

# IT IS MORE THAN JUST A CALCULATION: REFRAMING CHILD SUPPORT IN INDIAN COUNTRY

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I'm going to start off with a funny story. I was approached, I think it was a few months ago, by the editor board saying we'd like you to be part of the symposium, we're talking about Indian law this year, would you participate? I say "sure, tell me a little bit more." They say it's going to be a panel that you'll be a part of, and it'll be about ICWA, so there will be four or five of you. So right away going through my mind, I say of course, three other people that will be sitting beside me, I'll only have to talk for 5-10 minutes. If I'm boring, someone else can pick up the slack, it'll be perfect. Fast forward three, four weeks, I get an email, and they're telling me the other panelists aren't able to make it, so we're hoping that you'd still speak on a topic of your choosing and still present. PTSD just completely kicks in, and I'm thinking back to law school, being cold called and thinking, can I just pretend I didn't see this email? Keep my head down and keep going? All jokes aside, I'm really honored to be here. I'm really honored to be asked and to speak about a topic that is dear to my heart.

As you guys can see, it's called "It's More than Just a Calculation: Reframing Child Support in Indian Country." Just as a brief introduction. Who am I? Where am I from? What do I do? And why is this important? My name is Sharon Thompson. I work out of Circling Eagle Law, we are based out of Fargo, North Dakota. My husband, Lane Thompson, who is also a UND Law School Alumni, started the law firm and I joined him about two years after graduation. Our firm practices, I'd say, 80% in Indian country across about four to five different states throughout the United States. My practice predominantly is in family law, and I serve as a child support attorney for two tribal nations: White Earth Nation and Red Lake Nation. Today, everything that I'm going to be talking about is not reflective of either of those tribes, or any of my clients, but I am using Red Lake Nation as my case study to discuss with you guys this whole idea of reframing child support in Indian country. So, why is this important? And why am I even talking about this? The big thing that I've noticed in the five years that I've done child support in Red Lake Nation, and just in Indian country in general, is that when we think about child support, we really think about calculations.

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\* A recording of Ms. Thompson's presentation can be found online at: <https://law.und.edu/library/cle/2022/ndlr-symposium.html>. This transcript has been edited and refined for readability.

But what's ironic about that, is that in the very title itself, the child is never really considered.

I'm going to take a quick poll. Raise your hand if, when you think of child support, you think of numbers? Okay, pretty much everyone. How many of you guys think about calculations and math? Everyone. How many of you guys think about employment or employment opportunities? How many of you guys think about a parent and child relationship? Okay, so we're getting about 50% now. How many of you guys think about the child and their needs? Probably down to 25%. But yet, despite the very title, child support, the focus of the child isn't quite there. So, I have a goal for this presentation today, and something that I hope that you can take away from my presentation is that you will start shifting the "c" in child support from calculation to child. So, what is child support? When you think about tribal child support you will hear the term tribal IV-D programs, and the reason for the IV-D is that, under the Title Four of the Social Security Act, that's what authorizes Child Support Enforcement Programs to create and fund child support. 45 CFR 309.01 are the regulations that are established so that it provides the Indian countries and the tribal nations a framework as to what the requirements are in order to gain funding, but also in order to ensure that their program is operational. How do they do the funding? How do they allocate the funding? How are they going to be held accountable? What are the basic minimum program requirements? Currently, there are 60 tribes that operate IV-D programs. Here in North Dakota, Standing Rock and Three Affiliated Tribes are the two IV-D programs that we have. And then in Minnesota, Leech Lake, Mille Lacs, Red Lake and White Earth. Once again, as I said, I have the privilege of serving as a child support attorney for Red Lake Nation and White Earth. So, what are the services that we provide in IV-D programs?

