

The Indian Child Welfare Act: An Overview

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What is ICWA?

- Federal Law passed by Congress in 1978
- 25 U.S.C. §1901 et seq.
- Historical context – federal Indian policy
 - Boarding School Era – 1880s-1950s
 - Indian Adoption Era – 1950's -1970s

**From Florence---Indians Steal
Away Two Civilized Apa-
cho Girls**

The following appeared in Monday's extra
Mirror:

A letter from Mr. Joe Collingwood, dated
June 14, informs us that two Apache girls,
which Mr. D. C. Thompson raised, were sta-
ding and it was feared that they had been
carried off by some Apaches from the Sa-
carlo reservation, who had come to Florence
to compare with some white soldiers. Mr.
and Mrs. Thompson were inseparable for the
time of their adopted children. Mr. Thomp-
son had gone in pursuit of the thieves.

Florence is on the Gila river, in this Ter-
ritory. The Apache girls claimed to have been
taken by some soldiers when quite young, and
given to Mr. and Mrs. D. C. Thompson, who
saw them given to gift, as they would
have done were they their own natural chil-
dren. They were, of course, devoted to their
benefactors, and to be thus torn from them
and civilized life, and subjected to savage
life, will go hard with them. The girls can
be found, and should be taken from the Indi-
ans and given to their adopted parents.

Historical Context

- Four years of Congressional testimony prior to enactment of ICWA.
- Pattern and practice revealed that state and county agencies had engaged in automatic, systematic removal of Indian children from Indian families and placement of Indian children in non-Indian homes. Nationwide, removal rate was 25-35% and placement in non-Indian homes was 90%

Testimony

■ Chief of Mississippi Band of Choctaw Indians

- "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34 (1989).

Congressional Findings

- "[T]hat there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children, who are members or eligible for membership of an Indian tribe." 25 U.S.C. §1901(3).

Congressional Findings

- "[T]hat an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. §1901(4).

Congressional Findings

- "[T]hat the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. §1901(5).

Congressional Declaration of Policy

- "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." 25 U.S.C. §1902.

Applicable Federal Laws and Regulations

- 25 U.S.C. et seq. ("ICWA")
- BIA Guidelines (issued November 26, 1979).
- BIA Guidelines (issued February 25, 2015).
- Proposed Federal Rule (March 20, 2015). The rule mirrors the 2015 BIA Guidelines and would make them part of the Code of Federal Regulations, 25 C.F.R. Part 23.

Does ICWA apply?

- ICWA applies to Indian children. An "Indian child" under ICWA means is any unmarried person under 18 who is a member of an Indian tribe or eligible for membership in any Indian tribe and the child of a biological member. 25 U.S.C §1903(3).
 - How do you determine if child is enrolled or eligible? Tribal determination of enrollment is conclusive. 2015 BIA Guidelines, B.3
 - What if child is eligible for more than one Tribe? 2015 BIA Guidelines, B.4
 - What if parent is not enrolled?

Does ICWA apply?

- ICWA applies to State Indian child custody proceedings. An "Indian child custody proceeding" includes a foster care placement, a termination of parental rights proceeding, pre-adoptive placement and adoptive placement. Each is defined under ICWA 25 U.S.C. §1903(1). See also 2015 BIA Guidelines, A.2
 - Does ICWA apply to Tribal Court cases?
 - What about an in-home dependency? Does ICWA apply?
 - *In re Interest of Shayla*, 846 N.W.2d 668 (Ct. App. Neb. 2014); *In the Matter of Cooke Children*, 744 P.2d 596 (Or. Ct. App. 1987); *D.J. v. P.C.*, 36 P.3d 663 (Alaska 2001)

Indian Parents

- "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include unwed father where paternity has not been acknowledged or established. 25 USC §1903(9).
- Appointment of counsel 25 USC 1912 (b)

Tribal Intervention

- "In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." 25 U.S.C. §1911(c).
- The United States Supreme Court has recognized that an Indian tribe's rights under ICWA are separate and distinct from those of the parents. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1988).
- Court must provide notice to Tribe of all involuntary state court proceedings and no foster care placement or PR termination hearing shall be held until at least 10 days after notice. Parent and Tribe can ask for up to 20 additional days to prepare and right to intervene. 25 U.S.C. §1912(a)

