

SPECIAL FOCUS: INDIAN CHILD WELFARE

About this Issue

by Shanna Knight

Never in the history of the Indian Child Welfare Act¹ (ICWA) has there been much guidance on ICWA's implementation as today. In the last two years, the federal government has released two sets of guidelines (in 2015 and 2016) and the first comprehensive set of binding federal regulations since ICWA's enactment. Those regulations became effective last month. Recognizing these important developments in the child welfare field, this *CLP* issue focuses on ICWA, including the new regulations. It offers multiple perspectives on how judges, attorneys, and child welfare agencies throughout the country can better understand and use ICWA effectively to improve the lives of American Indian and Alaska Native children and their families.

ICWA: History and Importance

Congress enacted ICWA in 1978 in response to evidence that Indian families commonly faced unwarranted removal of their children—so much so that during that time at least 25% of all Indian children were being placed out of home, with 85% of those children being placed in non-Indian homes or institutions.² Indeed, even beyond the statistics that led Congress to pass ICWA in 1978, the federal government's history of targeting American Indian children for

assimilation and separating them from their families and culture stretches back over 100 years before ICWA's enactment.

Historically, the federal government passed laws and carried out campaigns seeking to eradicate tribal culture, including natural helping systems that tribes had used successfully for hundreds of years to protect their children. These efforts included forcibly removing children from their families, placing them in military-style boarding schools hundreds of miles from their families, and attempting to assimilate them into the dominant culture by using harsh discipline and emotional abuse.

In addition, the federal government worked with private and religious organizations to carry out the Indian Adoption Project in the 1950s and 1960s, through which hundreds of American Indian and Alaska Native children were adopted by non-Indian families with little or no consideration for their tribal connections or extended family ties.

When Congress passed ICWA in 1978, it sought to recognize tribes' rights as sovereign governments to protect their citizens, including their children. ICWA also ensures states consider tribal values; empowers tribes to serve their children and families; counterbalances bias in people

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provides lawyers, judges and other professionals current information to enhance their knowledge and skills, and improve the decisions they make on behalf of children and families. Topics include: abuse and neglect, adoption, foster care, termination of parental rights, juvenile justice, and tort actions involving children and families.

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and state systems; expands resources available to Indian families; and protects the best interests and unique rights of American Indian and Alaska Native children as tribal members.

Although ICWA became law almost 40 years ago, the effects of child removal policies and practices still reverberate within American Indian and Alaska Native communities. For example, American Indian and Alaska Native children are *still* disproportionately represented in state foster care systems, sometimes at rates as high as 12 times their population rate in some states.³

As a result, ICWA's heightened procedural and substantive due process provisions remain critical. These provisions ensure:

- agencies work to keep a family together and reunify a family if the child is removed,
- the state meets higher evidentiary standards before a child can be removed from home, and
- the state identifies placements with extended family or community members that serve the best interests of Indian children.

As expressed in a recent *amicus* brief to the U.S. Supreme Court, many national child welfare organizations recognize ICWA's protections are "the gold standard" for child welfare practice for *all* children.⁴

This Issue

This month's *CLP* issue contains diverse articles covering the spectrum of effective ICWA practice:

- an overview of the new 2016 ICWA regulations;
- guidance on how the ICWA regulations affect practice;
- advice for state courts on working with tribes collaboratively to benefit clients;
- an analysis of current, pending case law and concerning ICWA and the new regulations;

- reflections from a tribal judge on the state and tribal courts' roles in strengthening Indian families; and
- strategies for evaluating case outcomes and ICWA compliance in Indian child welfare cases.

Before the recent guidance and regulations, states were left with their own widely varying interpretations of ICWA's application—interpretations often not informed by Indian or tribal law. Now that this federal guidance exists, it is up to legal professionals, including attorneys, judges, and others, to understand and implement ICWA in a way that protects families' rights and ends the disproportionate removal of Indian and Alaska Native children from their homes. This issue will help you grasp the technicalities of ICWA so you can best serve and advocate for your clients' needs and help families stay together.

Shanna Knight, JD, ICWA specialist, National Indian Child Welfare Association.

Endnotes

¹ U.S.C. § 1901 et. seq.

² "Indian Child Welfare Program," Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong, 2d Sess, at 1, 3; *see also* American Indian Policy Review Commission Task Force Four. *Report on Federal, State, and Tribal Jurisdiction*, July 1976, 79.

³ Summers, A., S. Woods and J. Donovan. *Technical Assistance Bulletin: Disproportionality Rates for Children of Color in Foster Care*. National Council of Juvenile and Family Court Judges, 2013.

⁴ *See* brief of 18 national child welfare organizations as *amici curiae* in support of respondent birth father in *Adoptive Couple v. Baby Girl*, No. 12-399 ("Amici are united in their view that, in the Indian Child Welfare Act, Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children ...").

Court Affirms Termination of Parental Rights Despite Claims of Due Process Violations and Insufficient Evidence

In re M.G., 2016 WL 4987280 (W. Va.).

The Supreme Court of Appeals of West Virginia decided, without oral arguments, to affirm a decision terminating parental rights. The mother appealed four issues: 1) the allowed improvement period was inappropriate; 2) insufficient evidence; 3) the lower court failed to impose a less-restrictive dispositional alternative; and 4) her due process rights were violated because she was forced to defend herself against allegations beyond those in the original petition. The appeals court disagreed with the mother's claims and confirmed the termination of parental rights.

Mother, T.G., had three children ages 12, eight and six. In April 2014, an abuse and neglect petition was filed against T.G., alleging severe truancy due to neglect. The petition also included allegations that T.G. exaggerated and/or falsified the children's medical conditions to their detriment. At the time, the children had been treated by at least 21 different doctors, and medical reports revealed T.G. had reported unfounded medical conditions.

Initially, the children were placed in child welfare agency custody but were not removed from the home. However, the children continued to be truant and concerns about unnecessary medical treatment of the children increased. They were ultimately removed from the home in June 2014 and placed in foster care. Medical testing determined that while two of the children did suffer from myotonic dystrophy, as the mother claimed, they did not exhibit any symptoms. It was also determined that most of the medications the third child was receiving were unnecessary and were reduced or discontinued.

In August 2014 it was suggested at an adjudication hearing that T.G.

may suffer from Munchausen Syndrome by Proxy, which T.G. denied. T.G. was granted an improvement period and a case plan was created. The case plan had a goal of reunification and included services to correct the children's truancy and medical conditions and required a psychiatric evaluation. Five status hearings were held; T.G. and her counsel only appeared at two. During those status hearings it was reported that T.G.'s participation in services was declining, service providers were discontinuing services due to lack of progress, and she missed several visits.

Additionally, the children had required no treatment or medication since their removal from T.G. In January 2015, the children's counsel filed for termination of parental rights. Despite that motion, T.G. worked with a new provider from May - June 2015, attending about 50% of her appointments and continuing to believe her children suffered from various medical issues.

In September 2015, the oldest child, then 14 years old, wrote a letter to the court saying she did not want to return to T.G., did not believe her mother had changed, and worried about receiving proper care if returned to her custody. The court held a dispositional hearing and determined there was no reasonable likelihood T.G. could substantially correct the conditions of abuse and neglect in the near future. The court terminated T.G.'s parental rights in April 2016.

T.G. appealed the lower court's decision to terminate her parental rights. To overturn the lower court's ruling the appeals court must find the lower court's findings were clearly erroneous. Regarding the first issue, the appeals court found the improvement period was appropriate because the case plan clearly identified the problems and what T.G. needed to change.

Additionally, the case plan, met all requirements and T.G. had not objected to it at any of the prior proceedings.

The second claim regarding insufficient evidence was also supported. The standard of proof required to terminate parental rights is clear, cogent, and convincing proof. The lower court considered "voluminous additional evidence the overwhelmingly supported termination of [T.G.'s] parental rights." The lower court heard evidence from service providers about her failure to remedy issues in the case plan, evidence of missed visits, and evidence that T.G. exhibited characteristics associated with Munchausen syndrome resulting in abuse, but T.G. refused aid. The appeals court held this evidence, along with the oldest child's letter, supported terminating T.G.'s parental rights.

The appeals court found no merit in T.G.'s third claim that the lower court failed to impose a less-restrictive dispositional alternative. The appeals court found there was no reasonable likelihood T.G. would substantially correct the conditions of abuse and neglect based on the lower court's findings and the overwhelming evidence supporting termination. Termination was therefore necessary for the welfare of the children.

The fourth issue was that T.G.'s rights were violated because she was required to defend against allegations beyond those involving abuse and neglect in the original petition. Specifically, T.G. argued she had to defend against an allegation not found in the petition that she failed to provide stability to her children because of her changing relationship status. However, the appeals court found the child welfare agency had concerns that this issue affected ability to receive services designed to remedy the underlying allegations. The appeals court found no violation of her due process rights.

STATE CASES**California**

In re N.C., 2016 WL 6472095 (Cal. Ct. App.). JUVENILE JUSTICE, TRAFFICKING

Juvenile charged with prostitution in delinquency proceeding filed motion to exclude evidence under Californians Against Sexual Exploitation Act (CASE Act), claiming she was victim of human trafficking. Act states evidence victim engaged in “commercial sexual act” as result of human trafficking is inadmissible to prove criminal liability for that act. It applies in juvenile proceedings and to uncompensated sexual conduct. Trial court erred in denying juvenile’s motion to exclude evidence.

In re S.N., 206 Cal. Rptr. 3d 420 (2016). DEPENDENCY, DUE PROCESS

Juvenile court’s due process violation in failing to get personal waiver of contested jurisdictional hearing from mother was harmless because evidence supporting finding of jurisdiction was overwhelming. Evidence included two witnesses who saw mother’s reckless driving and odd behavior, child’s statement to social worker that mother admitted being drunk before collision, and mother’s positive test for marijuana and alcohol.

In re W.C., 2016 WL 6024408 (Cal. Ct. App.). DEPENDENCY, JURISDICTION
Child welfare agency filed dependency petition for 17-year-old youth without guardian. Juvenile court sustained jurisdictional allegation, but dismissed petition before dispositional hearing when youth turned 18. Court denied youth’s request to return to juvenile court jurisdiction and foster care. Failure to appeal dismissal of dependency petition barred nonminor from arguing he became dependent of court.

Florida

D.A.C. v. State, 2016 WL 6246697 (Fla. Dist. Ct. App.). JUVENILE JUSTICE, REPRESENTATION

Juvenile appealed delinquency adjudication in three separate cases of three counts of misdemeanor battery and one count of criminal use of personal information. His motion to withdraw plea to criminal use of personal information was denied. Juvenile’s waiver of right to counsel in first delinquency case was not permissible basis for finding juvenile waived right to counsel in different case on different

charge. Plea entered without counsel, which trial court accepted immediately after juvenile asserted right to counsel, was not knowing, voluntary, and intelligent.

In re H.T., 2016 WL 6775964 (Fla. Dist. Ct. App.). DEPENDENCY, GUARDIANSHIP

Failure of child welfare agency to notify father of intent to seek permanent guardianship of daughter and juvenile court’s failure to conduct evidentiary hearing on agency’s motion violated father’s due process rights. For purpose of proceedings on remand, court noted order specifying minimum of one hour per week supervised visits with additional visits at permanent guardian’s discretion satisfied requirements and did not leave frequency and nature of visitation to guardian’s discretion.