Under the Social Security Act the programs are required to provide for establishment of paternity, establishment of child support, modification, enforcement, location, and then intergovernmental. In my experience, I would say that 15% of the caseload that comes in are really focused on paternity, 40% are on establishment, 40% on modification, and 5% is on location. The one interesting thing is that with intergovernmental, what happens is that the state, or various different counties, will actually contact the IV-D programs requesting for our assistance in either the establishment or the modification because either the noncustodial parent or the obligor does not reside in the state and they're actually residing within the boundaries of the reservation, or they're working and employed by a tribal entity. So, within that 40%, I kind of throw in a lot of the intergovernmental cases as well. With all of this being said, the services are quite broad, and a lot of the times we don't really think about the child at any part of this first initial process. So,

when we're talking about getting into the process of child support, it's really simple and it's really basic. We have the application, we have the establishment, and we have the enforcement. So, the application, any parent or custodian can apply and have the ability to apply for child support. The one interesting thing is if the child is receiving state benefits, like MFIP [Minnesota Family Investment Program] or TANF [Temporary Assistance for Needy Families], there's actually a mandatory requirement that the custodial parent actually has to assign their rights to [the child support agency] establish child support and get it enforced. Application is really based upon whatever the tribe has put together and it's really, once again, focused on the tribe itself. So, here's the fun part: the establishment. We know that there's a legal duty for a parent to establish support of a child, but there is no way of enforcing that until there is a child support order that's been put in place. And, whether that's through a tribal court or through an administrative order, that support order is what is vital and the vehicle to ensure that this legal duty that is owed by a parent and owed to a child actually happens. Now an interesting fact that I didn't really know about until coming into this line of work is that under 45 CFR 303.4, there is a 90-day rule. What that means is that after an applicant comes in to ask for assistance in locating, so that 5% of the caseload that I talked about in locating a noncustodial parent or an alleged father, there is a duty that the federal government requires that the tribal IV-D program begin to establish child support within 90 days, regardless of whether or not paternity has been established. So, if we think of why they're doing that, clearly the importance of ensuring that the legal duty to support a child is actually going to be enforced.

Part of the establishment process in this very first step involves a lot of data collection. So for all those practitioners, note to self, be really kind to your case managers because they are going to be the ones that are gathering all this information to help you. One of the big issues, and the most contentious issues, that come up during the establishment process is income. What is considered income and what is not considered income? The federal regulations do not dictate how the tribes calculate child support, and they provide a lot of deference to the tribal nations. They do that out of respect for the tribes' sovereignty and in knowing that the tribes know better than anyone else as to the needs of their own people, their own families. But more importantly, incorporating the culture and the values so that their programs are going to be the most reflective and effective. So, when it comes to income, the federal government does state, and the laws do require, that income consists of all earnings and all income of the noncustodial parent, super broad. Typically what we see is that income comes from salaries and various other resources. When we talk about other resources, that's when the issue

gets a little tricky. Most of the time it includes bonuses, tips, self-employment earnings, overtime, and seasonal. But the big thing that, in Indian country, we notice is the issue of royalties, issues of income that is derived from treaty rights, and income that comes from maybe per capita or from interest. Once again, because of the deference to tribal sovereignty and to tribal nations to govern themselves, the federal regulation does not state, and actually provides, for the tribal nations to dictate for themselves how they want to deal with that. Are they going to include it as income or are they not? I will say that in my experience, in just two different nations in both in the same state, White Earth then Red Lake, we have totally opposite guidelines. In White Earth we actually do not include overtime or second jobs if they exceed the 40-hour workweek. In Red Lake, it's the opposite. What's also super interesting is that, in Red Lake, we actually utilize this deference that the federal regulations provide in that we have made a decision as a nation that we're not going to collect child support on all fisheries, on anyone employed with a fishery, or any income that's derived from fishing rights. As you guys can probably imagine, it becomes a huge issue of contention, especially because in Red Lake Nation our unemployment rates at about 80%. And of the 20% of individuals that are employed, 40% of those work for the fishery, which would mean that 40% of the kids might not be receiving the full benefit of the child support that they should.

