At 40, ICWA May Be Facing Its Biggest Legal Hurdle

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Law360 (February 9, 2018, 9:28 PM EST) -- The Indian Child Welfare Act has proved to be a powerful tool to keep Native American children with tribal families since it was enacted in 1978, but a recent suit by Texas, Louisiana and Indiana might be the sternest challenge yet to the constitutionality of the law.

The law, commonly known as ICWA, seeks to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families” by imposing federal standards for state child custody cases involving Indian children, such as adoption and foster care placement.

Advocates for the law say it’s needed as much today as when it was passed to keep Native American children from being removed from their homes and to provide tribal governments with authority to intervene in state court cases involving tribe members.

“If the goal of ICWA is for tribes to make the decisions regarding their children, I think 100 percent ICWA has increased tribes' exercising their inherent jurisdiction with their children,” said Kathryn E. Fort, director of the Indian Law Clinic at Michigan State University College of Law and its Indian Child Welfare Act Appellate Project.

But ICWA has long been a lightning rod for opponents who claim the law is based on race, rather the political status of tribes and individuals. Backers and opponents are girding for a battle in Texas federal court that could help determine the fate of both the law and thousands of Native American children.

In October, Texas Attorney General Ken Paxton, who has since been joined by his counterparts from Louisiana and Indiana, filed suit in Texas federal court to have the law struck down, alleging it racially discriminates against Native American children by privileging their placement with tribal families over their best interest as the deciding factor in custody and adoption cases.

The suit is a “long overdue” development, according to Timothy Sandefur, vice president for litigation at the nonprofit Goldwater Institute, which has worked on a slew of cases nationwide challenging the constitutionality of the law.

“One sure barometer of the progress we’ve made in drawing public attention to the way this law increases child abuse and neglect for vulnerable Indian children is that there are now four state AGs who have taken a stand in defense of these children,” Sandefur said, referring to the Texas federal court case as well as an Ohio appellate court case involving that state’s attorney general.

Fort, whose ICWA Appellate Project provides appellate legal support to tribes and their ICWA attorneys,

says she’s concerned about the case, because “we haven’t had this level of federal attack.”

“Any time a state brings a lawsuit claiming a statute is unconstitutional, it brings it to a different level,” added Fort, who said the project is assisting tribes in connection with the Texas case.

Still, many of the arguments both for and against the law date back to the debate around its passage in the 1970s, when it was created to reduce the number of Native American children being taken for adoption out of tribal communities, attorneys say.

Federal lawmakers behind the bill well understood the impact of removing children from their tribes, according to Pipestem Law Firm PC partner Mary Kathryn Nagle, an enrolled citizen of the Cherokee Nation.

“If you take away the next generation of tribal citizens, you’re taking away the nation and the culture,” Nagle said.

But the law actually pits tribes against Native American children, Sandefur argues.

“These are cases where state and tribal governments are depriving vulnerable children of their constitutional rights by taking away their rights to due process and equal treatment based solely on the DNA in their blood cells, which is offensive to every concept of American constitutional law,” Sandefur said.

Fort says ICWA opponents are seeking to undermine the law without understanding its value to tribes and individuals.

“There’s a long history of groups who have sought to work purportedly on behalf of Native people who don’t know anything about working with Native people or allowing for self-determination,” she said. “The tribes I work for tell me this law’s important, and the Native people I work for tell me this law’s important.”

The Texas federal court case will now provide a high-stakes setting for the battle over ICWA, as Texas has taken up the case of Chad and Jennifer Brackeen, a non-Native American couple who had their petition to adopt a Native American boy refused under the law.

The state and the couple argue that ICWA puts children at risk and violates the Texas Family Code by requiring that preference be given without good cause to a member of the child’s extended family, other members of their tribe or other Native American families in state-law-governed adoption placements, according to the suit, which Louisiana and Indiana joined in January.

The states' litigation marks a new wrinkle in the opposition to ICWA, which has continued to build since

2015, when Fort launched Michigan State's ICWA project.

Fort says that a spate of suits involving the Goldwater Institute, while so far unsuccessful in winning a hearing by the U.S. Supreme Court, are diverting tribes' resources into lawsuits and rehashing old arguments about the constitutionality of the law and the right of tribes to govern their members.

"I don't think that any of that is to the benefit of American Indian kids or families," Fort said.

Sandefur says that the Goldwater Institute plans to take part as an amicus in the Texas case, and while he added that he's disappointed that the Supreme Court petitions the group has worked on haven't been granted, he thinks the states' involvement could ultimately help ignite the high court's interest in ICWA. To date the high court has heard only two cases centering on the law.

"I do think the Supreme Court will take these issues more seriously, given that the AGs have the primary responsibility for taking care of these kids, and they're the ones standing up and saying, 'This is a problem,'" Sandefur said.

Counsel for Texas, Louisiana and Indiana did not return a request for comment.

The case is Brackeen et al. v. Zinke et al., case number 4:17-cv-00868, in the U.S. District Court for the Northern District of Texas.

--Editing by Kat Laskowski and Janice Carter Brown.