S.D. v. Dep’t of Children & Fam., 2016 WL 6992649 (Fla. Dist. Ct. App.).

TERMINATION OF PARENTAL RIGHTS, TESTIMONY

Father waived right to object to adult daughter’s testimony by computer in proceeding to terminate his parental rights to daughter’s younger siblings. Father initially agreed to her testimony by phone or computer, but revoked consent three days before trial. Daughter’s testimony over computer satisfied protections of confrontation clause. Witness was visible for judge to assess her credibility and father had opportunity to cross-examine her.

Georgia

Gerber v. State, 2016 WL 6395627 (Ga. Ct. App.). ABUSE, PORNOGRAPHY

Defendant appealed conviction for aggravated sodomy and five counts of sexual exploitation of children. As matter of first impression, appellate court determined prosecution for sexual exploitation of children based on possession of child pornography required proof defendant knew image depicted minor. Prosecution must prove defendant knowingly possessed illicit materials.

Shah v. State, 2016 WL 6407336 (Ga.). ABUSE, FELONY MURDER

Defendant appealed conviction for felony murder and two counts of first degree cruelty to children in connection with death of her infant daughter. Evidence was sufficient to support conviction but jury instruction on reckless conduct as lesser included offense of felony cruelty

to children charges was warranted and trial court’s error in denying defendant’s request for jury instruction on reckless conduct was not harmless.

Idaho

In re Doe Children, 2016 WL 6441259 (Idaho). TERMINATION OF PARENTAL RIGHTS, FAIRNESS

Magistrate judge’s statement to father in unrelated criminal case regarding his credibility did not make fair and impartial trial improbable in front of same judge in termination of parental rights proceeding. Substantial and competent evidence supported court’s finding that father failed each case plan requirement, including requirement he have clean drug tests.

Indiana

Carter v. State, 2016 WL 6994203 (Ind. Ct. App.). ABUSE, CORPORAL PUNISHMENT

Defendant appealed conviction for battery resulting in bodily injury to child. Evidence supported trial court’s finding defendant’s use of force in disciplining 14-year-old child was unreasonable. Defendant struck child at least 14 times with belt, resulting in bruising and lasting pain. Prosecution thus negated parental privilege as defense, despite evidence defendant had used progressive forms of discipline without success and trial court’s finding some form of punishment was necessary to control child’s conduct.

Iowa

State Public Defender v. Iowa District Court, 2016 WL 6138160 (Iowa). JUVENILE JUSTICE, REPRESENTATION

Public defender complied with statutory duty to return case to court after being appointed to represent juvenile whose interests were directly adverse to those of three other current clients. District court, not defender, had statutory duty to select and appoint successor counsel for juvenile. Defender did not violate ethical duty when she declined to represent juvenile and failed to expedite court’s selection and appointment of successor counsel.

Mississippi

Carter v. Carter, 2016 WL 7014021 (Miss.). CUSTODY, REPRESENTATION

In proceeding on father’s motion to modify physical custody of daughter, trial court did not abuse discretion in failing to appoint guardian ad litem (GAL). Issues father raised to show material change

in circumstances had occurred, including conditions of mother's residence and daughter's health and care, were not argued to support charge of abuse or neglect, triggering mandatory GAL appointment.

Carter v. State, 2016 WL 6963165 (Miss. Ct. App.). ABUSE, AGE OF VICTIM
On motion for post-conviction relief in sexual battery of child under age 14 case, defendant argued prosecution failed to prove victim's age beyond reasonable doubt. Prosecution provided adequate factual basis to establish child victim was under age 14 at time of offense, thus defendant's guilty plea operated to waive his claim.

Montana

In re M.V.R., 2016 WL 6988851 (Mont.). TERMINATION OF PARENTAL RIGHTS, REASONABLE EFFORTS
Mother appealed termination of parental rights, arguing child welfare agency did not make reasonable efforts to reunite family. Agency created treatment plan mother did not challenge, repeatedly accepted her back after she relapsed into drug use, twice moved to extend child's temporary legal custody to help mother complete treatment plan, and gave mother 14 months to get clean and comply with treatment plan before terminating rights.

Nebraska

In re LaVanta S., 2016 WL 7036621 (Neb.). DEPENDENCY, PERMANENCY
After juveniles were adjudicated mentally ill and dangerous and temporarily placed with child welfare agency, agency recommended continuing permanency plan of reunification while making concurrent permanency plans of guardianship. Juvenile court entered separate orders changing permanency objectives from reunification to guardianship and parents appealed. Juvenile court lacked statutory authority to change permanency plan without adjudicating juveniles as lacking proper parental care, support, or supervision.

New York

In re Matthew L., 2016 WL 6271106 (N.Y. App. Div.). DEPENDENCY, HEARSAY
Children's out-of-court statements to caseworker in neglect proceeding against father about domestic violence towards mother and excessive corporal punishment were sufficiently corroborated. Each child's account of father's behavior, including pulling of children's hair and

hitting them with belt and hands, was essentially similar to other children's accounts, mother's testimony, and father's admissions about punishment.

In re Merinda M., 39 N.Y.S. 3d 275 (2016). TERMINATION OF PARENTAL RIGHTS, BEST INTERESTS
Termination of father's parental rights was in best interests of child based on neglect finding. Father twice participated in program to teach nonoffenders risks of romantic involvement with sex offenders and how to protect children. Father acknowledged mother's status as sex offender, failed to establish separate residence from mother, and allowed mother and her son, who was also sex offender, to have unsupervised contact with his other children.

New Hampshire

In re S.T., 2016 WL 6989394 (N.H.). TERMINATION OF PARENTAL RIGHTS, GROUNDS
Child welfare agency filed termination of parental rights petition based on mother's conviction for second degree assault of her child and subsequent incarceration. Following reversal of conviction, mother filed motion for reconsideration of order entered while direct criminal appeal was pending. As matter of first impression, court found terms "conviction" and "convicted" in termination statute meant affirmance of guilt on direct appeal. Termination of mother's rights was therefore improper.

Oregon

Dep't of Human Servs. v. B.J.A., 2016 WL 6994932 (Or. Ct. App.). TERMINATION OF PARENTAL RIGHTS, PARENTAL FITNESS
Evidence at termination of parental rights proceeding did not show father was unfit due to lack of viable plan for return of children to his care. Although father showed limited understanding of children's medical needs, there was no evidence those needs were beyond father's ability to monitor with assistance. Father's current housing would be minimally adequate to parent children, and he was willing to rely on agencies to assess children's educational and developmental needs.

In re V.R.F., 2016 WL 6471958 (Or. Ct. App.). DEPENDENCY, DOMESTIC VIOLENCE
Evidence did not support trial court's

finding of risk of serious harm to children in dependency case, even though evidence showed father was emotionally abusive of mother and parents' conflict affected children. Other than caseworker's description of general effect domestic abuse could have on child, there was no evidence of present risk of serious harm that was reasonably likely to occur.

Utah

Adoption of K.A.S., 2016 WL 7155112 (Utah). TERMINATION OF PARENTAL RIGHTS, REPRESENTATION
Biological father appealed termination of his parental rights granted on petition by stepfather seeking to adopt stepchild. Incarcerated father would qualify for appointed counsel in juvenile court but needed to overcome presumption against appointment in district court. Risk that father could be erroneously deprived of his child was significant in determining whether due process required appointment of counsel.

State v. Cruz, 2016 WL 7031057 (Utah Ct. App.). ABUSE, TESTIMONY
Trial court adequately considered reliability and trustworthiness of child victim's statements in recorded interview before admitting recording into evidence in prosecution for sodomy of child. Judge found detective explained to child importance of telling truth, employed open-ended questions except to summarize or recap, there was internal consistency in child's statements, child's descriptions did not appear exaggerated, and child did not appear to be coached.

Washington

In re I.M.-M., 2016 WL 7015855 (Wash. Ct. App.). TERMINATION OF PARENTAL RIGHTS, SERVICES
Mother appealed termination of her parental rights. Evidence did not support trial court's finding child welfare agency provided mother with necessary and available services. Mother was never offered integrated mental health and chemical dependency services, even though agency was aware she had significant cognitive impairment affecting her ability to succeed in chemical dependency treatment and other services. Agency must show it offered all necessary available services and must tailor services offered to individual's needs.

Understanding the 2016 Indian Child Welfare Act Regulations

by Scott Trowbridge

The Indian Child Welfare Act (ICWA)¹ was passed in 1978 in response to widespread removals of Native American children. It came on the heels of official policies aimed at eroding tribal sovereignty and culture. ICWA is unique in that it seeks to protect children, their families, *and* the right of tribal governments to exercise *parens patriae* authority over their citizens.²

Although disproportionality of Native American children in the child welfare system has declined since ICWA became law, a 2015 report by the National Council of Juvenile and Family Court Judges shows that it remains a significant problem.³ On average, Native American children are 2.7 times more likely to be in foster care than their peers. Twenty-one states have a disproportionate number of Native American children in care.

This article explains key parts of ICWA for child welfare judges, attorneys, and agency staff. It reflects updates and clarifications found in the 2016 Federal ICWA Regulations and Guidelines. Though there are concrete steps to comply with ICWA, it can help to understand the spirit—an aim

to counteract social injustice. When a case involves Native American families, therefore, it is important to keep the history and current situation of disproportionality in mind.

The New Regulations

The Bureau of Indian Affairs (BIA) updated the regulations governing ICWA in 2016.⁴ If you are new to ICWA, this is a good starting place as the regulations comprehensively cover ICWA.

If you have more experience, you will find these regulations primarily clarify areas of inconsistency around the country rather than add new concepts.

Key Concepts

The new regulations resolve ambiguities and address several questions that

have been problematic over the years in rarer factual situations, like what to do if there is more than one tribe or if a state extends jurisdiction beyond age 18? This article covers only the key concepts that apply to most ICWA cases in child welfare proceedings.⁵

Applicability

The first question is - is it an ICWA case? In short, ICWA applies in “custody proceedings” where the child is an “Indian child.”