Jurisdiction under ICWA

- Indian tribes have exclusive jurisdiction over any child custody proceeding where the child is domiciled within the reservation of the tribe. 25 U.S.C. §1911 (a). If child is domiciled on Reservation, the Tribe can move to transfer right away and Court must transfer.
- Minors generally take domicile of parents. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Pima County Juv. Action, 5903, 130 Ariz. 202 (Ariz. App. Div. 2 1981). See also 2015 BIA Guidelines, §(A)(2).
- How would a child domiciled on the Reservation become the subject of a state child custody proceeding?

Jurisdiction under ICWA

- Tribes and States have concurrent jurisdiction over child custody proceedings in state court. 25 U.S.C. §1911(b). Tribes may transfer such cases to tribal court and state courts shall transfer unless:

Good cause not to transfer:
 ■ A parent vetos the transfer. *Maricopa County Juvenile Action JD-6982*, 186 Ariz. 354, 922 P.2d 319 (App., 1996).
 ■ Tribal court can also decline

- When should you transfer? What factors to consider?

- Tribal policy
- Timing (early in case, if family reunification fails)
- How does placement affect request?
- Procedure for transfer

What is Good Cause not to Transfer?

■ OLD BIA Guidelines (November 26, 1979):

- Proceeding is at an advanced stage and the petition to transfer was not filed promptly
- The Indian child is over 12 years old and objects
- Evidence necessary to decide case could not be adequately presented in the tribal court without undue hardship.
- Parents of child over 5 years of age are not available and the child has had little or no contact with the child's tribe or members of tribe
- The burden of establishing good cause is on party opposing the transfer of jurisdiction

Good Cause not to Transfer Cases

- *Maricopa County Juv. Action JS-8287*, 171 Ariz. 104 (Ariz. Ct. App. 1991)(denied motion to transfer when tribe waited over 2 years to get involved).
- *Michael v. Michael*, 198 Ariz. 154 (Ariz. Ct. App. 2000)(granted motion to transfer when filed within 6 months of dependency and GAL failed to meet burden establishing GC).
- *Pima County Juv. Action S-903*, 130 Ariz. 202 (Ariz. App. Div. 2 1981)(illegitimate child of un-emancipated Indian minor took domicile of mother for purpose of statute giving Indian tribe exclusive jurisdiction over any child custody proceeding).

What is Good Cause not to Transfer?

■ NEW BIA Guidelines (February 25, 2015)

- In determining good cause, a Court MAY NOT consider whether the case is at an advanced stage or whether the transfer would result in a change of placement for the child because the ICWA created concurrent, but presumptive, tribal jurisdiction. Thus, whenever a transfer is sought, it is presumptively in the best interests of the child to transfer the case.
- In addition to determining good cause the Court may not consider:
 - The Indian child's contacts with the Tribe or Reservation
 - The Socioeconomic conditions or any perceived inadequacy of tribal or BIA social services or judicial systems
 - The Tribal Court's prospective placement of the Indian child.
- The burden of establishing good cause is on the party opposing transfer

ICWA's Heightened Standards

- 25 U.S.C. §1912(d). Any party seeking a foster care placement of or termination of parental rights shall show that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.

- What are active efforts? Does it mean more than reasonable efforts under state law? See *Iona T. v. ADES*, 2009 WL 3051509.
- 2015 BIA Guidelines, § A.2: "Active efforts are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts required by Title IV-E of the Social Security Act." (emphasis added) Examples: keeping siblings together, diligent search for extended family. AE requirement begins right away. See also D.2 (active efforts must be documented).

ICWA's Heightened Standards

- 25 U.S.C. §1912(e). No foster care placement, or termination of parental rights, may be ordered in absence of a determination supported by clear and convincing evidence, including testimony of Qualified Expert Witness (QEW) that continued custody of child or Indian custodian will result in serious emotional or physical damage to the child.
- 25 U.S.C. §1912(f). No termination of parental rights may be ordered in absence of a determination supported by evidence beyond a reasonable doubt, including testimony of QEW that continued custody of child or Indian custodian will result in serious emotional or physical damage to the child. *Valerie M. v. ADES*, 219 Ariz. 331 (Ariz. 2009)(state law findings do not require proof beyond reasonable doubt).