Nonetheless, this isn't regulated and this is something that the tribal nations have decided that that's what they were going to do. There are some requirements in which the federal regulation does require under 45 CFR. They do state that, at a very minimum, we do have to consider all income and the tribal nation also has to provide for the consideration of an imputed income. So, what if one individual is unemployed? What would they be making? It also requires a rebuttable presumption, and what that means is that it ensures that the parties are able to have the ability to deviate up or down, depending on what the calculation says that it should be. Once we have all the income figured out, and we fleshed out how much the noncustodial parent is making, the next step is determining what does the child support guidelines say. There are three key models that I would say most child support guidelines are based off of: the income share, the percentage of income, and then the Melson formula. The income share is the most common, it is based on the fact that both parents share in the expenses of the family proportionate to their income, and that the child should continue to receive the same amount of support as the child would have had the parents not separated or been divorced. The percentage of income comes from the model that the support is based on a percentage of the income of the noncustodial parent and the number of children to be supported. There's kind of a flat percentage, that regardless of what you make, that is what the percentage of

child support you're going to be required to pay, and then there's also a varying percentage which is based upon if you are low income, you're going to pay for a lesser amount versus middle and versus higher income, where there is a cap. The Melson formula is a hybrid of both the cost share and the income sharing models, but what's interesting with the Melson formula is that it actually takes into account each parent's basic needs to be met before child support is set.

So, now that we get through the establishment and we go to court and we get an establishment order, the next big thing that child support takes care of is the enforcement. Under Title D, it does require that all the tribal nations and any IV-D programs have within its code, within its law, within regulation, an enforcement mechanism to ensure that the child support obligation is actually going to be adhered to. One of the main requirements is to have tribal employers agree to comply with income withholding orders. That is the most common form of enforcing child support orders and it's the most effective. In 2019, 72% of collections came from income withholding orders, now, unlike state entities, tribal child support departments are actually not required to implement the income withholding orders as soon as they receive them. They have the ability to decide and determine when those orders are going to be implemented, and if so, how. There are various tribes that actually have gone and chose to go through a full process of the tribal court to ensure that these income withholding orders have met the notice requirements and the protection of due process of each of the noncustodial parent before they enforce the orders. Then there's also other tribes that use a very informal process where it comprises of a group of tribal elders that are looking at these orders, and then also speaking with a noncustodial parent to see why they are or not in compliance. Once again, like I said, it's the federal government that has provided so much deference and so much respect to tribal sovereignty and allowing the tribes to dictate for themselves how they are going to go about enforcing their child support orders, and also enforcing child support orders from the state. The other form of enforcement comes from direct payments. Some tribal nations actually have little kiosks in their headquarters or in their main tribal building where individuals can come in and make payments. This happens a lot for nations where they might have a higher unemployment rate. So, in Red Lake, we have a kiosk that individuals can come and make their child support payment as well as the option for them to come directly to the program so that they can make their payments directly to us, and then we forward it on. Aside from ensuring that individuals comply with the support orders, the other end of it is arrears management. Most of the time, unfortunately, not everyone will comply with their child support orders. And as a result, a good chunk of arrears gets built up and part of the enforcement process is managing those arrears. The most common way that

we do that is through suspension, whether it's through driver's license, fishing rights, or other treaty rights. There's also a federal tax refund offset where child support can be collected from the federal income tax refund. Not all the tribes are subscribed to this, and I will commend North Dakota in being a really key partner in helping tribal nations be a part of the federal tax refund offset, because what North Dakota has done is actually started a coalition in which other tribal nations can join in and go through North Dakota to intercept federal tax refunds. Red Lake Nation, right now, is currently in the process of going through that because in order to actually qualify for the federal tax refund offset, there's actually a lot of administrative and technical processes that has to be done to be eligible. So, it's really nice to see that North Dakota is working so closely with tribal nations to help them. And then the last resort is through contempt. Civil contempt, criminal contempt can be found against individuals that are non-compliant with their support orders. Now that you have the run through and an idea of how child support works, where's the problem? Why does this even matter? Why do we need to reframe the idea of child support? I'll tell you a funny story.