Custody proceedings listed in ICWA mean:

- child in need of care⁶
- termination of parental rights
- adoption
- guardianship/conservatorship
- status offense cases *if* any part of the case results in removal⁷

The Act also lists two **exceptions**:

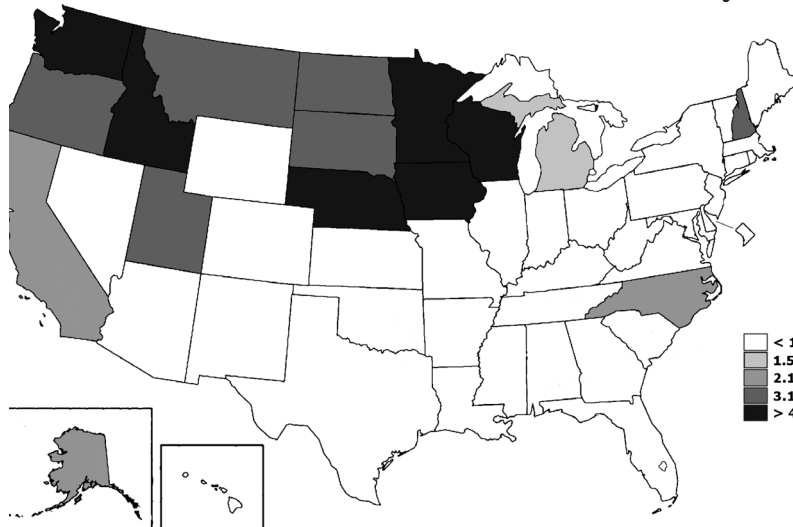
- delinquency proceedings⁸
- divorce or custody proceedings where custody will be awarded to a parent⁹

An *Indian child* is defined as an unmarried person under 18 who is a citizen of a federally recognized tribe or the biological child of a tribal member and eligible for citizenship.¹⁰

Inquiry

- The court must ask at the start of a proceeding, such as an emergency or shelter care hearing, if the participants have any reason to know the child may be an Indian child.
- The court must instruct the parties to inform it if they later learn of any reason to know the child may be an Indian child.
- If there is any reason to know the child may be covered, the court must treat the case as an ICWA

Native American Children in State Foster Care Systems



This map depicts the rate at which children identified as Native American are in state foster care per their percentage of the total state population. In the darkest states, Native American children are 4 times or more as likely to be in foster care as they are in the general population. Data from Summers, Alicia. *Disproportionality Rates for Children of Color in Foster Care*. National Council of Juvenile and Family Court Judges, 2015.

case pending verification.¹¹

Best practice

- Though the regulations indicate that the court should ask initially, and place the burden on parties to inform the court thereafter if any new information arises, the 2016 Guidelines and many states' best practice guides recommend asking at every hearing if the participants have reason to know the child may be an Indian child.¹²
- While ICWA does not cover cases where there is not yet court involvement,¹³ as the 2016 Guidelines note, agencies will benefit from asking about possible tribal affiliation as soon as possible. Tribes may have resources that can help prevent removal, including services and placements.¹⁴

Practice tips

How to ask? Given the past systemic efforts to break up Native American families, including through boarding schools¹⁵ and the Indian Adoption Project,¹⁶ families may be reluctant to acknowledge their tribal affiliations to government entities. Explaining the reason for the inquiry can be helpful, stating something like, "If your child is eligible to enroll with a tribe, there may be additional services and support."

It is appropriate to ask about American Indian/Alaska Native *ethnicity* as that may lead to information about whether ICWA applies. However, it is important to understand ICWA is not based on race,¹⁷ but *political* relationship with the tribe and tribal citizenship laws may not be based on ethnicity in a predictable way.

Questions to ask children and close and extended family members:

Has anyone in your family:

- ever lived on tribal land?
- participated in tribal events?
- received services from a tribal office/agency or the federal Indian Health Service?
- received benefits from a tribe?

If you receive any positive responses, ask for the name of the tribe

and location. This can help narrow down the correct tribe. With over 560 federally recognized tribes, 'Cherokee' or 'Potawatomi' will not be precise enough – there are three Cherokee and five Potawatomi tribes, for example.

Jurisdiction

There are three types of jurisdiction under ICWA – exclusive tribal jurisdiction, concurrent tribal-state jurisdiction, and emergency jurisdiction.

Exclusive jurisdiction

Tribal courts have exclusive jurisdiction over a proceeding if the child resides or is domiciled on tribal land,¹⁸ or if child is a ward of a tribal court.¹⁹ ICWA relies on common law definitions of domicile²⁰ and children typically take the domicile of their parents.²¹

If a state court finds the tribe has exclusive jurisdiction, the state court notifies the tribal court, dismisses the case, and sends all relevant information to the tribal court.²²

Concurrent jurisdiction

If an Indian child does not live on tribal land and is not a ward of a tribal court, the case falls under ICWA's concurrent jurisdiction provisions. The parent or the tribe may request transfer to tribal court and the state court must grant that request unless:

1. either parent objects,
2. the tribal court declines the transfer, or
3. there is good cause for denying the transfer.²³

The ICWA regulations list criteria the state court **should not** consider in a good cause hearing:

1. that the proceeding is at an advanced stage if the parent or tribe received late notice,
2. that there were prior proceedings²⁴ where no request to transfer was made,
3. whether the child's placement might be affected by transfer,
4. the child's cultural connections

Resource

To learn more about the history of ICWA, Mississippi Court Improvement's video is a good starting point. It is available online: <http://www.youtube.com/watch?v=VJCqeauLvY8>

with the tribe,

5. socioeconomic conditions of the tribe, or
6. any negative perceptions of tribal social services or the tribal court.²⁵

If the case is not transferred under concurrent jurisdiction, tribes have a right to intervene in state foster care or termination proceedings at any time.²⁶

Emergency jurisdiction

Though many states' emergency and dependency phases are not clearly distinct, ICWA treats emergency situations as separate proceedings. The emergency proceeding ends when a continued custody proceeding is initiated, the child is physically returned, or the case is transferred to tribal court.

ICWA provides a high standard for removing a child and a 30-day timeframe.

- Under ICWA, an emergency placement must terminate when there is no longer a risk of "imminent physical damage or harm to the child."²⁷
- Emergency placements should not go beyond 30 days without a court finding that:
 - the child faces imminent physical damage or harm if returned,
 - the court has been unable to transfer the case to tribal court, and
 - it has not been possible to initiate a child custody proceeding.²⁸

Given the tight timeframes, not all ICWA provisions apply in the emergency proceeding. A chart in § 23.104 lists which provisions do not

apply. However, the guidelines encourage following many of the provisions where possible, such as inquiry, notice, placement preferences, and active efforts.²⁹

Notice

The petitioner in any involuntary proceeding must notify the parents and tribe if they have reason to know ICWA may apply.³⁰ Copies of notices are sent to the BIA regional director.³¹

Notice requirements

- Notice must be sent by registered or certified mail with return receipt requested.³²
- Notices under ICWA must include specified identifying information, information about the parties' rights, and copies of documents. The requirements can be found in § 23.111(d).
- Foster care and termination proceedings cannot be held until at least 10 days after the notice is received by the tribe or parent and they may request up to 20 additional days.³³

Practice tips

- Additional notice by email, which may speed up proceedings, is encouraged.³⁴ Many tribes have a designated ICWA agent who should receive the notice. A list is published at www.bia.gov.
- Unknown tribe or parents – If the specific tribe or a parent's identity is unknown, notice must be sent to the regional BIA office, which will try to help locate the tribe. § 23.111(e). Notice should be sent to the BIA regional director with as much identifying information as possible. This list of regional offices is in § 23.11.³⁵
- The regulations increase the role of BIA regional offices regarding notice copies and finding unknown parties. They can also help troubleshoot issues that arise.

Determination of Tribal Membership

Tribes, as sovereign governments, have the authority to establish their criteria for membership/citizenship.³⁶ State courts must find on the record whether ICWA applies, but this is based on the tribes' testimony or documentation regarding eligibility.

The regulations and guidelines reject the 'existing Indian Family' exception.³⁷ That exception, which had developed in case law, meant that ICWA could be found not to apply in situations where a state court perceived that a family had not been living in a way that conformed to tribal roles and customs. Consensus on the viability of the exception, even in states that had adopted it, has been in question for some time. In fact the state that first articulated it expressly rejected it stating "the existing Indian family doctrine appears to be at odds with the clear language of ICWA."³⁸ Only a few states ever adopted it, and a number of those do not follow it in practice.³⁹

Similar issues arose in the recent Supreme Court case, *Adoptive Couple v. Baby Girl*, popularly known as the *Baby Veronica* case. The case involved a mother's decision to place her child in a private adoptive placement over the father's objection. The father, who is Cherokee, had not had physical or legal custody of the child. Thus, the Court concluded there was no "break up" of an Indian family by allowing the adoption.⁴⁰ This case has more direct impact on private cases as the Court suggested the holding was limited to private cases.⁴¹

Another major reason the existing Indian family exception is difficult to defend is that tribes, as sovereign governments, are not bound to recognize the exception and can assert that the state cases do not have precedential authority over them.

Evidence

ICWA requires high standards of proof and specific substantive findings. It also has a unique requirement for expert testimony. Congress intended for

these to place a strong check on biases against tribal communities and cultural practices and directly combat the well-documented history of removal for insubstantial reasons.

Standards of proof

- Foster care placements require clear and convincing evidence.
- Termination of parental rights requires evidence beyond a reasonable doubt.
- There must be evidence to show a causal relationship between the conditions in the home and potential "serious emotional or physical damage to the child," if returned.⁴²

Qualified expert witnesses

Testimony from a Qualified Expert Witness (QEW) is required on the safety concerns in foster care and termination decisions.⁴³ Along with the standard of proof, this helps the court ensure decisions are made objectively, with cultural context. The QEW should be able to put the parent's strengths, needs, and appropriate services into a cultural context.

- A QEW should be able to testify "as to the prevailing social and cultural standards of the Indian child's tribe."⁴⁴
- The regularly assigned social worker for the child may not serve as a QEW even if they have expertise in the child's tribe.⁴⁵

Active efforts

In ordering a foster care placement or termination of parental rights in an ICWA case, the court must find that active efforts were provided to prevent removal or reunify the family and those efforts were unsuccessful.⁴⁶ These should be tailored to the family and provided in collaboration with the tribe and the family.⁴⁷

Active efforts in ICWA predates the more commonly applied reasonable efforts standard in the Adoption and Safe Families Act.⁴⁸ Active efforts have traditionally been considered a higher level of activities to help a family. The distinction between active and

reasonable efforts has blurred because all families deserve the highest level of support from the child welfare agency. This intensive or active level seems “reasonable.” The regulations clarify this with a concrete list of minimal efforts to be provided:

1. A comprehensive assessment of the family with a focus on safety.
2. Identification of and active assistance for parents with appropriate services.
3. Inviting tribal representatives to participate in case planning, service provision, and placement decisions.
4. A diligent search for extended family members for placement and other supports.
5. Working toward keeping siblings together.
6. Regular visitation in the most natural setting possible.
7. Liberal use of trial home placements.
8. Assisting with tertiary needs such as “housing, financial, transportation...and peer support services.”
9. Offering alternatives to traditional services if optimal services do not exist.
10. Postreunification services.⁴⁹

Placement Preferences

Placement preferences must be followed in ICWA cases unless there is a determination on the record that there is good cause to depart from them.⁵⁰

In foster care or preadoptive placements, preference should be given to placements in the following order:

1. extended family
2. a foster home approved or selected by the tribe
3. an Indian foster home approved by the state or other nontribal authority
4. an institution approved by an Indian tribe or organization

In adoptive placements, a placement should be given preference in the

following order:

1. a member of the Indian child’s extended family
2. other members of the Indian child’s tribe
3. other Indian families⁵¹

A good cause determination to depart from placement preferences may be made on the record based on:

- the request of the parents or child,
- sibling attachment,
- extraordinary physical, mental, or emotional needs of the child, or
- unavailability of a suitable preferred placement after a diligent search.⁵²

Good cause determinations should not be based on:

- socioeconomic conditions of the proposed placement, or
- ordinary bonding that occurs with time spent in a placement in violation of ICWA.⁵³

Invalidation for ICWA Violations

The child, parent, or tribe, may petition to invalidate actions in foster care and termination proceedings when ICWA is violated.⁵⁴ This requires rehearing the matters related to the violation and may lead to delays for the child and family.