Qualified Expert Witnesses

■ Under 1979 BIA Guidelines (D.4) a Qualified Expert Witness is:

- A member of child's Tribe who is recognized by tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices.
- Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Tribe.
- A professional person having substantial education and experience in the area of his or her specialties.

Qualified Expert Witness Cases

- Rachelle S. v. ADES, 191 Ariz. 158 (1998)(Testimony of attending doctor that child was at serious risk of harm if returned to family was sufficient QEW, QEW knowledge of culture only needed when cultural mores involved).
- Brenda O. v. ADES, 226 Ariz. 137 (2010)(Psychologist testimony about mother's drinking problem and inability to care for children was sufficient QEW to support termination of PR).

Qualified Expert Witnesses

■ Under the 2015 BIA Guidelines (D.4.) a QEW should have specific knowledge of the Indian tribe's culture and customs. Persons with the following characteristics, in descending order, are presumed to meet the requirements for a QEW:

- A member of child's Tribe who is recognized by tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices.
- A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.
- A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of the prevailing social and cultural standards and child rearing practices within the Indian child's tribe.
- A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

ICWA Placement Preferences

- Any foster care placement shall be in the least restrictive setting which most approximates a family and in which special needs (if any) may be met. Child shall be in reasonable proximity to his/her home. 25 U.S.C. § 1915
- In any foster care placement under 25 U.S.C. § 1915(b), preference shall be given to:
 - A member of child's extended family
 - A foster home licensed by the Tribe
 - A licensed Indian foster home
 - An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable for child's needs
 - Preferences can be changed by tribal resolution

ICWA Placement Preferences

- In any adoptive placement under 25 U.S.C. §1915(c) preference shall be given to:
 - A member of the child's extended family
 - Other members of the Indian child's tribe
 - Other Indian families
- Placement preferences must be followed unless there is "good cause." What is good cause?

What is Good Cause?

- Under 1979 BIA Guidelines (F.3), good cause may be based on:
 - The request of biological parents or the child if of sufficient age
 - The extraordinary physical or emotional needs of the child as established by a qualified expert witness
 - The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

What is Good Cause?

- Good cause is a very factually specific determination. Depends on circumstances of the case.
- *Navajo Nation v. ADES*. Good cause to allow child adopted by non-Indian, non-relative because child was with foster parents for a period of time; child was bonded; adoption certification; African-American culture; and lack of diligence by Navajo Nation. COA upheld.
- *Yvonne L v. ADES*, 2011 WL 241987 (2011). Good cause found when children were with foster family for long period of time; only relative available would not adopt and was not supported by tribe. COA upheld.
- *Maricopa County Juv. Act*. A-25525, 136 Ariz. 528 (Ariz. Ct. App. 1983); *Coconino County Juv. J-10175*, 153 Ariz. 346 (Ariz. Ct. App. 1987).
- Un-reported cases: *Priscilla G. v. ADES* 2010 WL 702464; *Robert T. v. ADES*, 2010 WL 5422605; *Jeff O. v. ADES*, 2011 WL 3820513; *Christina H. v. ADES*, 2012 WL 70650.

What is Good Cause?

- Under 2015 BIA Guidelines, if any party asserts that good cause exists, that party must state it in writing or on the record and be made available to all parties. 2015 BIA Guidelines, F.4(a).
- The party seeking the departure from the placement preferences has the burden of proving by clear and convincing evidence that "good cause" exists for departure. 2015 BIA Guidelines, F.4(b).
- The court may only consider whether the placement in accordance with the preferences meets the physical, mental and emotional needs of the child and may not depart from preferences based on socio-economic status. 2015 BIA Guidelines, F.4(d).

What is Good Cause?

