

2023 ALASKA NATIVE CASE LAW UPDATE: PRESENTED AT THE ALASKA BAR ASSOCIATION'S 39TH ANNUAL ALASKA NATIVE LAW CONFERENCE

Andrew B. Erickson, Anna C. Crary, River E.M. Sterne, and Noah I. Star¹

I. INDIAN CHILD WELFARE ACT & CHILD IN NEED OF AID CASES

Miranda T. v. State, Department of Health & Social Services, Office of Children's Services, 524 P.3d 1105 (Alaska 2023)

This case concerned an adoptive mother's challenge to a disposition order in a child in need of aid (CINA) proceeding. The adoptive mother (Miranda) challenged the disposition order's predicate findings that OCS had made active efforts and that the removal of her daughter was necessary to avoid harm to the daughter. The Alaska Supreme Court rejected both challenges and affirmed the order.

The Court began by explaining the early stages of a CINA proceeding. A disposition order occurs after a hearing to determine whether OCS's custody of a child should continue after the period of temporary custody. The disposition stage is the third of three early stages in a CINA case and can result in placing a child in OCS custody for up to two years, but not extending past the child's 19th birthday. To approve temporary OCS custody, the superior court must make the same removal findings required in the earlier "adjudication" stage of a CINA proceeding—that the child's placement preferences follow ICWA and that OCS made active efforts prior to removal.

A. Procedural History

This appeal turned on the specific and lengthy facts of the CINA proceedings. The child, Bishope, was a 17-year-old minor. CINA proceedings began in 2015 when Bishope was arrested and taken into a juvenile facility. Bishope refused to return to Miranda's care.

The proceedings that followed were myriad and reflected the difficult relationship between Bishope and Miranda. OCS sought temporary legal supervision over Bishope, intending to establish a case plan with Miranda to determine appropriate services while

¹ Attorneys, Landye Bennett Blumstein LLP, Anchorage, Alaska.

Bishope was released and placed with a family friend in Anchorage. This temporary supervision was granted. Later that year, OCS petitioned for and was granted temporary custody pending further proceedings. At some point thereafter, Miranda agreed to provisional findings of Bishope being a child in need of aid to facilitate Bishope's foster placement. But OCS instead placed Bishope in residential treatment, rather than foster care, which prompted Miranda to seek a review hearing.

After OCS completed a psychiatric evaluation of Miranda and Bishope, OCS and Miranda entered into a stipulated adjudication agreement (instead of the hearing) in order to start Bishope on the psychiatrist's recommended treatment plan. OCS ultimately reneged on the stipulation with Miranda because of issues relating to the pandemic and finding a long-term treatment placement out of state under Alaska Medicaid. OCS admitted error in not understanding the Alaska Medicaid requirements for out-of-state placement. Instead, OCS placed Bishope in an in-state foster home.

Accordingly, OCS and Miranda negotiated an amendment agreement, covering both adjudication and disposition. But the other parties, including Bishope's tribe, attorney, and Guardian ad Litem, opposed this agreement more strongly than the previous one as not in Bishope's best interests. Throughout this procedural back and forth, Bishope continued running away from placements and ultimately was admitted to a secure psychiatric hospital due to her high-risk behaviors.

In October 2020, the court began the disposition hearing that underlies this appeal. The court found that Bishope was a child in need of aid, citing evidence from Bishope's therapist and the psychiatric opinion of OCS's expert that returning Bishope to Miranda's care would result in emotional and physical damage to Bishope. The court then found that OCS made active efforts to support the disposition.

B. The Supreme Court's Decision

The Court affirmed the superior court's disposition order. Active efforts are required before temporary custody is granted, just as the same is required before terminating parental rights. The superior court had found active efforts starting "fairly recently," even though it characterized OCS's early efforts as "complete chaos" as evidenced by the failed stipulations, treatment plans, and placements over time. But the Court determined overall that active efforts were made. Based on the record, the biggest barrier toward reunifying the family was Bishope and Miranda's toxic relationship.

The Court also affirmed the superior court's removal findings in the disposition order because the superior court did not err by finding that Bishope and Miranda's toxic relationship meant that returning Bishope to Miranda's home would interfere with her treatment and was therefore contrary to Bishope's welfare.

The Court dismissed other portions of Miranda's appeal as moot concerning delayed review hearings and the failure to enforce the stipulated agreements between Miranda and OCS. The Court also rejected Miranda's evidentiary challenges to OCS calling Bishope's former therapist as an expert witness in the disposition hearing.