Petitions to invalidate can be filed for violations of:

- exclusive and concurrent jurisdiction, intervention, and full faith and credit provisions;⁵⁵
- notice, appointment of counsel for parents, right to review documents, active efforts, standards of evidence and qualified expert witnesses; and⁵⁶
- voluntary termination procedures.⁵⁷

Conclusion

The letter of law in ICWA leans toward rights, responsibilities, and compliance. The spirit of ICWA aims to counteract social injustice. This spirit becomes particularly relevant

when Native American youth describe how they have benefitted from the activities in their communities or from parents who have had a unique service experience that helped them reunify—such as a positive Indian parenting program⁵⁸ or a tribal healing and wellness court.⁵⁹ The guidance shared in this article and others in this *CLP* issue will help you experience some of these successes in your own practice.

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Endnotes

1. 25 U.S.C. § 1901 et. seq.
2. Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. 38,778 (June 14, 2016), 25 C.F.R. § 23.101. (For brevity, because this brief largely refers to the regulations, citations are shortened – 25 C.F.R. § 23.xxx for the regulations, FR p. 3xxxx for the comments to the rule.)
3. Summers, Alicia. *Disproportionality Rates for Children of Color in Foster Care*. National Council of Juvenile and Family Court Judges, 2015.
4. FR p. 38778.
5. ICWA also covers some private and voluntary cases not addressed thoroughly here.
6. U.S. Department of the Interior, Bureau of Indian Affairs. *Guidelines for Implementing the Indian Child Welfare Act*, 2016, 79 (hereinafter BIA Guidelines).
7. 25 C.F.R. § 23.103.
8. 25 U.S. Code § 1903(1), 25 C.F.R. § 23.2. ICWA would apply if a subsequent child welfare petition was filed on a delinquent child.
9. 25 U.S. Code § 1903(1), 25 C.F.R. § 23.103.

10. 25 C.F.R. § 23.2; 25 C.F.R. § 23.103; FR p. 38868.
11. 25 C.F.R. § 23.107.
12. BIA Guidelines, 2016, 11.
13. 25 C.F.R. § 23.103(b)(4); FR p. 38796.
14. BIA Guidelines, 2016, 11.
15. National Museum of the American Indian. "Boarding Schools: Struggling with Cultural Repression," *Native Words Native Warriors*. Available at <http://www.nmai.si.edu/education/codetalkers/html/chapter3.htm>
16. The Adoption History Project, University of Oregon. "Indian Adoption Project." Available at <http://pages.uoregon.edu/adoption/topics/IAP.html>
17. As expressly noted in 42 U.S. Code § 1996b(3) 'Interethnic Adoption.'
18. "Includes reservations and land held in trust. See, "Reservation," 25 C.F.R. § 23.2, BIA Guidelines, 2016, 85.
19. 25 C.F.R. § 23.110.
20. The parent's domicile is the place where the parent has been physically present, regard as their permanent principal home, and intend to return to if they are not currently residing there. If the parents are not married, domicile follows the child's custodial parent. 25 C.F.R. § 23.2.
21. "Parent" is used here as the more common scenario, but most provisions of ICWA regarding parents also apply to an "Indian Custodian" - a citizen of a federally recognized tribe who has custody of the Indian child by tribal custom/law or state law. 25 C.F.R. § 23.2; FR p. 38795.
22. 25 C.F.R. § 23.110.
23. 25 C.F.R. § 23.117.
24. Including, as 'proceedings' is defined here, a TPR proceeding following a foster care proceeding.
25. 25 C.F.R. § 23.118(c).
26. 25 U.S.C. § 1911; C.F.R. § 23.111.
27. 25 C.F.R. § 23.113.
28. 25 C.F.R. § 23.113(e).
29. BIA Guidelines, 2016, 28-29.
30. 25 C.F.R. § 23.111(a).
31. 25 C.F.R. § 23.11, FR p. 38807.
32. 25 C.F.R. § 23.111(c).
33. 25 C.F.R. § 23.112.
34. 25 C.F.R. § 23.111; BIA Guidelines, 2016, 20.
35. 25 C.F.R. § 23.11.
36. 25 C.F.R. § 23.108.
37. Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. 38,868 (June 14, 2016), 25 C.F.R. § 23.103(c).
38. In re A.J.S., 204 P.3d 543, 549 (Kan. 2009).
39. *E.g.*, neither TN nor LA recognize it in agency policies. Tenn. DCS Policy 16.24; Louisiana DSS, Office of Comm. Servs., Family Servs., Appendix 5-C Indian Child Welfare Act (ICWA), available at <http://stellent.dcfis.la.gov/LADSS/getContent?id=113496>
40. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2560 (2013).
41. *Id.*
42. 25 C.F.R. § 23.121.
43. 25 C.F.R. § 23.121(b).
44. 25 C.F.R. § 23.122.
45. 25 C.F.R. § 23.122(c)
46. 25 C.F.R. § 23.120.
47. 25 C.F.R. § 23.2.
48. FR p. 38791.
49. 25 C.F.R. § 23.2.
50. 25 C.F.R. § 23.129.
51. 25 C.F.R. § 23.130.
52. 25 C.F.R. § 23.132(c).
53. 25 C.F.R. § 23.132(d)-(e).
54. 25 C.F.R. § 23.137.
55. 25 C.F.R. § 23.137; 25 U.S.C. § 1911.
56. 25 C.F.R. § 23.137; 25 U.S.C. § 1912.
57. 25 C.F.R. § 23.137; 25 U.S.C. § 1913.
58. <http://www.nicwa.org/success/positive_indian_parenting.asp>
59. <<http://www.wellnesscourts.org>>

IN THE FIELD

How the New ICWA Regulations Impact Practice

by Margaret Burt

Child welfare lawyers and judges sometimes view the Indian Child Welfare Act (ICWA) as a negative. "Oh, no! Child welfare cases are hard enough to handle, now I have to deal with this ICWA stuff on top of it." Everyone takes a deep breath and pulls out the ICWA statute—and now the new ICWA regulations and guidelines—and pours over the details, trying to keep it all straight.

The truth is ICWA provisions can be of great assistance to practitioners, regardless of who they represent. When ICWA applies, it often means the family receives more support, assistance, and services—something attorneys and judges should welcome.¹ The new regulations and guidelines build on ICWA's benefits by providing key technical changes and greater clarity to help all child welfare

professionals implement the statute's provisions in practice.

This article provides specific examples of how the new regulations help attorneys representing children, parents, and agencies, as well as family and juvenile court judges handling any case that involving ICWA.

In general, the regulations provide greater clarity because they require more efforts to determine if ICWA applies and therefore means the family may be eligible for more assistance. For example, the court must ask in every emergency, involuntary, or voluntary proceeding if anyone knows or has reason to know the child may fit the ICWA definition. If the court has reason to think the child may be an Indian child, the court must apply ICWA until it is confirmed that the child is

not entitled to ICWA's protections.

The regulations also decrease risks of litigation involving such issues as a child's eligibility for tribal membership and whether ICWA applies to the case. This is because under the regulations, the tribe determines if the child is a member or is eligible to be a member with a parent who is a member. The state court cannot substitute its judgment on this point. This saves the court and attorneys valuable time previously spent litigating if the child was eligible for tribal membership and if ICWA applied.

If you represent children, the new regulations will support your efforts in several ways. For example, children's preferences can be specifically considered in foster care and adoption placement decisions.² Additionally,

sibling attachments are now valued and can be considered in placement decisions.³ Another support is that children entitled to ICWA's protections will retain that status and protection if legal proceedings continue after age 18.⁴ Finally, for children who are adopted, the regulations provide a clearer process to obtain information from the adoption file upon becoming an adult.⁵

If you represent parents, you will welcome how the new regulations' clarify the definition of "voluntary." Specifically, when a parent is alleged to have "consented" to a placement but in reality did so under threat of removal by the court or the state agency, that will not constitute "voluntary" placement and ICWA protections will still apply.⁶ Additionally, a court may not deny parents ICWA protection by concluding they do not participate in tribal activities,⁷ an Indian parent has had little contact with the child, or the court thinks the child's blood quantum should not qualify the child for ICWA status.⁸

Parents' counsel who were discouraged by the Supreme Court's rulings in *Baby Girl v. Adoptive Parent* will also welcome the regulations' clarification to include more parents among those protected by ICWA. The phrase "continued custody" that received such intense scrutiny in the Supreme Court's decision now includes legal or physical custody as interpreted by tribal law, custom, or state law.⁹

Parents' counsel is not required to make a transfer to tribal jurisdiction request in writing but can do it orally and the request can be made any time.¹⁰ Also, the regulations clarify that the removal of an Indian child must cease immediately if it is no longer necessary to prevent harm.¹¹ A causal connection must also be found between the conditions in the home and that continued custody by the parent will result in serious emotional or physical harm.¹² Another huge change is parents' preferences can be considered in foster and adoptive placement decisions, even when those

Reconnecting with Indian Heritage: Restoring Hope

Dionne had three school-age children. She knew she was a member of a tribe but had never lived on tribal land or had much contact with the tribe. Her parents had moved the family away to a large city over 300 miles from the reservation when Dionne was a baby and had not remained involved with the tribe.

A Family in Need

Now 32, Dionne felt like things had been going wrong since the birth of her third child. The father of her two older children had abandoned the family. The father of her youngest child beat her in front of the children and frequently hit the children. She could not keep a job and found it impossible to feed and dress the children on welfare in the city. The children often missed school. Dionne lost her temper with them often and seemed unable to stop hitting them. The oldest child told his teacher how bad things were at home when the teacher noticed the bruises on his arms and legs.

Children's Removal

Dionne's children were then placed in foster care. To visit them, Dionne had to take two busses and visit in a messy "visitation room" at the state agency. The children cried through the visits. In time the children were moved to a different school because no foster home was available to take them in their home school district. The state moved the youngest child to yet another foster home when the foster mother said she couldn't handle all three.

Dionne was more depressed and angrier than ever. She knew things were bad at home—but foster care seemed worse for the children. She wondered how long it would take to get them back. Her lawyer told her the case would be handled differently because she was Native American and the children were members of the tribe. Dionne did not think this would help as her family had not been involved with the tribe for so long.

Tribal Involvement

When the tribe was contacted by her lawyer, Dionne was surprised that they sent a woman caseworker from the reservation to the court appearances. The tribal caseworker offered to talk to Dionne and they met together with her lawyer. The tribe wondered if Dionne would consider moving to the reservation. They had transitional housing available on the reservation and there were part-time jobs that might lead to something more. There were services—parenting classes, counseling services—that had no waiting lists and incorporated tribal culture and practices. The tribe had its own foster homes and they would look at some of her extended relatives as placement options. The children would be together and she could see them often and perhaps in a relative's home. There was a good, smaller school for the children.

Hope Restored

Dionne decided this move may be what the family needed. The parties agreed that the legal case would be transferred to the tribal court so Dionne would not have to travel back to the city. Dionne felt she had more help and concrete assistance and support from the caseworkers on the reservation—and the ability to connect with a larger family and community network. The children's situation would be better and Dionne felt optimistic for the first time that she would have a real chance to fix her problems and reunite with her children sooner.

preferences differ from ICWA or tribal preferences.¹³ Parental concern about anonymity, particularly in newborn adoptions, can also be considered.¹⁴ (See *Reconnecting with Indian Heritage: Restoring Hope for a Family* for an example.)