- Under the 2015 BIA Guidelines (F.4(c)(1)&(2)), good cause to deviate from the ICWA placement preferences must be based on one or more of the following considerations:
 - The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference.
 - The request of the child if the child is able to understand and comprehend the decision that is being made.

What is Good Cause? (continued)

- Under the 2015 BIA Guidelines (F.4.(c)(3)), good cause to deviate from the ICWA placement preferences must be based on one or more of the following considerations:
 - The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act. The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interest of an Indian child in light of the purposes of the Act.

What is Good Cause? (continued)

- Under the 2015 BIA Guidelines (F.4.(c)(4)), good cause to deviate from the ICWA placement preferences must be based on one or more of the following considerations:
 - The unavailability of a placement after a showing by the applicable agency in accordance with section F.1., and a determination by the court that active efforts have been made to find placements meeting the preference criteria, but none have been located. For purposes of this analysis, a placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

Ethical Considerations

- Who is your "client"? Contacts with tribe, relative, mom, dad
- Out-of-state cases and unauthorized practice of law
- Contact with agency social workers who are represented by Attorney General or legal counsel

Out of State Considerations

- Appearing by phone

- Pro hac vice versus ICWA representative.

In re Interest of Elias, 277 Neb. 1023 (Neb. 2009)(state statute governing unauthorized practice of law which required an Indian tribe be represented by a Nebraska licensed attorney was preempted in context of state court child custody proceedings under the federal and state Indian Child Welfare Act); *In re NNE*, 752 N.W.2d 1 (Iowa 2008)(Indian tribe may represent itself in ICWA proceedings).

- Don't forget about changed time zones!

Questions?

Case Scenario #1

- "Child" is a member of an Arizona Indian Tribe. Child was removed from mother's custody by CPS in May of 2010 due to mother's substance abuse issues and lack of a permanent residence. Child was 4 months old when she was removed. The Tribe intervened in the case shortly after removal. At the time of removal, CPS did not have any Indian foster homes available to place child. The Tribe's Reservation is located approximately 4 hours from the city where mother lives and had an available relative for placement. However, CPS and the Tribe agreed that placement of the child on the Tribe's Reservation with the relative could impede reunification with mother. Thus, CPS and the Tribe agreed that there was "good cause" to deviate from the ICWA placement preferences for purposes of reunification and placed the child with a non-Indian/non-relative foster home. At the time, the Tribe stipulated that it only agreed to the deviation for the purpose of reunification and would object to any permanent placement outside the ICWA placement preferences. By the end of 2010, despite efforts by CPS and the Tribe, the mother had not successfully reunified with the Child. At the same time, the child's foster parents had developed a close relationship with Child and expressed an interest to adopt. The child was approaching his 1st birthday and had lived with the foster parents for 8 months of his life. The Tribe objected to the adoption and requested a change of custody to the relative who lived on the Tribe's Reservation. The foster parents requested a bonding assessment.

Case Scenario #2

- A minor mother (age 16) gives birth to twins (the "Children") in Iowa in June of 2009. The Mother and the children are enrolled members of an Arizona Indian Tribe. The minor mother's guardian lives on an Indian reservation in Arizona and has custody of the minor. The minor mother was temporarily living in Iowa with an aunt. The aunt had contacted an Iowa adoption agency shortly after finding out the minor was pregnant. The Iowa adoption agency agreed to pay for the minor's living expenses and costs associated with her birth. The adoption agency also paid for an attorney for the minor. About 4 months before giving birth, the minor moved to Iowa to live with her aunt. The minor agreed to give up her babies for adoption and have the adoption agency handle the adoption. After having the babies, the minor turned the Children over to the adoption agency and they were placed with an adoptive couple that was non-Indian and not a relation to the mother or the Tribe. The adoption agency and attorney for the adoptive parents initiated adoption proceedings in the juvenile court of Iowa. As part of these proceedings, the adoption attorney notified the Arizona Indian Tribe of the pending adoption action. Once notified, the Tribe attempted to intervene in the case. The Court refused to rule on the motion to intervene unless the Tribe appeared in person and counsel associated pro hac vice. The Tribe also filed a Motion to Transfer Jurisdiction.
