tribes ought to exert their authority over those cases and if they have to deal with issues such as conflict or attitudes that people in the Tribe have towards the court, well, I think that's part of developing the court and part of exerting your sovereignty.

To me the Indian Child Welfare Act is basically — well, not basically maybe, but it is, to a large extent, an issue of Tribal sovereignty. I see the Indian Child Welfare Act in the context of other laws, and other developments that were going on back during the same period that the Indian Child Welfare Act was passed. And I personally feel strongly that it should be viewed in that way, as part of the overall development of Tribal sovereignty. So I think when Tribes — even if the decision might be in a particular instance, decision-makers of the Tribe might feel that the best interest of a particular child or children might be served by allowing the state to exert jurisdiction. I mean, I'm not a Tribal member (*laughs*) so it's not really my place but my personal opinion is that in the long run that's a bad idea. I think that Tribes should exert their jurisdiction actively, aggressively. I think jurisdiction is like a vacuum. If you don't use it, somebody else fills it. So I just feel strongly that the Tribe should be very assertive about the rights they have that have been recognized by the Indian Child Welfare Act because it is in that larger context. And I got — before you two got here — but I talked about how probably — in terms of — we were talking about my past experiences and I was saying that one of the biggest experiences, or most notable experiences I've had was seeing the Tribal courts in Minnesota develop. You know, playing some role in that, but just being there for the development of them in the '90s. When I first went to Northern Minnesota, the — with the exception of Red Lake, the Tribal courts up there were functioning in a very minimal, very minimal level. But I saw the courts there in Northern — at Leech Lake and White Earth really

develop. I just think it was a very positive change. *(laughs)* They started really asserting themselves in child welfare cases. I think that's been a very positive thing for those Tribal communities. And they definitely had some battles. They probably still do. *(laughs)* I mean I haven't been involved with those reservations for a while but they definitely had some jurisdictional fights when they were trying to first establish themselves.

RG: This might be a question that you don't know the answer to but does the Passamaquoddy Tribe — which I'm gathering is the one that you've worked with the most since you've been here in Maine?

PT: Yeah. I've worked with all the Tribes to some extent, but the court that I've been in primarily is the Passamaquoddy.

RG: Do they often intervene in child custody proceedings covered by ICWA, or in child welfare cases covered by ICWA?

PT: Well, yeah, I believe they do. Again, I wouldn't — since my involvement is primarily — has been here primarily in Tribal court so those aren't cases where they're intervening, those are cases where they are hearing the cases. Yeah, I think they've done a fair amount of intervention, the Maliseets; I don't know about the Micmacs. I honestly don't know if they're actively intervening. That's just something I'm not familiar with. But as far as I know, the other Tribes are. If they're not actually taking the cases there, they generally would be intervening in them.

And then they do have funding issues, that I guess the other really striking thing — I mentioned having a non-Indian judge was something that you just can't help but notice. *(laughs)* If you've practiced in other places where it's very unusual to have a non-Indian judge, you know non-Indian players really. The other thing — and not that other Tribes are rolling in dough, because they're not, but I think that the lack of resources for the Passamaquoddy is a big issue. They really run their quota on a shoestring. That has a definite impact on what they are able to do. And I think it also causes them to defer to the state. In instances where — in the long run, I think that's not necessarily the best thing but it's driven by actual reality.

GW: So for example, not having — a child with special needs not having the funding to meet the child's need within the Tribe so then they'll decide they'll let the state, which will then pay for the child?

PT: Accesses the money that is needed for the child to get what they need. I personally believe that to the extent that Tribal courts have developed I mean. if you go back to where, the period when the Tribal courts were not actively exercising jurisdiction, those cases were being heard obviously in state courts. Or to the extent that now the Tribes are exerting themselves, what is the logic for that money not following those children? *(laughs)* To me, you know, it's a given that if you've transferred the caseload, the money ought to follow the caseload. Unfortunately, that's not the way it works. So.

RG: Are you aware of any cases where the state has declined to transfer a case to Tribal court?

PT: In Maine?

RG: Mm-hmm.

PT: Aware, but I haven't been involved. I think I've heard of a few cases in Maine where that was the issue but I have not personally been involved in, again, because I'm generally involved in cases that are in a Tribal court.

RG: To the best of your knowledge, knowing that you were not personally involved, do you happen to know what the reasons were for those decisions about declining to transfer a case to Tribal court?

PT: Well, you know, the usual Good Cause stuff. I mean, if you go through the Good Cause provision in the Child Welfare Act and in the PIA regulations, they have the criteria for Good Cause to keep the case in the state court. I think from what I've heard, if those situations have arisen, I think there might be one, one actual reported decision in Maine. I think I read it at some point. *(laughs)* But I — dealing with the Good Cause factors under the RCWAs [00:28.57] as far as removal or not removal. But again, it hasn't been an issue in a case that I've handled in Maine.

RG: What strengths does state Child Welfare possess in ensuring ICWA compliance?

PT: What strengths? I'm not quite sure how to answer that.

RG: That's okay.

SWH: It's sort of a what are they doing well and followed up by the what are they not doing so well. If that's something you have a sense of in the work that you've done.

PT: Well, I have the general sense that there's a feeling on the part of the Tribal players in the system that the state, in the state of Maine, that the state social services people have been cooperative and responsive up to a point, *(laughs)* but not beyond. There's still — I'm looking for the right word. It's not a seamless — I mean it probably isn't anywhere — I mean, I know in Minnesota, they've gone through years and years of efforts to coordinate and work out the cooperation. They were one of the first states to really develop a strong compact but there were still problems and funding issues that were not resolved. Maybe they have been, I don't know.