When I started at Red Lake Nation five years ago, I had just come out of being in a state private practice doing civil litigation and had no idea about Indian law. I'll be really honest with all of you, I never took an Indian law class. I don't have my Indian Law Certificate. I'm also Canadian, so that also threw a wrench in everything. But I respected what tribal law represents, and I respected tribal sovereignty, so I got asked to be the child support attorney for White Earth and for Red Lake Nation. And I said, of course, why not? I read the regulation. I read the limited case law. I know what law school has taught me. I can do this, won't be an issue. So, I walk into court and my caseload for my first docket was 20 cases, five years ago, we had court every other week. 20 cases, I'm ready to go. I have my stack of files, I sit down, I meet my clerk, I meet my judge who, if you're in Indian practice, you know you get really close with your clerk and your judge. There's not a whole lot of us. So, I'm waiting. 10 o'clock rolls around, the first case gets called. I look around, no one shows up. All right, default judgment. Here we go. My fifth case is up now. Look around. Same thing. No one shows up. Of my 20 cases that day, only one party showed up, one noncustodial party. Then I thought to myself, called my husband as I'm driving home, is something wrong with me? Did I forget to file a notice, did I forget to mail out notices? No one showed up for court. He says, "you're fine. It's okay. It's not a big deal. You'll see them again in two weeks. I'm sure they'll show up then." Alright, okay. So, I'm picking myself back up. Two weeks later, I'm doing this again; I'm walking into court. Now this time, I only have 15 cases. So I'm going, okay, I got to have some more people show up. By the end of my docket this time, zero. Not a single party showed up for court. So, of all 15

cases, default judgments, civil contempt orders. That got me thinking, what's going on? What's the problem? Where did we go wrong? What did I do wrong? How come no one is showing up for court? Now, keep in mind, I came from the state side where I really would say that no one dares to not show up for court. And so, I knew something was wrong with the system and I started to get in contact with our case managers, with our directors, with the community to find out what is the problem, and I realized two big things. One, lack of trust. Our communities did not trust the process. Our communities did not trust that child support was really doing what it's supposed to do, ensuring that the child was going to receive some type of financial support. The other problem came with the enforcement and the arrears. With the caseload in Red Lake, 80% of our cases for enforcement were matters that were in arrears. And in those 80%, the average arrears were \$15,000. So, we had a vicious cycle. We had custodial parents who didn't trust the system, who weren't going to come in and apply, or if they did apply, weren't going to keep us up to date as to how their kids were doing or if they got removed and placed elsewhere, or if the noncustodial parent was actually paying. And then, we also had the noncustodial parent who either could pay but wasn't going to, or couldn't pay and just didn't care anymore. And so that was why no one showed up for court. But what really bothered me the most was that the one party that was hurting throughout this entire process, that kept being forgotten about, was the child. This child wasn't getting the support that they needed, and more importantly, they probably had no idea what was even going on for their non-custodial parent. So that got me brainstorming, and it got me thinking, okay, how can we fix this problem? I remember in law school they said as attorneys we're problem solvers, right? So, what can we do? I started looking towards other tribal nations that have very well established, well-functioning child support programs, also ones that have been very effective, and I realized that the consensus with all of these programs is that they went away from the calculation focus to be more child focused.

So, how do we do that? And when do we do that? And why do we do that? Being child focused starts from the very beginning, and what that means is from that very first establishment of child support, that first support order, we have to ensure that we're keeping in mind the child, but also, the noncustodial parent and ensuring that we're taking into account whether or not they're actually going to be able to meet the support orders. If you have a noncustodial parent that is coming in that has been established a support order that is well beyond what they can afford, you're setting them up to fail from the very beginning. And if they're failing, they're not going to want to get back up and try again. So, I needed to get them to reinvest. I needed to get the noncustodial parents in the community to reinvest back into the child

support program, and by doing so, what we had to do was become more child focused. We had to take into account at the very beginning with the establishment orders to ensure that we were keeping the child in mind, and then also the circumstances of the noncustodial parent. Then, on the back end of it with the enforcement process, we had to do the same thing. The theme within our department, I always say to our case managers and our new ones, is that we need our fathers and mothers to reinvest back into their kid to rebuild that relationship so that they actually care to show up for court. But more importantly, that they care to make sure that their child is being supported. So, how do we do that? How do we accomplish being more child focused in the establishment and the enforcement process?

