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# Indian Child Welfare Act: Keeping Families Together and Minimizing Litigation

by Sarah Krakoff

**T**he Indian Child Welfare Act<sup>1</sup> ("ICWA") has been in existence for twenty-two years. Nevertheless state courts, state social service employees, county and court-appointed attorneys, and adoption agencies still struggle with how to incorporate the ICWA into state procedures for child welfare. Often, unfamiliarity with the ICWA and lack of exposure to Indian tribal governments cause missteps early in ICWA cases, putting the parties unnecessarily at odds. Under these circumstances it may be difficult for the Department of Social Services, the tribe, the biological parents, and foster care parents or prospective adoptive parents to come to a resolution regarding placement of the child.

While many cases involving the adjudication of an Indian child's placement may inevitably become contentious, others may be resolved cooperatively if the letter and spirit of the ICWA are followed from the outset. This article makes suggestions for steps the parties can take early in the process to assure full compliance with the ICWA, thereby minimizing protracted litigation.

## Background and Purposes Of the ICWA

Congress passed the ICWA in response to overwhelming testimony regarding the disproportionate removal of Indian children from their homes. Before the ICWA was passed, from 25 to 35 percent of all Indian children were separated from their

families and placed in homes or institutions, a rate from five to nineteen times greater than that for non-Indian children.<sup>2</sup> The devastating effect on Indian tribes was multiplied by the fact that most of these Indian children were placed in non-Indian foster and adoptive homes.<sup>3</sup> As stated in the ICWA itself,

[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and . . . an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes.<sup>4</sup>

The state courts' and social service providers' failure to recognize Indian cultural norms and family relationships contributed to this disturbing exodus of Indian children from their tribes.<sup>5</sup>

Congress responded by passing the ICWA, which provides procedural protections and minimum standards in child custody proceedings involving Indian children.<sup>6</sup> This ground-breaking piece of federal legislation, in an area of family law that is traditionally reserved for states, is justified by the unique government-to-government relationship that the United States has with Indian tribes.<sup>7</sup> The ICWA recognizes the rights and interests not just of Indian children to know their families, cultures, and political affiliations, but also the rights of Indian tribes themselves to ensure their ongoing vitality.<sup>8</sup> The ICWA has a dual scheme for ensuring the protection of both of these sets of rights. One aspect of the statute requires state courts to follow minimum federal guidelines in Indian child custody cases.<sup>9</sup> Another gives tribes the right to exclusive jurisdiction in certain cases and concurrent jurisdiction and intervention rights in others.<sup>10</sup>

## Identify Indian Children Early

Custody proceedings involving Indian children can become protracted if a child is not identified early in the process as one who warrants the ICWA's special protections. The ICWA defines an Indian child as:

any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.<sup>11</sup>

In Colorado, neither the tribe nor the Bureau of Indian Affairs ("BIA") need reach a conclusive determination regarding a child's eligibility for tribal membership as long as there is evidence for the trial court to conclude that the child is eligible.<sup>12</sup>

If a child is not identified as Indian at the outset of a child custody proceeding, the private or state agency may be close to finalizing a placement only to be halted by a party, typically the biological parents, Indian relatives, or the child's tribe, asserting failure to comply with the ICWA. Private and state agencies involved in pre-adoptive, adoptive, and foster care place-

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*This column is sponsored by the CBA Young Lawyers Division. This month's article was written by Sarah Krakoff, Associate Professor at the University of Colorado School of Law, Boulder—(303) 492-2641. Krakoff was the Director of CU's Indian Law Clinic from 1996 to 1999. Previously, she worked for DNA-Peoples Legal Services on the Navajo Nation (1993-1996).*

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ment should therefore implement rigorous, yet culturally sensitive, means for identifying Indian children.

Why is it difficult to identify Indian children? Some Indian parents are reluctant to acknowledge their tribal affiliation initially. Reasons for this may include shame or embarrassment because the parents do not want relatives on the reservation to know that there are difficulties with their children. A parent also may be fleeing an abusive situation on the reservation and be adverse to the tribe's involvement. Another cause of reticence is the fear, due to a history of discrimination, that being labeled an Indian will mean worse treatment by state authorities.

In almost all cases, parents at some point desire to invoke the ICWA's protections, even in situations where the parent is fleeing abuse. Moreover, the Indian child and the tribe have a right to the ICWA's protections whether or not the parent wants to invoke them.<sup>13</sup> Therefore, all parties benefit if the ICWA has been applied from the earliest possible point in the case.

How can state and private agency employees, who often are working under

stressful situations, do a thorough job identifying Indian children? The task need not be overly burdensome, and an extra measure of care early in the process might mean greater stability for the child in the long run. Oral interviews, including follow-up questions on the issue of the child's identity, are likely to be more effective at overcoming parental reluctance than paper questionnaires. If either parent is identified as Indian, the interviewer should be careful to determine in which tribe the parent is enrolled.

ICWA cases often are delayed by notice being sent to the wrong tribe. To the uninitiated attorney, it may be surprising that there are many different Sioux tribes in South Dakota, as well as some in Montana, North Dakota, and Nebraska. A notice sent to the Rosebud Sioux Tribe regarding a Cheyenne River Sioux child will fail to procure verification of the child's tribal affiliation.

Delay also can be caused by forwarding incorrect or insufficient information to the tribe. For example, delay may occur if the tribe fails to acknowledge a parent as a tribal member because the parent's name on the membership rolls is different from the one forwarded by the county attorney. State and private agencies therefore should ask Indian parents whether their names on tribal rolls might differ from their current names.