Finally, provisions helpful to Indian families include the higher level of proof needed to remove the child, particularly the requirement of “active efforts” on the part of the state agency and not just reasonable efforts as in non-ICWA cases. The new regulations require that “active efforts” start immediately and provide some definitive examples of active efforts.¹⁵

If you represent agencies, the biggest benefit is the clarity the new regulations bring. The agency attorney can provide better advice to the agency client on some previously problematic interpretations and provisions that made sense in 1978 but are no longer as applicable. There are more details about how to notify parents and tribes, for example, and some flexibility in the process.

If you are a family or juvenile court judge, there is more clarity about your role determining if a case involves ICWA. The regulations specify how to proceed when a determination is made that the tribe has exclusive jurisdiction, or when a case with concurrent jurisdiction is being transferred to the tribal court.¹⁶ There is more detail on the “good cause” to refuse a transfer that may significantly limit the time-intensive litigation that section has caused.

A clearer understanding of the role of the Bureau of Indian Affairs in locating tribes and qualified expert witnesses, and helping maintain ICWA adoption files is also helpful. There have been problems in the past locating a good quality expert to testify in a removal or termination matter; the regulations now provide flexibility while ensuring the expert knows the social and cultural standards of the child’s tribe. The court and the agency

will have more guidance when questions arise about departing from the placement preferences.

The technical changes and clarifications in the new ICWA regulations help all frontline child welfare professionals. By applying ICWA’s provisions according to the regulations, child welfare-involved families can benefit from increased services and supports to help keep them together and preserve their Indian heritage and traditions. By relying on the new regulations and guidance, attorneys and judges can better ensure these families access the supports they need.

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nationally to agencies, attorneys, judges, and tribes on child welfare legal topics, including ICWA.

Endnotes

1. *E.g.*, Active efforts 25 C.F.R. § 23.2.
2. 25 C.F.R. § 23.132(c).
3. 25 C.F.R. § 23.132(c); 25 C.F.R. § 23.2.
4. 25 C.F.R. § 23.103(d)
5. 25 C.F.R. § 23.138 et. seq.
6. 25 C.F.R. § 23.2. ‘Involuntary proceeding’
7. 25 C.F.R. § 23.103(c).
8. 25 C.F.R. § 23.108.
9. 25 C.F.R. § 23.2. ‘Parent or parents’
10. 25 C.F.R. § 23.115
11. 25 C.F.R. § 23.113.
12. 25 C.F.R. § 23.121.
13. 25 C.F.R. § 23.130(c)
14. 25 C.F.R. § 23.129(b)
15. 25 C.F.R. § 23.2.
16. 25 C.F.R. § 23.110; § 23.115 et seq.

RESOURCE

The Heart of ICWA: A Personal Stories Video Project

Purpose: Recognizing the need for Indian Child Welfare Act (ICWA) public education materials that can be distributed widely and through-out social media channels, the National Indian Child Welfare Association (NICWA) partnered with award-winning Producer/Director Karen Odyniec and Producer Milo Daemgen to produce four short-form digital stories.

The multipart digital storytelling series, *The Heart of ICWA*, features Native families sharing their stories of family upheaval, perseverance, healing, and resilience in the face of threats to their well-being. In this series, families convey firsthand what happens when basic ICWA protections are followed and the devastating consequences when families and children are deprived of these basic rights.

Content: The series includes four videos about American Indian/Alaska Native families who have been involved in the child welfare system.

The videos are posted on NICWA’s YouTube channel:
<https://www.youtube.com/channel/UCRRmU68Ih20mEwUnSKnSavA>

Legal Challenges to ICWA: An Analysis of Current Case Law

by Matthew Newman and Kathryn Fort

The 2013 Supreme Court decision *Adoptive Couple v. Baby Girl* placed the Indian Child Welfare Act (ICWA) in the public spotlight. In that case, the Court held that a noncustodial father does not have certain rights under ICWA. The *Baby Girl* decision motivated many interest groups, including tribal governments, non-Native child welfare organizations, and adoption and foster care advocates to closely examine ICWA issues at every level, from national policy to local implementation.

After *Baby Girl*, Indian Country exerted tremendous effort to have the Bureau of Indian Affairs (BIA) reexamine its historical antipathy for ICWA enforcement. This process began with informal ICWA listening sessions hosted by the BIA and culminated in the publication of updated 2016 ICWA regulations and guidelines.¹

While Indian Country celebrated the BIA's actions, ICWA opponents mobilized a detailed and strategic legal campaign to reverse this progress and dismantle foundational precedents and statutes. If ICWA's protections are eroded or eliminated, many who work in child welfare believe these issues will become more troublesome.

Since 2015, these legal challenges have come in one of three waves. The first wave consisted of federal lawsuits attacking ICWA as an unconstitutional statute that violates individual due

process and equal protection rights and exceeds Congress's authority over Indian affairs. The second wave is comprised of federal lawsuits challenging state laws that implement and expand ICWA provisions. Finally, the

If ICWA's protections are eroded or eliminated, many who work in child welfare believe these issues will become more troublesome.

third wave arises from state appellate cases that have drawn significant attention and may reach the U.S. Supreme Court.

Wave I – Federal Challenges to the Statute

National Council for Adoption v. Jewell

The National Council for Adoption (NCA) filed the first legal challenge against the BIA's ICWA reforms in May 2015. Styled as an Administrative Procedures Act (APA) suit, the complaint included claims that: (1) ICWA denies Indian children due process and equal protection by subjecting their dependency cases to its provisions; (2) ICWA and the federal guidelines commandeer state agencies for federal purposes; and (3) ICWA exceeds Congress's authority to legislate in the area of Indian affairs. NCA's position focused extensively on arguing that the guidelines carried

the weight of a legislative rule, and as such, required formal notice of rule-making and public comment. Specifically, NCA highlighted the guidelines' use of words such as "require," "must," and "shall" as indicators that the BIA intended the guidelines to be binding, legislative rules.²

In response, the BIA raised several jurisdictional and legal defenses, including lack of standing. The BIA also disputed NCA's characterization of the guidelines as legislative rules. To dispute the constitutional claims, the BIA relied on U.S. Supreme Court and federal circuit precedents holding that laws pertaining to tribes and tribal

members are not "racial in nature," but rather derive from tribes' political status as "distinct, independent communities" under the Constitution.

The district court agreed with the BIA's arguments and dismissed the case. Specifically, the court held that NCA lacked standing because it failed to demonstrate any cognizable injury from the guidelines. The court also held that the guidelines are not "final agency action" subject to judicial review because the BIA published the guidelines as nonbinding "advisory guidance" that allows state court judges to be the ultimate decision makers. The court dismissed the remainder of the claims for lack of subject matter jurisdiction and cited the long line of federal court precedent upholding tribal citizenship as a political, rather than racial, classification.³ NCA appealed the district court's decision to the Fourth Circuit Court of Appeals in February 2016. Briefs have not been

Resources

Federal Regulations:

<https://www.bia.gov/cs/groups/public/documents/text/idc1-034238.pdf>

Federal Guidelines:

<https://www.bia.gov/cs/groups/public/documents/text/idc2-056831.pdf>

Case Filings:

<https://turtletalk.wordpress.com/fort/icwa/>

filed yet and the appeal remains pending.

Carter v. Washburn

In July 2015, plaintiffs represented by the nonprofit Goldwater Institute filed a class action lawsuit against the BIA and the state of Arizona challenging various provisions of state and federal law as they applied to Indian child welfare proceedings. The proposed class of plaintiffs includes all Native children in the Arizona foster care system who reside outside a reservation as well as all foster parents, preadoptive, and prospective adoptive parents who are not members of the Native child's extended family.

The suit challenges ICWA's provisions on transfer, active efforts, burdens of proof for removal, burdens of proof for termination of parental rights, and placement preferences, as

well as corresponding sections in the revised guidelines, and an Arizona law requiring the state Department of Child Safety to "ensure compliance with ICWA."

The Gila River Indian Community and the Navajo Nation each intervened in the suit on the grounds that four of the named child-plaintiffs were citizens of the two tribes. The BIA filed a motion to dismiss the suit on grounds similar to those in *National Council for Adoption v. Jewell*: (1) plaintiffs lack standing, and (2) plaintiffs failed to state a claim upon which relief could be granted. The case remains pending before the district court.

Wave II – Federal Challenges to State Laws

Doe v. Piper

In June 2015, the birth parents of an Indian child filed a federal suit in Min-

nesota challenging the constitutionality of the Minnesota Indian Family Preservation Act (MIFPA). Plaintiffs challenged MIFPA's provisions (1) requiring notice to tribes in cases of voluntary adoptions and (2) guaranteeing a tribe's right to intervene in voluntary adoptions. The plaintiffs argued that these provisions violate the birth parents' due process right to parent their child and direct their child's upbringing, and that the provisions discriminated against their child based on race.

Plaintiffs sought to preliminarily and permanently enjoin MIFPA's application to their child's voluntary adoption proceeding in state court. Plaintiffs named as defendants various state officials charged with administering MIFPA, as well the Commissioner of Health and Human Services for the Mille Lacs Band of Ojibwe, in which the birth mother was an enrolled citizen.

Tribal and state attorneys successfully defeated the preliminary injunction. Soon after, the tribe and the state filed separate motions to dismiss. The district court granted the tribe's motion and dismissed all claims levied against it on the basis the tribe enjoyed sovereign immunity from suit. The court also removed the health commissioner as a defendant. The court allowed the case to continue against the state government officials, however, because the court agreed with the plaintiffs' claim they faced irreparable harm because of the requirement to notify the tribe. Finally, even with the health commission's promise that the tribe would not intervene in this matter, the court found this issue was not moot because it had both the potential to reoccur and not be resolved timely. The case is awaiting trial on the constitutional issues.

Doe v. Pruitt

In a nearly identical case to *Doe v. Piper*, an Oklahoma couple, birth parents of an Indian child eligible for membership in the Cherokee Nation, filed a federal lawsuit challenging

Key U.S. Supreme Court ICWA Cases

- ***Mississippi Band of Choctaw Indians v. Holyfield***, 490 U.S. 30 (1989). Parents who were members of the Choctaw tribe surrendered their rights and placed their twin children for adoption. The children in the case were born off the reservation, but their parents lived there. The Supreme Court found that the children being born off reservation did not change the parents' domicile, relying on the common law definition. The Court concluded the tribal court had exclusive jurisdiction over the case and the state court's adoption order was invalid. The case is cited often for broadly affirming the intent of Congress to protect tribes' *parens patriae* role, even in the face of parents consenting to placement of their children.
- ***Adoptive Couple v. Baby Girl***, 133 S. Ct. 2552 (2013). In a private adoption case involving an Indian child where the father never had physical custody, the Supreme Court held that ICWA was not a bar to a state adoption, in particular that qualified expert and active efforts provisions did not apply. The Court also found ICWA's placement preferences did not apply because there were not competing adoptive parties. This case hinged on the fact that under South Carolina law, the father had not vested his custodial rights via affirmative action including by not paying child support. The Court reasoned that he lacked custody in the first place for disruption of any 'continued custody' according to ICWA. This case has limited application to child welfare cases that require engaging all relatives regardless of ICWA applicability, for example, regarding case planning and notice. The majority opinion and concurrence also suggest a narrow interpretation, distinguishing it from public child welfare cases.

the constitutionality of the Oklahoma Indian Child Welfare Act (OICWA). Like *Doe v. Piper*, plaintiffs' federal lawsuit specifically targeted the OICWA provisions requiring notice to tribes in cases of voluntary adoption, and guaranteeing a tribe's right to intervene in voluntary adoptions. Additionally, plaintiffs incorporated certain arguments from the *National Council for Adoption v. Jewell* suit; specifically, that OICWA was beyond the scope of the legislative powers

to tribal court violated the children's due process rights and discriminated against the children based on their race.

