

## CURRENT ATTACKS ON THE ICWA FOLLOWING BIA GUIDELINE AND PROPOSED REGULATIONS

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## ICWA AS THE GOLD STANDARD OF CHILD WELFARE

- Active efforts to avoid removal and for reunification
- Clear and convincing evidence of imminent harm
- Qualified Expert Witness for cultural evidence
- Preference of Placements (family and tribal members)
- Beyond a Reasonable Doubt Standard for TPR
- Notice and inclusion of Tribe for cases, and transfer preference to the tribal courts

## ICWA IS BEST PRACTICE

- The best practices in child welfare of allowing families to remain together and encouraging reunification are embodied in ICWA.
  - Best practices are to provide support and service to parents and families *before* there is any separation of a child from either parent, that removal is appropriate only when necessary to protect a child from serious harm, that the goal of any unavoidable temporary separation is reunification, that separation at birth should not be treated differently, and that clear and objective rules are paramount.
  - ICWA accomplishes all of those goals through its "active efforts" provision, by uniformly presuming that it is in the child's best interest to preserve ties to her parents, and by limiting the circumstances in which that presumption may be overcome—guarding in particular against case-specific dynamics or biases.
- If removal is unavoidable, the best practices in child welfare of encouraging kinship and community placement are embodied in ICWA.
  - The first choice for alternative placement is the child's extended family.
- That notion of family includes a child's extended (*i.e.*, tribal) community

## "BEST INTEREST"

- The hook
- A subjective test – better isn't best.
- Timely permanency is a tenet of child welfare law
- Timely permanency is often a primary consideration for "best interest"

## BEST INTEREST

- In child welfare law, the best interest analysis is a frequent test, but always complicated and subjective guess work and predictions, and when there are so few no Native Americans as judges, lawyers and social workers, the cultural piece is easily under-assessed.
- The guidelines re-affirm that the ICWA placement preferences are in the best interest of "Indian" children.
- Do most of the parties in the state courtrooms have any understanding of the cultural impacts?

## NO "EXISTING INDIAN FAMILY" FINDINGS

- Perhaps the most offensive, paternalistic, privileged judicially-created findings
- State judges and lawyers arguing over what constitutes "Indian" enough?
- A child is not subject to ICWA if they have never been to their reservation? Example: tribal reservation could be hundreds of miles away
- Non-Custodial parents are not enough to attach tribal connections?

## ORCHESTRATED LAWSUITS

- In multiple states
- Recent rulings in VA and AZ
- VA – not a final action from the agency no summary j
- AZ – class certification was denied
- Most up to date orders and other documents by Kate Ford – Turtle Talk

## GOLDWATER INSTITUTE

- Goldwater sought out specific cases by contacting foster care and adoption groups in Arizona, highlighting the unfair treatment of Native American children and no reflection of best interest.
- The media attack includes allegations that broadly accuse tribes as not wanting to keep Indian children safe or happy, but merely as pawns of tribal sovereignty and power
- Goldwater suit involves two tribes, and two children, with separate facts.
- The media attack focuses on a handful of tragic cases that happened in tribal jurisdictions outside of Arizona.
- Their “research” is based on anecdotal evidence, and throngs of evidence of child abuse and neglect, including child fatalities for all ethnic groups of children are not included.

## THE CLAIMS

- Class Action
- Equal Protection
- Due Process (best interest eval) 5<sup>th</sup> amendment
- First Amendment
- "A child with Indian ancestry is not an item of commerce, nor an instrumentality of commerce, nor tangible personal property the possession of which by federally-recognized Indian tribes promotes "Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Nor is a federal law dealing with child custody proceedings "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.*; *Rice v. Cayetano*, 528 U.S. 495 (2000)." Exceed fed govt power via 10<sup>th</sup> amendment

## GOLDWATER

- Many children who are subject to ICWA have few, if any, ties to the tribe upon which ICWA confers jurisdiction over them. Some but not all are members of the tribes but do not thereby consent to surrender their constitutional rights. Some are enrolled in the tribes as a result of the mandates of ICWA and the New Guidelines. Others are not members and have virtually no connection to the tribes other than a prescribed blood quantum. See New Guidelines, 80 Fed. Reg. at 10153, B.4(d)(3) 117. By operation of ICWA, ***Plaintiff children like baby girl A.D. and baby boy C. are forced to associate with tribes and tribal communities and be subject to tribal jurisdiction often against their will and/or contrary to their best interests.*** See *id.* at 10150, A.2 (active efforts required to reunify an Indian child not only with the child's family but also with the child's tribe).