Tuluksak Native Community v. State, Department of Health & Social Services, Office of Children's Services, 530 P.3d 359 (Alaska 2023)

In December 2021, a 15-year-old member of the Tuluksak Native Community, who had been adjudicated a child in need of aid and placed with an extended family member, voluntarily visited an emergency room after an incident in which he became upset and tied a rope around his neck. He was transferred to North Star Behavioral Hospital without the involvement of OCS or the court. In late December OCS filed a request for a hearing under AS 47.10.087 (.087), which allows a court to authorize OCS to place a child in its custody into a "secure residential psychiatric treatment center" if certain statutory criteria are met.

Prior to the initial .087 hearing, the Tribe filed a response to OCS's request, questioning whether .087 applied to the proceedings given the boy's seemingly voluntary admission to North Star. At the hearing, OCS argued there was clear and convincing evidence the boy was suffering from mental illness and likely to cause serious harm to himself as a result. The Tribe objected, arguing that there was no evidence the boy could not be treated in a less restrictive environment. The court continued the hearing several times.

At the final .087 hearing, the Tribe objected to OCS's witness testifying about treatment plans OCS had not produced and requested that the authors of the records appear for cross-examination. OCS called a nurse consultant witness who testified about OCS's process for finding residential treatment placements for minors. He explained that OCS had applied to nine facilities on the boy's behalf, but seven of the facilities denied the boy admission because they could not provide the level of care he required. The facilities that accepted the boy's applications were in Texas and Utah.

At the conclusion of the hearing, the superior court found that it had credible direct testimony from a mental health professional that the boy was suffering from mental illness. The court also found that there were no reasonably available less restrictive alternatives to secure residential treatment that would adequately meet the boy's needs. The court noted "that OCS had 'barely' met its burden regarding subsections 2 and 3 of .087."

On appeal, the Alaska Supreme Court affirmed the superior court's decision allowing the boy's placement at an out-of-state secure residential treatment facility. The Court held that the Tribe had failed to identify a reason why it was improper for the trial court to have proceeded under .087. The Court also concluded that because .087 hearings are a type of CINA placement hearing, the superior court properly allowed certain hearsay and mental health testimony from OCS's witnesses. The Court held that the superior court made sufficient findings regarding each .087 factor and that it did not plainly err in failing to consider ICWA placement preferences. Finally, the Court rejected the Tribe's argument that .087 was unconstitutional as applied to the boy's case.

Regarding the propriety of proceeding under .087, the Court rejected the Tribe's argument that its decision in *In re Hospitalization of April S.* required the superior court to apply Alaska's voluntary mental health commitment statutes instead of .087. The Court made clear that although its *April S.* decision "explained that the first 30 days of [a] minor's commitment were not, in fact, 'voluntary' because OCS was not a 'parent or guardian' as statutorily defined in AS 47.30.690," it did not prevent OCS from seeking "placement in a secure residential treatment facility under .087." The Court clarified that *April S.* merely "prevents OCS from bypassing the findings required under either .087 or AS 47.30.700-.730 by claiming that a minor has been 'voluntarily' committed under AS 47.30.690."

As to the Tribe's hearsay and mental health testimony arguments, the Court emphasized that "an .087 hearing is best situated as a placement hearing" and that these "hearings implicate fundamental CINA considerations that allow for and at times require less formal procedures." The Court concluded that "hearsay may be admissible in .087 proceedings as long as it is probative of a material fact, has circumstantial guarantees of trustworthiness, and the appearing parties are given a fair opportunity to meet it." The Court also held that the superior court did not err by allowing and relying on the State's mental health care professional witness who did not independently produce all the diagnoses and opinions he used in testifying as to whether the boy met the criteria for placement in a secure residential facility. The Court concluded that although witnesses may not "testify as

a ‘conduit’ for any other mental health professional’s opinion by simply reading that opinion into the record,” because the State’s witness was part of the boy’s care team, “and his provision of treatment was naturally informed by others’ diagnoses, observations, and statements,” it was permissible for the superior court to allow and rely on his testimony.

The Court rejected the Tribe’s argument that the superior court abused its discretion in managing discovery prior to the .087 hearings. The Court’s holding rested on the principle that though “[i]deally, all parties should possess all relevant information prior to litigation the questions posed under .087[,] . . . rapidly evolving situations may present obstacles to that ideal.” Because the superior court made “numerous efforts to ensure that the parties were able to effectively meet” the State’s witness’s testimony, the Tribe failed to show that it was harmed by the lack of further discovery, and the Tribe withdrew its request for an additional continuance, the Court saw no error in the superior court’s management of discovery.