Three big things changed for Red Lake Nation over the last five years. We started minimum support orders that were not based upon the child support guidelines. We're very fortunate that we had a great team of case managers, director, and also our tribal business council who was behind us in our efforts, where we were able to provide for that deviation so that the minimum support orders was actually what it says. Minimum support based upon the ability and the financial ability of the noncustodial parent. So I say, typically our minimum support orders start at \$25 a month because, unfortunately, at Red Lake, we have a really high unemployment rate. At \$25, that seemed to be that threshold where the noncustodial parent was able to meet and was going to be consistently making that payment. And when it's for such a small amount, they're able to feel like they have a chip in the game and that they're doing something. So, as we fast forward to the enforcement side of it, what we started doing was entering employment and educational assistance and deferrals. So although we still have to enter in civil contempt orders against a noncustodial parents for when they're not complying with their child support orders, rather than throwing on a penalty or putting them into jail, what we've done is say, in order for you to avoid having to pay this penalty, we're going to require that you start applying for jobs, or you go and complete some educational classes, or that you get your GED certificate. And so, as part of that, what we've done is have the noncustodial father provide them with the necessary tools so that, hopefully, we can set them up so that eventually they can move out of the minimum support orders into what is actually their presumptively correct child support obligation. Then, the last thing that we've done, I'll say that I'm most proud of our Red Lake Nation, is the relationship building. What I've noticed in a lot of the cases where there are high arrears, these noncustodial parents have zero relationship with their child. And as a result, they don't really care whether or not they're paying child support because they don't really know who's on the other side receiving that benefit. So, in trying to be more child focused, we were thinking of new ways in which we can build that

relationship between the noncustodial parent and the child, and I will put a caveat to that is, we involve the custodial parent to ensure that there is no safety concerns and that they're in agreement with it. And so as part of that, we built into our child support orders, or any of our civil contempt orders, that the noncustodial parent has to provide at least a greeting card or a holiday card to that child for every major holiday and birthday, and the child support program actually provides a basket of cards that they can choose from. During Christmas time we do a toy drive so that the noncustodial parent can actually have access to all of the resources and there's no more excuses.

With that being said, I am proud to say that, as of last year, out of our docket, and now we went from every two weeks to every single week, we have a 90% attendance. The only parties that do not attend have already contacted our case manager to inform us that they don't attend. But every party, especially the non-custodial party, is attending because they actually believe in the child support system now, and they trust us a little bit more. But more importantly with our arrears management going from 80% of arrears management in our enforcement cases last year, we were able to report that we have had a decrease to 70%, and the average arrears went from \$15,000 to \$9,000. The reason for it, I like to say, is because of the fact that we've made the changes from being calculation focused to child focused. We ensure that parents are actually being set up to succeed at the beginning with our establishment orders, and then encouraged to continue to succeed if they end up running into some difficulties. And most importantly, the child has been the one that's benefited from all of it because now they're actually receiving financial support that they haven't, and they've also been able to slowly develop a relationship with a parent that might not have been there before.

I have one success story that I'm going to end with. I'm going to call this member, this noncustodial parent, Joe. Joe is my first child support case where we actually implemented this child focused guideline or method, or however you want to call it. Joe had a child support order established well before my time, and when his file came across my desk his arrears was at \$37,560. Joe also does not have a job, and the first time that we had him back in court, it was for a modification, because we were required under federal regulation to have a routine annual review of child support, whether it's every four years or two years. So, that was why his file came across my desk. So I looked through it, and I said, well this is great, he's never going to pay; he probably has no means to pay. What are we going to do? We brought Joe to court, he never showed up for the first three hearings, we kept sending him out notices. Finally, he shows up and we ended up asking him what were his needs. What was it, Joe, that you needed in order for you to succeed? And the simple answer was I don't even know who my kid is. Great, okay. So,

this is what we're going to do. We ended up modifying his child support order to \$25 because that's all he could afford at that time. In addition to that, what we ended up helping was facilitating with the custodial parents the ability for Joe to write letters to his son and to begin establishing that relationship. And as Joe continued to work towards paying his minimum, what we've also done is credit back his arrears, and so every month that he made a \$25 payment, we were going to match that and write that off of his arrears because luckily, these are tribal funds that the tribal nations have the ability to actually regulate and control. And three years later, Joe doesn't have \$35,000 in arrears, he's down to \$10,000. He also has now established visitation with his child so that he's going to actually see and is invested and, what's most exciting for me as an attorney, is that Joe actually now has full time employment because of all of the job efforts that he has made during the child support process where he was required to apply for three jobs every single month and attend interviews. So, for me, I see that as a success, and I see how shifting from a calculation focus to a child focused model will really benefit Indian country, but most importantly, the Indian children of our nations. Thank you very much for your time.