WASHINGTON POST OP-ED

GEORGE WILL, SEPT 2, 2015

**"THE BLOOD-STAINED INDIAN CHILD WELFARE ACT"**

- In final adoption hearings in Arizona, a judge asks, "Does this child contain any Native American blood?" It is revolting that judicial proceedings in the United States can turn on questions about group rights deriving from "blood."
- The 1978 act's advocates say it is not about race but about the rights of sovereign tribes, as though that distinction is meaningful. The act empowers tribes to abort adoption proceedings, or even take children from foster homes, solely because the children have even a minuscule quantum of American Indian blood. Although, remember, this act is supposedly not about race.
- By treating children, however attenuated or imaginary their Indian ancestry, as little trophies for tribal power, the ICWA discourages adoptions by parents who see only children, not pawns of identity politics. The Goldwater Institute hopes to establish the right of Indian children to be treated as all other children are, rather than as subordinate to tribal rights.
- "[Is it one drop of blood that triggers all these extraordinary rights?](#)" asked Chief Justice John Roberts during oral arguments in [a case involving the ICWA](#). Indeed.

## CHILD WELFARE IN TRIBAL COURTS MYTHS

- Campaign that tribes would rather let their children die or remain in dangerous care than to ever let a "white" family have the child
- Myths that tribes don't achieve or advocate for permanency
- Myths that tribes treat children as pawns in an economic fight, or petty power claims

## INDIAN CHILDREN FACTS

- In Arizona, Indian children are 7.9 percent in out of home care (disproportionality) (5.6 percent of population) 1342 children
- <http://www.azcourts.gov/casa/Child-Welfare/Child-Welfare-Stats>
- Arizona has one of the highest rates of Out of home care in the nation, with a steady rise in recent years (currently over 18000)

## ARIZONA CHILD WELFARE

- No secret some serious challenges
- Another class action is pending Tinsley v. Flanagan that alleges chronic failures of the state of arizona to achieve permanency for children, as well as a long list of other deficiencies. ICWA is not involved.
- <http://aclpi.org/sites/aclpi.org/files/Tinsley%20v%20Flanagan%20complaint.pdf>

## MYTH: THE ICWA IS RACE-BASED AND UNCONSTITUTIONAL

- Indigenous “blood” is not the ICWA test, racial or genetic traits are not the test, and the way someone looks is not the test.
- While it is true, many tribes have blood quantum requirements for membership, the tribal membership question is different for every tribe as an exercise of sovereignty.
- Likewise, the ICWA is designed to support tribal sovereignty and sustainability by giving tribes opportunity to address child welfare issues over their children/members. Authority for law is based on based on **status of tribal membership**, not racial classifications.

## CHILD DEATH FACTS

- Over 1500 children die a year in the US from child maltreatment, (abuse, neglect, combination of both)
- Difficult to measure
- Between 1/3 to 1/2 of those were known to social service agencies
- [http://www.unh.edu/ccrc/factsheet/pdf/childfat\\_FS6.pdf](http://www.unh.edu/ccrc/factsheet/pdf/childfat_FS6.pdf)



## CHILD DEATH CONTINUED

- An estimated 1,640 children died in 2012 as a result of abuse or neglect, mostly at the hands of parents. "Some children who died from abuse and neglect were already known to CPS agencies," the report states. "In 30 reporting states, 8.5 percent of child fatalities involved families who had received family preservation services in the past 5 years. In 35 reporting states, 2.2 percent of child fatalities involved children who had been in foster care and were reunited with their families in the past 5 years."
- U.S. Dept of Health Services Report, 2012

## WHO IS ADVOCATING FOR THE ICWA ON THE GROUND?

- Native Americans in the judiciary are beyond underrepresented, but are in fact a true rarity.
- Native American attorneys are underrepresented in all state jurisdictions, and even more so in children's law, for children, parents, GALs, and sometimes even tribal representatives.
- Nationwide there are only approx. 2600 Native American attorneys. (1.6 percent of population, but only .5 percent of attorneys) – National Native American Bar Association Study
- Many tribes cannot afford to send any representative to proceedings, and when they can, it's often a non-lawyer.

## MEMBERSHIP WITHIN TRIBES IS TRIBALLY-DETERMINED

- For purposes of the ICWA, the guidelines and the proposed regulations clarify that only the tribe can determine the child's eligibility.
- One challenge state courts and state agencies note is tribal delays and non-responsiveness.
- Some tribes have members who have unclear status do to roll audits, etc.

## LEGAL RESPONSES IN GOLDWATER

- US DOJ
- Arizona
- Gila River Indian Community
- Native American Rights Fund
- National Congress of American Indians
- National Indian Child Welfare Association

## OTHER ICWA ADVOCATES

- AAIA
- ACLU
- Major Child Welfare Organizations (including Casey Family Programs)
- ABA

## WHAT SHOULD EVERY INDIAN LAW ATTORNEY DO?

- Educate tribal leaders, directors, and all attorneys on the ICWA history and policy and need
- Be prepared to attack and defend myths
- Support organized response with NARF, NICWA, NCAI
- Strive for competency in child development as it relates to better outcomes for children, as it relates to the tribal judicial system.
- Advocate for tribal response to ICW and involvement if possible, timely as possible (IGAs, active efforts to avoid removal, and placement, avoid temporary placement in non-compliant homes)
- Educate tribes on needs to develop and offer QEW

## OTHER RECOMMENDATIONS

- Advocate for children's law attorneys to be competent, experienced in children's law, Indian law, and ICWA, and compensated competitively
- Keep updated (Turtle Talk is following)
- Advocate for community education on child welfare