The Court resolved an unsettled question—what the applicable burden of proof is in .087 proceedings. The Court held that .087 findings must be made by clear and convincing evidence to protect children’s liberty interests “and harmonize .087 with the requirements of commitment hearings.”

The Court held that the superior court’s .087 findings were supported by clear and convincing evidence. The Court acknowledged that sending Alaska Native children to out-of-state treatment centers “could be incredibly restrictive,” and explained that ICWA’s placement preferences are meant to address this. The Court stated that an “.087 hearing unquestionably implicates” ICWA’s placement preferences because placing a child in a secure residential psychiatric facility “falls into the definition of a ‘foster care placement.’ ” But the Court nonetheless held that the superior court’s failure to apply ICWA to the boy’s case was not plain error. The Court reached this conclusion because no party raised an ICWA argument directly before the superior court and because the Court found that neither the boy nor the Tribe “was obviously prejudiced by the court’s failure to inquire into or apply the ICWA placement preferences.”

Finally, the Court rejected the Tribe’s argument that the superior court’s application of .087 deprived some children, including the boy, of equal protection under the law because “some children get less protection than others.” The Court held that the Tribe had waived its equal protection arguments by not sufficiently briefing the issue before the superior court. The Court also held that the Tribe lacked standing to raise due process

arguments on behalf of the boy because the Tribe failed to make an argument as to why it had standing and failed to make “any showing of how or why violation of [the boy’s] constitutional rights would implicate its own constitutional rights.”

Jimmy E. v. State, 529 P.3d 504 (Alaska 2023)

The mother of four children challenged the termination of her parental rights. The father of two of those children, Jimmy, challenged the same. For their shared children, the mother and father argued that the father gave sufficient reason to OCS to know his two children were Indian children under ICWA and challenged OCS’s failure to conduct the ICWA-required diligent inquiry as a result. The Alaska Supreme Court held that Jimmy gave OCS a reason to know that his two children were Indian Children and that ICWA applied and reversed the termination order on this basis for these two children. The Court rejected the mother’s separate challenge to the termination of her parental rights for her two other children.

The superior court terminated parental rights after it deemed ICWA inapplicable because Jimmy had not demonstrated his children were members of a tribe. The superior court determined that Jimmy only informed the court that he was eligible for membership in an unknown tribe and failed to establish that his children were enrolled in a tribe. Under these circumstances, the court held that OCS had no further duty to investigate when no party had come forward with evidence that ICWA applied. To the extent there was a duty, OCS fulfilled that duty. The children were found to be children in need of aid due to abandonment and substance abuse and Jimmy and the mother’s parental rights were terminated.

ICWA requires state agencies to provide notice and inquire with potentially involved tribes after a parent provides a “reason to know” that a child is an Indian child. ICWA, its implementing regulations, and the BIA Guidelines for ICWA proceedings clarify this requirement. Under the federal regulations, a state court must inquire at the beginning of an involuntary custody proceeding whether any party has a reason to know the child is an Indian child. The court conducting the custody proceeding must also instruct the parties to come forward with information that comes to light later in the case. When a party to the proceeding tells the court it has discovered information showing the child is an Indian child, OCS must use “due diligence” and identify and work with tribes of which there is reason to know the child might be a member. The court must also treat the child as if they are an Indian child until the court determines they are not. When a child’s tribe is unknown, OCS

must notify the BIA director and include information so the BIA can identify tribes to contact. BIA Guidelines further recommend that OCS attempt contact with the children's potential tribes multiple times and seek BIA assistance, before proceeding as if ICWA does not apply.

Here, the Alaska Supreme Court deemed Jimmy's specific assertions that he is a descendent of a shareholder of CIRI, an Alaska Native Corporation, "a reason to know that Jimmy's children are Indian children." The Court addressed what constitutes a "reason to know" for the first time, holding that a " 'reason to know' is information that is more concrete than a 'reason to believe,' but it is inherently less definitive than when a court 'knows' a child is an Indian child." This is a record-dependent and fact-specific inquiry. In considering whether Jimmy's assertion constituted a reason to know, the Court looked to other jurisdictions, like Washington, which deem statements of ancestry or heritage to constitute a "reason to know" given ICWA's purpose to protect tribal sovereignty where an Indian child is involved.