The tribe defeated the preliminary injunction, and later filed a motion to dismiss citing tribal sovereign immunity as plaintiffs named tribal officials as defendants in the suit. Before the district court could rule on the motion, the parties stipulated to voluntarily dismiss the suit without prejudice. The children's dependency case

will head to the U.S. Supreme Court. The foster parents in the California case have filed a petition for *certiorari* after the California Supreme Court denied review of the case. Depending on the decisions in lower federal courts, it appears inevitable that at least one party will seek review from the nation's highest court. The possibility of a split in the circuits has increased considerably in the past year. The future of the lawsuits is unclear, but it is to be expected that Indian Country will continue to fight for enforcement of ICWA and the newest guidelines and regulations.

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the federal Constitution conferred to states.

The state and tribal attorneys filed respective motions to dismiss the suit, arguing plaintiffs lacked standing to bring the suit and failed to properly state a claim upon which relief could be granted. Although the district court held oral argument on the motions to dismiss in January 2016, it has not issued a decision in the case.

C.E.S. v. Nelson

In September 2015, foster parents of children enrolled in the Grand Traverse Band of Ottawa and Chippewa Indians sought and received from Michigan federal court an *ex parte* temporary restraining order against a tribal prosecutor, a tribal social worker, and a state court judge, all of whom were involved in the children's state court dependency case. During those state proceedings, the tribe sought, and the judge granted, a motion to transfer the children's case to the tribal court for further proceedings. The federal restraining order prevented any further state proceedings regarding the placement of the children to occur. Like many of the plaintiffs in the Wave One cases, the Michigan plaintiffs claimed certain MIFPA provisions violated their individual constitutional rights; specifically that transferring the case

was transferred to tribal court where adoption proceedings are continuing.

Wave III and Beyond

In addition to the federal cases currently in litigation, there have been a number of state appellate cases that have attracted heightened interest.

- The Washington Supreme Court strongly upheld ICWA and the principles behind it despite claims from the appellant and *amici* regarding ICWA's constitutionality. See *In re T.A.W.*, 383 P.3d 492 (Wash. 2016).
- In Arizona, the Court of Appeals decided a case on statutory language, rather than on the broad constitutionality of the law, even though it was invited to do so by appellees and *amici*. See *Gila River Indian Community v. Dep't of Child Safety*, 379 P.3d 1016 (Ariz. Ct. App. 2016).
- The California Court of Appeals also recently upheld both state and federal laws concerning the placement of a Choctaw child with her extended family, even under intense media scrutiny and multiple appeals. See *In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (Ct. App. 2016).

It is likely that one of these cases

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Kathryn E. Fort is the director of the Indian Law Clinic at Michigan State University College of Law where she also runs the ICWA Appellate Project, which assists tribes with ICWA appeals. She also co-edits the popular Indian law blog, Turtle Talk. Her work is available at <https://papers.ssrn.com/sol3/results.cfm>

Endnotes

1. 2015 ICWA Guidelines <<http://www.bia.gov/cs/groups/public/documents/text/idc1-029637.pdf>> and 2016 ICWA Regulations <<http://www.bia.gov/cs/groups/xraca/documents/text/idc1-034264.pdf>>.
2. Court documents for this case can be found at turtletalk.wordpress.com/fort/icwa/national-council-for-adoption-v-washburn. Plaintiff's Complaint at 21-22.
3. *Id.* at 11-13.

Improving Outcomes in Indian Child Welfare Cases: Strategies for State-Tribe Collaboration

by Shanna Knight, Victoria Sweet and David Simmons

When a child is removed from his or her home based on suspected abuse or neglect, the court steps in to make critical legal decisions affecting that child's and family's life. These decisions about a child's safety and permanency—usually the responsibility of parents—are also the honor and responsibility of extended family members, community members, and tribal leaders when a child is

an Indian child. Attorneys and judges practicing child welfare law must be competent in the law and best practice, including the Indian Child Welfare Act (ICWA). A great part of competency under ICWA is rooted in the uncommon expertise that can only come from the child's tribe(s).

Working with the Indian child's tribe helps attorneys, judges, and state agencies meet the letter of the law and ensures best practices and appropriate services are delivered to Indian families, thus supporting their successful reunification. Tribes are necessary to identify a child as an Indian child under ICWA,¹ and they can intervene in or take jurisdiction of a case as necessary.² Further, an Indian child's tribe can help the state find or provide the best, culturally appropriate services; identify extended family and community members who can provide resources or placements; identify and provide qualified expert witnesses to inform the court about tribal cultural values about child rearing; and help state practitioners think outside the box and apply tribal cultural norms to state proceedings.

Learning the legal requirements of ICWA is vital to comply with federal law, but practitioners need to understand how states and tribes can work together to implement the law. This coordination is key to providing services that are culturally sensitive and preserve and improve outcomes for Native American families.

How States and Tribes Can Work Together

Coordinate around key case activities and share information.

One of the best ways to improve ICWA practice is for state and tribal workers to build strong, cooperative relationships. In some jurisdictions, state

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social workers will call tribal representatives to let them know formal notice will be sent regarding a child who may be a member or eligible for membership in their tribe. This gives the tribes the chance to verify the information immediately and provide a formal response quickly. In other locations, these relationships have led to state social workers collaborating with tribal social workers on case plans.

Much time is saved by working together. The tribal social worker will have information on available culturally appropriate services for families and children and much of the information to complete diligent searches for relatives and ICWA-compliant placements. In addition, if the case remains in state court and the child ends up being removed and no tribal placements are available, the tribal and state social workers can work together to help the child maintain strong family and cultural ties.

Work together to find qualified expert witnesses.

Many states have found locating a qualified expert witness (QEW) challenging, especially in light of the scant guidance in the new regulations. Practitioners are simply instructed that the QEW cannot be the caseworker regularly involved in the case and the state should contact the tribe or Bureau of Indian Affairs to locate the expert.³ However, the witness's expertise should include "the prevailing social and cultural standards of the Indian child's Tribe" regarding child-rearing practices.⁴ Although the regulations do not expressly say so, it will be almost

impossible to find such an expert without working with the tribe. The tribe is in the best position to identify and recruit QEWs, although training them to testify may fall on the state.

In some jurisdictions around the country, tribes are teaming up with states to help state workers find QEWs.⁵ They do this by creating lists of people who have agreed to serve in this capacity and who are determined by someone in the tribe to be qualified. In addition to helping create the lists, tribes have also worked with states to create and provide QEW training so potential QEWs understand their roles and responsibilities.

Encourage tribes to share court representatives.

In a few states, local tribes have offered to assist tribes that are unable to send representatives to court.⁶ While this relationship is often created between tribes, states have also encouraged this practice and helped facilitate

introductions between tribal representatives. By having a local tribal worker appear on behalf of the long distance tribe, it makes it easier for the tribe to exercise its right to intervene in the case and complete next steps. This promotes timeliness while remaining in compliance with ICWA requirements.

Ease burdens on tribal representatives.

States are assisting tribes by not placing additional burdens on tribal representatives. Nothing in ICWA requires a tribal representative to be law trained when appearing on behalf of a tribe. However, some state courts have been unwilling to allow the non-law trained representatives to appear in court, effectively preventing the tribe from formally participating. Most states have now discontinued this practice and some are formalizing it through court rule changes. Taking it a step further, the guidelines encourage⁷ and at least one state is already considering a court rule that would allow lawyers who are not licensed in the state where the hearing is being held to appear in court on behalf of a tribe in an ICWA hearing without having to find local counsel, or meet other “pro hac” requirements such as fees.⁸ Again, this makes it easier for tribes to intervene according to their rights under the law.

Benefits of State-Tribe Coordination

Provides unique services that strengthen Native children’s sense of identity and community.

Tribes provide a sense of community and identity for children who otherwise might feel lost in the system. The state system is often overburdened by the sheer number of cases that go through it each month. Working with tribal systems or transferring cases to the tribal court system can give the child access to programs and individualized attention that would not be possible in state programs. Many tribes have afterschool tutoring, sports

Unlocking the Benefits of Tribal Membership: Sasha’s Story

Sasha, a young mother with two toddlers, stood before the court alleged to have neglected her children. Child protective services claimed she frequently abused alcohol and her young children were not being fed properly, had missed medical appointments, and lacked basic supervision. The state claimed Sasha allowed inappropriate, unsafe people in the home and the family was cycling through home evictions and homelessness. Sasha knew she had problems and she had burned her bridges with most of her extended family. She felt alone and terrified, and worried for her children.

Uncovering Tribal Ties

The judge asked Sasha, as he did in every child welfare case, “Do you have any reason to think you or your children have any American Indian heritage?” The caseworker had asked her if she “was a member of a tribe” and she had said “no.” The way the judge asked sounded different though and she had a different answer. Sasha told the judge she had been adopted as an infant and she knew nothing about her birth family. However, comments by her adoptive family over the years made her wonder if she could have Native American birth relatives. Then the judge said something surprising—“Let’s get your adoption file and see what it says!”¹

The court obtained Sasha’s 25-year-old adoption file from a nearby county. Sure enough, Sasha’s birth mother was listed as a local tribe member. The tribal representatives were contacted. Not only did they advise the court that Sasha was a member of the tribe based on her birth mother’s membership—the adoption did not affect that—but that Sasha’s children were also tribal members.² The case was an Indian Child Welfare Act matter!

Tribal Membership Creates Support Network

The tribal nation informed the court and the parties that many extended relatives of Sasha’s birth family lived nearby and the tribe had services to offer Sasha and the children. The opening of that adoption file also opened options to Sasha and her children. Now there were new relative placement options, a larger network of supportive family members, tribal caseworkers willing to help and coordinate with the state caseworker to locate appropriate service providers for Sasha’s issues—more hands, more help. Sasha felt like she had true allies to support her efforts to better her situation. The family’s prognosis had improved.

—Margaret Burt, JD, private child welfare attorney, upstate NY.

¹ ICWA requires sealed adoption files be opened to share information with adult adoptees about possible tribal connections.

² Not all tribes determine membership the same way.

programs, tribal libraries, grief counseling, and access to programs designed and funded for Native children to prepare for post high school life.

In addition, the children participate in traditional games and ceremonies, and learn their traditional languages. When a child has been removed from home, whether

temporarily or permanently, the child often struggles to find a sense of belonging or stability. A tribe is uniquely situated and invested in helping children of their nation know who they are and to thrive as members of their tribe.

Creates conditions that improve outcomes and helps Native

children and families flourish.

Community commitment also leads to extraordinary outcomes. In one case, a boy who had been placed in the tribal foster system not only flourished as he regained his sense of identity in the community, but he discovered new talents and passions. Because of his speaking abilities and the insights he gained through reconnecting with his culture, he was given an opportunity to speak at a White House conference for Native youth in foster care. He is currently preparing to transition from foster care and travels around the country as a motivational speaker. He aspires to work at a national park that was created to tell his tribe's story.⁹

Connecting with a tribe and accessing available services and supports also benefits parents. For many parents, the tribe's support network can be the catalyst to make life changes that help them improve their situations. (See *Unlocking the Benefits of Tribal Membership: Sasha's Story*)

Ensures Native children are raised in their culture.