GW: I'm just not saying anything because I didn't think you should hear, so I'll tell you later.

PT: I know I'm talking about things that someone in this room knows more about than I do. Anyway, that's —

RG: What strengths and weaknesses do you see the Wabanaki Tribes here in Maine possessing in working with the state for ICWA compliance?

PT: Well, I would look at that on a broader context, not just ICWA compliance. But I mean I've been working in the, you know, Wabanaki communities for most of the last ten years. All the Tribal communities in Maine but particular the Passamaquoddy and I've often said that I think the strength of the Passamaquoddy communities is amazing actually. (*laughs*) When you look at what they've gone through and the strength that remains, the people that keep stepping forward to try to do positive things, I'm continually amazed by it. I think I've said this, when I've attended community meetings there that the Tribal members will tend to be very critical of their own institutions, and each other, and I feel once in a while it's necessary for — you know, it's a good idea for someone from the outside to say, 'Whoa, step back a little and assess the strengths that you do have' because I do think there's a lot of very committed and creative and caring people in the Passamaquoddy communities and an underlying, I don't know what the word is exactly, but strength, I guess. It's still there.

And in spite of everything that's happened that they still have that — they are a community. They have a lot of conflicts and a lot of internal issues but there's no question that they have a strength of community that I think is really remarkable and still provides the opportunity I think, to do some really positive things. I'm currently working with their Restorative Justice Commission on trying to make some changes in the way the Tribal court and Tribal law enforcement deal with addiction and things of that sort. There's just a lot of good people there that are still trying in spite of everything that's happened. It's all intertwined. When we talk about this issue, the TRC's issues, but it's all one. I've dealt a lot with the prison population and it's all connected. You can't really separate one from the other. I know that the TRC is not getting involved with working with the Wabanaki prison population. I think that's exactly right because they're not separate. It's all connected. Those people should not be excluded from the community. I hope that one of the things, one of the benefits of the whole TRC process will be that the Tribe itself will embrace the people who've gotten themselves locked up, gotten themselves in the criminal justice system because it's all of a piece to me — and I think that it's really important for the prisoners — for Wabanaki prisoners to be able to reconnect to their Tribes, to Tribal beliefs. I mean, you can't impose it on somebody but I think, if somehow a rejuvenation of Tribal culture can reach those prisoners, I just think that's a really positive thing. Help them to reintegrate. Because we have this situation in Maine where the state has jurisdiction and the state runs the prisons and the county jails but almost all those people come back to their Tribal community and they come back with whatever happens to them in those state run facilities, they bring back to the Tribal communities with them, and the Tribe has very little to say about it. There is up to now very limited involvement with those folks when they're in those institutions and I think the Tribe ends up with the problems when they come back to their Tribal community. Then everybody says well, it just adds to some of this negative attitude that a lot of people have towards the Tribal community — a lot of non-



Indians have toward the Tribal communities but they don't recognize that they're manufacturing this in their own *correctional* — quote unquote — institutions and then dumping them back into the Tribal community and then blaming the Tribal community. So.

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

PT: Do I think it does enough? Well, if it was fully implemented, probably. (*laughs*) I don't think the Act has ever been fully implemented anywhere. I still think that it's an ongoing battle, it seems, all the time to really enforce and implement the purposes of the Indian Child Welfare Act. And I know I've been involved with, not only myself in Minnesota, but Indian legal services advocates all over the country that I'm in contact with all the time. They're just having to fight these battles all over the country to get the Act to be really followed. Sadly, I think that a lot of — in my view, a lot of lawyers, not just lawyers, but I can speak for lawyers more than other people, they seem to look at the Act as either an impediment or a leverage and I don't think that it ought to be viewed in either of those ways. I don't think the Indian Child Welfare Act is just there to give one side in a lawsuit a leg up. I think there's a larger purpose. I think, again, that it comes back to my belief that the ICWA is part of a larger movement towards Tribal self-determination. I think that what's really important.

I've had a lot of disagreements, even with Tribal people at times about it because people who were involved with particular cases, they come back to what I think are narrow concepts of best interests instead of the bigger picture. The issue of best interest, I feel, has been settled by the Indian Child Welfare Act. That's what the real point is, is that as a matter of Federal policy it is in the best interest of Indian children to not be separated from their Indian families and their Tribal communities and their Tribes. People still don't really accept that. It seems that a lot of people think that the ICWA is a good idea when it promotes what they think is in the best interest of a particular child. (*laughs*) Then they look for ways to get around the ICWA when they think that it interferes with what they think is in the best interest of a particular child and I think that's really missing the point of what the ICWA is supposed to be about. But.

RG: What do you think is needed to make sure that the act is fully implemented?

PT: Well, probably, I think education as much as anything else. Just continue to try to raise people's awareness about why there was a need to pass that law and why there still is a need to fully implement it and that it's not a special privilege to just get past those — and that it shouldn't be a political football or a legal football. I mean, there are important purposes and I'm not sure that there's really been a buy-in to that. I mean, obviously Congress passed it. So there was a buy-in by Congress but I'll be willing to bet if you asked the members of Congress right now, not very many of them would be able to give you a good explanation of what the real purposes or the real need was for the Indian Child Welfare Act. I also think it probably wouldn't pass now because of the erosion of the support for those sorts of things.

RG: Do either of you have any questions you would like to add?

GW: I don't think so.

RG: Is there anything else you would like to add?

PT: No, I'm fine. And I wish I could have been more help. But, uh.

RG: No, it was excellent. Thank you so much for your time.

GW: Thank you for coming.

SWH: Thank you.

PT: Okay. Well, good luck with it.

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