Jimmy's identification as a CIRI descendent gave OCS "clearly discernible next steps for determining whether he or his children were members of a tribe within a particular region." The Court identified "[l]ogical next steps" for OCS, such as "asking for further information about Jimmy's mother, potentially contacting Jimmy's mother, providing notice . . . to tribes within the CIRI region, and providing this information to the BIA." The Court noted that Jimmy's initial statements of ancestry may have been vague—but his clear statement of CIRI ancestry constituted a "reason to know" his children were Indian children and that ICWA may apply.

The Court rejected OCS's argument that Jimmy's statements that his children were eligible to be enrolled but not yet enrolled in a tribe obviated the reason to know and the due diligence that ICWA requires thereafter. The Court reasoned that a parent's uncertain statements regarding their child's potential tribal membership cannot determine ICWA's applicability without undermining tribal sovereignty. The tribe, not the child's parents, decides the children's membership.

Because OCS had reason to know, the Court further held that OCS did not meet its due diligence obligation. OCS failed to provide sufficient information to the court to confirm that it acted with due diligence in investigating the children's status as Indian children. The record showed that OCS did not investigate Jimmy's CIRI ancestry claim. At the outset of the case, OCS had informed Nome, Tanana Chiefs Conference, and the BIA

of the case. But these regions did not overlap with CIRI and OCS did not conduct any further inquiry in the CIRI region. These efforts alone were also not the due diligence that ICWA required.

II. CORPORATE GOVERNANCE CASES

***Bremner v. Yak-Tat Kwaan, Inc.*, 3AN-23-06096CI (Oct. 27, 2023)**

Shareholders of Yak-Tat Kwaan, Inc. filed a complaint for injunctive relief and declaratory judgment, seeking a court order requiring Yak-Tat to convene a shareholder meeting on September 23, 2023. The superior court granted the request and issued the order. Yak-Tat noticed the meeting to its shareholders, hired an independent CPA to count votes for a new board of directors election, and mailed a meeting packet with the rules for the meeting, among other documents. The definition of “quorum” in the rules conflicted with the definition in Yak-Tat’s bylaws.

The CPA determined that there were 33,766 shares entitled to vote at the meeting. Shareholders Shari Jensen and Verna Henninger were present at the meeting but did not register with the CPA or vote their shares. Jensen was the President/CEO of Yak-Tat and held 164 shares, while Henninger was the Chair of the Board of Directors and held 132 shares.

The CPA, pursuant to the meeting rules, determined that 16,874 shares were represented in person or by proxy at the meeting. The CPA counted all votes twice and concluded that quorum had not been met with only 49.97% of shareholders voting. The CPA therefore did not confirm the newly elected Board.

The dissident shareholders filed an expedited motion requesting that the superior court confirm the Board before Yak-Tat received dividends from Sealaska in November. The court granted the motion and ordered Yak-Tat to confirm the new Board.

The superior court determined that AS 10.06.415 and Yak-Tat’s bylaws, which define quorum as “a majority of outstanding shares entitled to vote at the annual meeting, represented in person or by proxy,” controlled over the definition in the rules, which required shareholders to be “registered” at the meeting to contribute to a quorum. The court concluded that both Jensen and Henninger were “present” at the meeting for quorum purposes. The court also concluded that the CPA erred by not reducing the total number of

available shares available for calculating quorum by 20 shares from the unsettled estates of deceased shareholders. The court found that Yak-Tat's bylaws, which would have required such a reduction, were consistent with ANCSA, whereas the meeting rules, which did not require the reduction, were not.

III. SUBSISTENCE HUNTING/FISHING CASES

***State of Alaska, Department of Fish & Game v. Federal Subsistence Board,* 62 F.4th 1177 (9th Cir. 2023)**

The Ninth Circuit reversed in part and vacated in part a decision of the U.S. District Court for the District of Alaska ruling that a challenge to the Federal Subsistence Board's approval of certain changes to hunting practices on federal public lands in Alaska was moot. The State of Alaska Department of Fish and Game brought the challenge, arguing that two changes violated the Alaska National Interest Lands Conservation Act ("ANILCA"): (1) the Board's opening of a 60-day emergency hunt for the Organized Village of Kake, which intervened in the action; and (2) the Board's partial temporary closure of public lands in game management Unit 13 to non-subsistence users.

The Kake Hunt ended before the district court issued its decision and the partial Unit 13 closure expired while the appeal to the Ninth Circuit was pending. The Ninth Circuit panel held that the State's claim regarding the Kake Hunt, which alleged that the Board acted in excess of its statutory authority in opening the hunt, was not moot because it was capable of repetition yet evading review. The panel reached this conclusion for three reasons: (1) there was evidence that the Board had opened similar emergency hunts previously; (2) the regulation authorizing the hunt remained in effect; and (3) the public interest in settling the legality of the Board's approach weighed against a mootness ruling.