In one case, a couple who had not been able to have children of their own was able to adopt three siblings. The social services department in the tribe tried to ease the children and the foster parents into the placement. The children visited the home several times to start developing a relationship with each other before the placement was finalized. The children now have a stable home, they are dancing in pow wows, and are being raised to know

and love their culture. Through tribal community events, they also have retained a relationship with previous foster parents and with a sibling who was adopted by a different family. All of this was done through the tribe's social services with state court oversight since the tribe lacked its own court system—an excellent example of state and tribal cooperation for the well-being of Native children.¹⁰

Conclusion

State and tribal systems do not need to be adversarial. Each system is designed to consider the best interests of children. ICWA protects the relationship of the child to both the biological family and the tribe. While there are additional legal requirements, developing strong relationships between systems can help ensure state systems are complying with federal law. In addition, tribal systems provide benefits, services, and a sense of identity for a child during a stressful and often painful time. State and tribal cooperation in implementing ICWA has proven benefits for the Native children and families who end up in state court systems. Such partnerships increase resources available to families while also making it easier for state judges, attorneys, and agencies to comply with ICWA.

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David Simmons is the director of government affairs and advocacy at the National Indian Child Welfare Association. He is a staunch advocate for improving services to American Indian and Alaska Native children and improving collaboration between tribal and state courts and agencies.

Endnotes

1. 25 U.S.C. § 1903; 25 C.F.R. § 23.108.
2. 5 U.S.C. § 1911; 25 C.F.R. §§ 23.110, 23.111(d), 23.115.
3. 25 C.F.R. § 23.122.
4. *Id.*
5. *E.g.*, "Tribal State Agreement," February 22, 2007. <http://www.mncourts.gov/mncourtsgov/media/scao_library/CJI/TSA-Tribal-State-Agreement.pdf>
6. *E.g.*, Minnesota American Indian Center, the American Indian Children's Resource Center in Oakland, CA, and Ho-Chunk for the Winnebago tribe.
7. U.S. Department of the Interior, Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 2016, 8. <<https://www.bia.gov/cs/groups/public/documents/text/idc2-056831.pdf>>
8. *See*, Michigan Supreme Court. "Proposed Amendment of Rule 8.126 of the Michigan Court Rules, ADM File No. 216-04, November 2, 2016. <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2016-04_2016-11-02_FormattedOrder_PropAmendOfMCR8.126.pdf>
9. National Indian Child Welfare Association. "Honor the Tradition of Strong Native Families." <<http://myemail.constantcontact.com/Elijah-s-Story-of-Strength.html?soid=1102238947047&aid=8ZZ4L7CK2lo>>
10. Passey, Brian. "Keeping the Culture." *The Spectrum*, April 3, 2015. <<http://www.thespectrum.com/story/life/family/2014/05/05/k-e-e-p-i-n-g-t-h-e-c-u-l-t-u-r-e/8715909/>>

State-Tribe Collaboration Grants

In November 2016, a state-tribal ICWA grantees kick-off meeting was held in Washington, DC. The new grants, issued by the U.S. Children's Bureau, provide a unique opportunity for states and tribes to work jointly to improve their ICWA practice. Courts and child welfare agencies also participate. Three states—Oklahoma, North Dakota, Minnesota—with over 40 tribal partners received grants. Tribal representatives attending the meeting included Grand Portage Chippewa, Cherokee Nation, Seminole Nation of Oklahoma, Sac and Fox Nation, and Muscogee Nation. Though it is a small number of grants, each grantee will evaluate their efforts and their results should be informative for the field.

Strengthening Indian Children and Families: Lessons from Tribal Court

by the Honorable Richard Blake

A young girl's case came before me. She had experienced more tragedy and heartache than any person deserves at a young age. As the tribal judge hearing her case, I was charged with placing her in a home with individuals and a family who would be responsible for caring for her and healing her heart. Because there was not available kin or a home with a tribal member, we placed the child with a Native American foster family who lived in our community.

I am a tribal court judge and often hear cases involving our children. My experience working with state court judges and my fellow tribal court judges leads me to believe that tribes and states share core values. We believe children are sacred and families are sacred. This has been and will always be true. As a tribal court judge, I experience these universal truths daily. I'm charged with a very important job of ensuring justice is served and protecting those children who come before my court.

Preserving Communities and Families

The young girl is doing very well in her current placement. She's important—to our community and to the survival of our people and our culture. The media sometimes makes light of the importance of tribes' collective rights and concerns for our cultural survival through proper placement of our children. *Why is it important?* Historically, the impact of policies affecting children from private and government actors has been grave. They have caused pain and suffering for generations.

When you cannot eliminate or control a population of people or their culture through removal, or placing them on reservations, or through war, you just have to assimilate them. Efforts to "Kill the Indian and Save the Man"¹ began in the late 19th and early 20th centuries. Those efforts most obviously affected the children. In

spite of some of the most difficult and painful circumstances imaginable—some unimaginable—tribal nations and communities are growing stronger and stronger across the country. Our children and families are so important because they are survivors of this horrific history. Our people inherit that trauma, yet they survive and thrive and become leaders in our tribal and local communities. *I see it every day.*

In my work as a judge and president of the Board of the National American Indian Court Judges Association I see signs of hope at the local level and across Indian Country. I also see strong communities. Our communities face real challenges. The co-occurring factors of substance abuse, mental health, and domestic violence are not confined to states alone. We too struggle to help parents and families facing these challenges. Given many very rural locations it is even more difficult. However, we know change and healing are possible, because we see it, *because I see it.*

Promoting Justice: Three Strategies

The following three strategies can continue to build hope and bring justice in Indian country:

Work with partners to develop and implement services for Indian children and families grounded in traditional values.

There is growing evidence that designing interventions and treatments

that draw upon traditional practices and community values increase success rates. Family healing and healing-to-wellness courts are a fine examples of this.² Healing-to-wellness courts support traditional values and emphasize healing through community relationships. There is community support and often the participation of tribal elders. These approaches are less adversarial and recovery focused, similar to drug courts. They treat people and families with respect, and look for strengths. People are not seen as problems or known only by their problems—they are vital members of our community and our tribes.

Build or enhance state and tribal consortiums—government-to-government working groups.

We have done this to great success between state and tribal courts. There are too few of them, but the ones that exist are strong and we are pleased to see new consortiums taking root in Montana and other states. It begins with relationship building as the bedrock foundations. Judges from states and tribes meet each other in person, observe one another's courts, and share challenges, experiences, and successes. This leads to stronger working relationships and stronger policies and practices because efforts are better informed and supported and are increasingly jointly created. It will help in all domains, but especially with Indian child welfare practice and ICWA. Governments, judges, social workers, and communities work together in a spirit of trust toward good, common sense solutions.

Collaborate and communicate between communities, organizations, and agencies.

A collaborative approach leveraging resources and knowledge will lead

to more meaningful training of those individuals on the frontlines protecting our children. It will eventually lead to better outcomes for our children and families. A few examples rooted in our work are:

- At the National American Indian Court Judges Association, we organize tribal and state court judicial consortia events with Casey Family Programs and state Court Improvement Programs. Judges get to talk to each other and exchange ideas about issues and best practices concerning court-involved Indian children appearing

effort to go to support the graduates and this child. At the event, there was an area where all the children's artwork was displayed. The Head Start teacher pointed out a painting to me in the corner. My first reaction was that it was a very lovely crow, because there was a splotch of black paint in the center. Upon further review, I realized it was me. The black paint represented my robe, and the surrounding paint was my courtroom. To say I was affected by this gesture is an understatement. She gave me that painting that day, and I later had it framed and placed in my chambers. It reminds me

she talks about how each part of the weave is important to the entire basket that each individual is represented in the weave. If you think about our work in the child welfare arena as the basket, each of us are part of the weave, and each of us are part of the design of this basket. Your input and work is necessary to the weave. Without your part, the entire basket is incomplete and flawed. We understand that working for better outcomes for our children and families are not confined to our tribal lands, but it also extends to our local communities as well. I hope my words help guide you in your work to help strengthen Indian children and families.

If you think about our work in the child welfare arena as the basket, each of us are part of the weave, and each of us are part of the design of this basket.

in the courts.

- We partnered with the National Council on Juvenile and Family Court Judges to support and encourage education, information sharing, and advocacy as essential to improving state and tribal juvenile and family court systems. We offer a joint membership to both our organizations to help state and tribal court professionals attain best practice and create systems that provide the best possible outcomes for children and families.
- We are working with the Administration on Children Youth and Families to identify opportunities to promote data sharing and collaboration between state and tribal courts and child welfare agencies. Reaching out to other agencies and organizations enhances existing work, helps problem-solve, and provides a collaborative approach to this work.

of the great role tribal judges play in the lives of our children. At the end of the day, we all want our children to survive, thrive, and be safe and loved. Period.

My good friend and colleague, the Honorable Cheryl Fairbanks, teaches sessions on traditional peacemaking and peacemaking in tribal and state courts. She uses an example of the traditional basket to illustrate many points, primarily that the basket in the context of peacemaking represents the tradition of the tribe. Most poignantly,

The *Honorable Richard Blake* (Hoopa Valley) is president of the Board of the National American Indian Court Judges Association, Boulder, Colorado.

Endnotes

1. Stated by Richard H. Pratt in *Official Report of the Nineteenth Annual Conference of Charities and Correction*, 1892.
2. See Romney, Lee. "Yurok Tribe's Wellness Court Heals with Tradition." *Los Angeles Times*, March 5, 2015. <<http://articles.latimes.com/2014/mar/05/local/la-me-ln-yurok-wellness-court-20140304>>; Liedke, Matthew. "Judicial Officials Celebrate 10th Anniversary of Wellness Courts in Cass Lake." *InForum*, December 8, 2016. <<http://www.inforum.com/news/4176237-judicial-officials-celebrate-10th-anniversary-wellness-courts-cass-lake>>

One Nation, One Voice Healing Ride: A Unique Tribal Service

The Dakota 38 Plus 2, an association of tribal nonprofits, have been organizing Healing Rides for over 10 years. The riders travel historic routes on horseback to learn about their culture and history. The rides provide a healing environment for foster and at-risk children, those suffering from substance abuse, and post-traumatic stress disorder.

According to Tracy 'Ching' King, a former Tribal president and a founder of the Indian Child & Family Resource Center (<http://icafc.org>), the healing effect on people in caring for and riding horses has roots in his peoples' religious beliefs. The routes they ride on the healing rides commemorate past tragedies and focus participants on surviving and thriving beyond their difficulties.

Learn more: <http://sunktanka.weebly.com/dakota-38-plus-2-memorial-ride.html>

Providing Hope for all Children and Families

One day, the local Head Start program invited me to a graduation ceremony. I was aware the young girl was attending the school, so I made an

Key Indian Child Welfare Resources

ICWA Regulations/Guidelines:

Federal Regulations:

<https://www.bia.gov/cs/groups/public/documents/text/idc1-034238.pdf>

Federal Guidelines:

<https://www.bia.gov/cs/groups/public/documents/text/idc2-056831.pdf>

ICWA Case Law:

ICWA Case Filings:

<https://turtletalk.wordpress.com/fort/icwa/>

State-Tribe Collaboration:

Tribal Law and Policy Institute Publications on Tribal-State Court Collaborations

<http://www.home.tlpi.org/tribal-state-court-collaboration-publica>

Tribal Engagement Strategies: Establishing and Sustaining Connections

<http://www.ncjfcj.org/resource-library/publications/tribal-engagement-strategies-establishing-and-sustaining-connections>

ICWA Compliance:

A Guide to Compliance with the ICWA

http://www.nicwa.org/Indian_Child_Welfare_Act/documents/Guide%20to%20ICWA%20Compliance.pdf

Improving Compliance with the ICWA: A Guide for Juvenile and Family Courts

<http://www.ncjfcj.org/resource-library/publications/improving-compliance-indian-child-welfare-act-guide-juvenile-and>

ICWA Checklists for Juvenile and Family Court Judges

<http://www.ncjfcj.org/resource-library/publications/indian-child-welfare-act-checklists-juvenile-and-family-court-judges>

Resolution in Support of Full Implementation of the Indian Child Welfare Act

http://www.ncjfcj.org/sites/default/files/FNL_ICWA_Resolution_07132013.pdf

Measuring Compliance with the ICWA: A Research and Practice Brief

<http://www.casey.org/measuring-compliance-indian-child-welfare-act>

Indian Child Welfare Act Search Guide

<http://www.familydesign.org/icwa-search-guide/>

Research:

Disproportionality Rates for Children of Color in Foster Care (Fiscal Year 2014)

<http://www.ncjfcj.org/Dispro-TAB-2014>

Videos:

Heart of ICWA Personal Stories Project

<https://www.youtube.com/channel/UCRRmU68Ih-20mEwUnSKnSavA>

Mississippi ICWA Video

<http://www.youtube.com/watch?v=VJCqeauLvY8>

Capacity Building Center for Courts ICWA News

<https://www.youtube.com/watch?v=68Gx9nSUQYw>

Organizations:

Capacity Building Centers for States, Tribes & Courts

<https://capacity.childwelfare.gov>

National Indian Child Welfare Association

www.nicwa.org

National Council of Juvenile and Family Court Judges

<http://www.ncjfcj.org/our-work/icwa-compliance>

National American Indian Court Judges Association

<http://www.naicja.org/>

Native American Rights Fund

<http://icwa.narf.org>

Tribal Law and Policy Institute

<http://www.tribal-institute.org/lists/icwa.htm>

The Importance of Measuring Case Outcomes in Indian Child Welfare Cases

by Alicia Summers and Kathy Deserly

As practicing child welfare attorneys, judges, and agency staff, you may not have a direct role in research on compliance or case outcomes for Indian Child Welfare Act (ICWA) cases....yet! New regulations were released in December 2016 that require child welfare agencies to gather ICWA data. Some of these data will naturally involve court processes you are involved in. Below is a summary of what we know about measuring ICWA case outcomes and ICWA compliance.

Native children are overrepresented in the foster care system at a rate 2.7 times higher than their rate in the population nationally. They are disproportionately represented at early decision points in the case, starting with investigation, removal, and entry into care. This should be surprising considering the higher standard for removing Indian children from their parent or custodian under ICWA and begs the question—*Are states really complying with the requirements of ICWA? And if so, Why are the outcomes so poor for Native children?*

Data Lacking in ICWA Cases

In nearly four decades since ICWA's passage, no federal agency was required to assure state compliance with ICWA's protections. While isolated studies focused on various facets of ICWA implementation and compliance, little in-depth data exists on actual child outcomes in ICWA cases.

ICWA funding—through the Bureau of Indian Affairs—was made available to federally recognized tribes and tribal consortiums early on. Programs developed through this limited funding soon became a loosely-knit nationwide network of tribal and Indian child welfare service programs, foster families, and advocates. The individuals working in these programs understood the historical underpinnings that led to the passage of ICWA.

New reporting requirements may provide the first opportunity to really examine case outcomes on a national level.

They witnessed in their own communities and elsewhere the disparities of numbers of Native children in state and county foster care systems. They saw many successes in their own communities because of ICWA, but due to the lack of specific federal oversight around compliance, these staff often struggled to share this information.

Commissioner Rafael López, of the Administration on Children, Youth and Families, noted regarding the absence of ICWA data in a recent interview with *The Chronicle of Social Change*: “Given the history we’ve had with the removal of Indian children from Indian country...not being able to articulate very clearly what’s happening to all children, let alone American Indian and Alaska Native children, is unacceptable.”¹

Emerging Compliance Efforts

More recently, several states, through their Court Improvement Programs (CIPs) or other agencies, have begun to explore compliance with ICWA in a more nationally coordinated way.

These studies typically result in reports to the court with descriptions of current practice and recommendations for improvement. Areas of research include descriptive information on how and when children are identified, how and when specific findings are made on the record (e.g., active efforts, imminent physical damage or harm), the use of qualified expert witnesses, and whether and how the court followed placement preferences.

Beyond those, some studies have begun to dig deeper to determine what types of active efforts are being made, what criteria is used to select qualified expert witnesses, and how the tribe is engaged in case processing. These studies provide descriptive overviews of compliance, but rarely go deeper to predict how current practices affect outcomes for Indian children and families. New reporting requirements may provide the first opportunity to really examine case outcomes on a national level.

AFCARS Reporting Requirements

In the last year, proposed changes to the Adoption and Foster Care Analysis and Reporting System (AFCARS)—a database that title IV-E child welfare agencies are required to report to for all children in foster care—will soon require that agencies report specific ICWA variables.

Among elements proposed are:

- instances where the state title IV-E agency inquired about information on a child’s status as an “Indian child” under ICWA
- transfers of cases to tribal courts
- legal notifications made to families and tribes
- whether and when the agency began to make active efforts

States will also have to document whether the foster care placement of Native American children meets the placement preferences established in ICWA, set to ensure that children are kept primarily near parents and with other members of the tribe. They will also have to report on the voluntary and involuntary terminations of parental rights in cases involving Native American parents.

These data can help inform local and national efforts by allowing an opportunity to identify and describe the unique needs of Indian children in foster care and paint a picture of the current state of ICWA compliance. The changes to AFCARS are huge for the field and will be critical to move understanding of ICWA cases forward in a meaningful way.

DOJ Compliance Efforts

In a separate effort to address ICWA compliance and improve outcomes, the Department of Justice (DOJ) is redoubling efforts to support the Indian Child Welfare Act, launching a new initiative to promote compliance with ICWA. Under this effort, DOJ will actively identify state-court cases where the United States can file briefs opposing the unnecessary and illegal removal of Indian children from their families and tribal communities. DOJ will work with the Department of the Interior and the Department of Health and Human Services to ensure all tools available to the federal government are used “to promote tribes’ authority to make placement decisions affecting tribal children, to gather information about where ICWA is being systematically violated and to take appropriate, targeted action...”²

State/Local Compliance and Technical Assistance

In addition to changes in AFCARS data, there are resources available to help state courts design and implement compliance efforts on the state and local levels. Organizations like the Children’s Bureau’s Capacity Building Center for Courts (CBCC) (see box)

The Capacity Building Center for Courts: ICWA Resources

The Capacity Building Center for Courts (CBCC) promotes ICWA compliance through resources, tools, and products that advance the interests of Indian children, tribes, and families.

Video. The CBCC produced a short video calling on dependency court professionals across the country to renew their commitment to promoting ICWA compliance. The video lists a number of additional resources available through the CBCC that support ICWA efforts. You can view the video at <https://www.youtube.com/watch?v=68Gx9nSUQYw>.

ICWA Quicksheet. This tool promotes continuous quality improvement. Coming soon is a 13 module online course covering the nuts-and-bolts of the Indian Child Welfare Act. The course includes the 2016 regulations and provides best practice tips for litigating ICWA cases in state courts.

ICWA judicial training. This training can be adapted to any state and weaves together the history and black letter law to provide a holistic overview of the statute, and ways to ensure ICWA compliance in court.

Future work. Over the next year the CBCC will develop an ICWA Baseline Measures Toolkit to help states make data-informed decisions about their ICWA efforts. A research agenda will guide the CBCC’s work and focus resources on issues that need the most attention. The CBCC is also working closely with state courts, agencies, and tribes to integrate the 2016 regulations and best practices into every courtroom, in every case.

—Andy Yost, JD, liaison,
Children’s Bureau’s Capacity Building Center for Courts
<https://capacity.childwelfare.gov/courts>

work directly with the CIPs to increase their capacity to meaningfully assess their work. ICWA is a priority for the CBCC, and their efforts include assisting with research design, tool development, implementing changes, data analysis, and reporting.

A new grant has also been funded by the Children’s Bureau that provides funding for states and tribes to jointly work to improve ICWA. North Dakota, Oklahoma, and Minnesota and associated tribes met in the beginning of December to start these efforts.

This work helps to disseminate research findings, enhance the robustness of research to better inform how ICWA compliance relates to positive outcomes for American Indian families and youth, and contributes to a growing evidence base for effective programs and practices.

Linking Outcomes to Measurable Data

There remains consensus among tribal social services and courts, and state staff who work closely with them, that ICWA has helped, even if there is more work to do. We still hear consistent anecdotes from tribal ICWA workers, state social workers, grandparents and children.

“When I was placed with my grandma I knew I was home”

“I was adopted and I’m looking for my tribe.”

“I want to know who my parents are ...I want to know who my relatives are”

“I miss my mom and dad, but at least I’m with family and I still get to see them sometimes.”

These are the voices and stories that ICWA workers and advocates hear

every day. It is the reason ICWA became law. Until these stories are linked to measurable data, they are just snapshots. Without oversight and appropriate data collection, the outcomes for Native children served by ICWA will remain elusive and the value of the law will continue to be questioned.

Alicia Summers, PhD, is the director of research and evaluation at the Capacity Building Center for Courts. She has worked for over 11 years on evaluation of child welfare court practice with states and tribes to improve outcomes for children and families.

Kathy Deserly, co-project director for the Capacity Building Center for Tribes, works for the Tribal Law & Policy Institute. She has worked at the tribal, state, and national levels for over 35 years. She founded the Indian Child and Family Resource Center, a training and technical assistance center for tribal social service programs.

Endnotes

1. Kelly, John. "38 Years after ICWA, Feds to Collect Data on Native American Foster Youth." *Chronicle of Social Change*, April 8, 2016. <<https://chronicleofsocialchange.org/subscriber-content/38-years-icwa-feds-collect-data-native-american-foster-youth/17310>>

2. White House Press Office. "FACT SHEET: Improving Outcomes for Our Nation's Foster Youth" White House Press Release, December 8, 2014. <<https://www.whitehouse.gov/the-press-office/2014/12/08/fact-sheet-improving-outcomes-our-nation-s-foster-youth>>

ABA Center on Children and the Law Spring 2017 Conferences

Tyson's Corner, VA

April 25-26: 5th National Parent Attorney Conference

Valuing Dignity & Respect for All Families

April 27-28: 17th National Conference on Children and the Law

SOAR—Strengthening Our Advocacy for Results

ICWA Preconference (April 24): The preconference will cover the substantive law and practical tips and techniques for lawyers. It will improve understanding of Native American clients and communities to better prepare lawyers involved in Indian child welfare practice. The preconference speakers will feature a number of contributors to this *CLP* issue.

Learn more: http://www.americanbar.org/groups/child_law/2017-conferences.html



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