As to the partial Unit 13 closure, the panel vacated the portion of the district court's decision addressing the merits of the State's claim, remanding the issue to the district court with instructions to dismiss the claim as moot.

***State of Alaska, Department of Fish & Game v. Federal Subsistence Board,* 700 F. Supp. 3d 775 (D. Alaska)**

Following remand from the Ninth Circuit, the U.S. District Court for the District of Alaska addressed the primary issue remaining in the case: whether the Federal Subsistence

Board “has the authority to open an emergency hunt for rural subsistence users pursuant to Title VIII of ANILCA.” First, the court considered what the scope of remand was and whether the “major questions” doctrine applied to the case.

As to the first question, the court determined that two subsidiary issues were within the scope of remand: “(1) whether ANILCA authorizes the FSB to delegate the authority to open a hunt to local land managers, and (2) whether the FSB has the authority to delegate hunt administration outside of a federal agency, specifically, the authority to determine who can hunt and who can receive meat.” The court concluded that although the State had not raised these issues on appeal, because the Ninth Circuit’s mandate did not foreclose consideration of the issues, they were properly before the court.

Regarding the major questions doctrine, which requires “Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance,’ ” the court held that it did not apply to the State’s challenge. The court explained that because the Board’s “purpose and authority” are “quite narrow,” whether it had the authority to open an emergency rural subsistence hunt on federal lands in Alaska was not the kind of decision that triggers the major questions doctrine.

Turning to the substantive issues in the case, the court concluded that Title VIII of ANILCA authorized the Board to open emergency hunts for rural subsistence users. Applying the *Chevron* doctrine for agency deference, the court agreed with the Board’s interpretation of ambiguities in the statute. It explained that because a rural subsistence preference is unconstitutional under the Alaska Constitution, meaning the State may not implement such a preference, and because “Title VIII of ANILCA requires that there be a rural subsistence preference . . . [,] the authority to manage fish and game on public lands to meet that preference reverts to the federal government.” The court held that this authority, paired with more specific provisions of Title VIII, gave the Board the power “to both close and open emergency rural subsistence hunts for public safety reasons on public lands.”

The court also concluded that the Board’s delegation of its authority to local federal land managers was “reasonable given the valid concern of a potentially large number of food security and pandemic-related emergency requests at the outset of the pandemic.” Finally, the court concluded that because the emergency hunt was authorized to benefit the residents of the Organized Village of Kake (OVK), “it was reasonable and logical for the [Board] to permit the OVK to choose who would most likely be successful in completing

the hunt for that community and who in the community was in need of the meat.” The court held that the Board did not exceed its authority by delegating the responsibility for making these “limited decisions” to the OVK.

IV. LAND USE CASES

State of Alaska v. Haaland, No. 3:22-cv-0163-HRH (D. Alaska)

The State of Alaska sued the Department of Interior under Section 706(1) of the Administrative Procedure Act (“APA”), arguing that the federal government had repeatedly failed to comply with Congressional directives to identify, investigate, and remedy contamination on ANCSA lands from hazardous substances. The State also brought a claim under Section 703 of the APA, seeking a judicial declaration that the federal government’s failure to comply with the Congressional directives constituted “agency action unlawfully withheld and/or unreasonably delayed in violation of the APA” and that the federal government has authority to comply with the directives.

The Department of Interior moved to dismiss the State’s claims under Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure, arguing that the State lacked standing to bring them and that the claims were not plausible as pled.

The U.S. District Court for the District of Alaska granted the Department’s motion, concluding that the State lacked standing to bring its claims. The court noted that the State had adequately alleged injuries by arguing that the Bureau of Land Management’s (BLM) failure to follow the Congressional directives had “significantly injured Alaska” by frustrating “Alaska and Alaska Native’s [sic] abilities to fully and fairly remedy the contamination of ANCSA land” and allowing contamination to spread further. But the court held that the State had failed to adequately allege “the other two elements of standing, ‘traceability and redressability.’ ” The court’s conclusion was informed by the fact that the Congressional directives at issue merely required the BLM to provide Congress with various reports about the contaminated ANCSA lands, rather than requiring it to take any particular action to remediate the contamination. Because the BLM provided these reports, the injuries the State complained of were not attributable to the agency’s action or inaction. Further, because the “directives did not express, and were never intended, to effect a remedy for the injuries,” the court could not redress those injuries with a favorable decision for the State.