Finally, state and private agencies should be thorough with respect to determining whether an absent parent is a tribal member. Private adoption agencies should be particularly alert to this issue. Parents desiring to make their child available for adoption may want to conceal information about any possible tribal affiliation of the child. However, under the language of the ICWA, such children are covered and subject to the ICWA's procedural protections,<sup>14</sup> as well as to its placement preferences.<sup>15</sup>

If the child's tribal heritage is discovered after a preadoptive placement that does not comply with the ICWA, resolution inevitably will be heart-wrenching for all involved. Early detection minimizes the risk of having to disrupt the child's family connections after becoming settled in a new home. Early detection of a child's tribal affiliation, even if it is unclear whether the child is eligible for enrollment in the tribe, also should prompt the agencies involved to err on the side of compliance, both with respect to the procedural protections and the placement preferences.

## Embrace the Indian Tribe's Involvement

Under the ICWA, Indian tribes have the right to be notified of child custody proceedings involving Indian children in state court<sup>16</sup> and to intervene in those proceedings "at any point."<sup>17</sup> Tribes also have a presumptive right to have the proceedings transferred to their own courts.<sup>18</sup> Agencies should not look on these rights as impediments to swift placement of Indian children. Instead, state and private agencies should assume a partnership relationship with tribes in ICWA cases. With this approach, rather than perfunctory compliance with the ICWA, it is more likely that: (1) the ICWA's requirements will be followed in a manner that best insulates cases from successful appeals; and (2) the Indian child will be placed in a home that complies with the ICWA's preferences.

What advantages are there to making a friend of the tribe instead of an enemy? A good relationship with someone in the tribal attorney's office or the tribe's own ICWA program will make it more likely that the office will return phone calls and make the case a priority. Tribal ICWA programs, just as state social service programs, are swamped with cases. They will be more likely to focus on a particular case if they feel they are making a difference. With the tribe's enthusiastic involvement, it is easier to locate placements, such as Indian foster care homes and relatives of the child, that comport with the ICWA. Early placements complying with the ICWA avoid ugly conflicts that otherwise often arise between "bonding" with a non-Indian caretaker versus ICWA compliance.<sup>19</sup>

In addition, if the tribe requests the case be transferred to its court, all parties involved should consider the advantages of such a change of jurisdiction. For example, Indian parents relocating to urban areas and undergoing stress from dislocation, isolation, and poverty often have more resources on their reservations. The circumstances causing a parent to become entangled with social services may diminish in the tribal setting. Even if placement with the parent remains inappropriate, it also is more likely that the tribe will be able to locate and provide support for placements with relatives. Therefore, despite the common stereotype of unresponsive tribal service providers, it is important to recognize that the tribe may have more beneficial and efficient resources for placing Indian children than a state agency.

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## Follow the ICWA's Placement Preferences

The ICWA mandates that in preadoptive, foster care, and adoptive placements, Indian children shall be placed in prescribed settings, the first choice being with members of their extended families.<sup>20</sup> As mentioned above, many of the most difficult ICWA cases (and often the ones that make the worst law, from the Indian tribal perspective) are those in which an Indian child has been placed with a non-Indian caretaker for a prolonged period of time. Even if appropriate relatives and Indian foster homes are available, courts and social service providers are inevitably tempted to urge that "good cause" exists to deviate from the ICWA's preference for Indian placements to avoid disrupting the child's attachments.<sup>21</sup>

Colorado courts have not determined whether bonding alone constitutes good cause to deviate from the preferences.<sup>22</sup> However, in the case of *In the Interest of A.N.W.*, the court upheld a non-Indian placement based largely on the fact that the child had been with the non-Indian caretaker for a prolonged time.<sup>23</sup> Such efforts by state courts are understandable because a child who has bonded with a caretaker will undergo some loss if removed from the placement.

Additionally, an Indian child will suffer loss without connection to the tribe. The ICWA recognizes and prioritizes this connection, but state court judges often are swayed the other way. The only real solution is to avoid such Solomonian choices by adopting a default rule of placement in compliance with the ICWA. Implementing this suggestion depends on following the previous suggestions regarding early identification of an Indian child and constructive involvement by the child's tribe.

## Conclusion

The Indian Child Welfare Act has been a success in many regards. Indian children are less likely to be spirited away from their reservation homes by well-meaning, but culturally unaware adoption agencies and social workers. Indian tribes have social service programs of their own and perform many of the functions that formerly were monopolized by state courts and agencies. Many state courts and agencies have made admirable efforts to incorporate the ICWA into their family law regime, but the ICWA's promise is not yet fulfilled.

The same history that prompted the ICWA's passage haunts Indian families today. Many Indian people were deprived of resources essential for enabling them to be parents themselves, such as the culture of their own Indian parents. The situation often becomes more acute in urban areas. When Indian parents become ensnared in procedures requiring intervention for their children, all parties involved must understand that the ICWA does and should apply. If applied enthusiastically and early in the process, the ICWA can serve the best interests of Indian children and tribes, and ultimately of our proudly pluralistic society.

## NOTES

1. 25 U.S.C. §§ 1901 *et seq.*
2. H.R. 1386, 95th Cong. 2nd Sess. 1, 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531.
3. *Id.* at 11.
4. 25 U.S.C. § 1901(4).
5. H.R. 1386, *supra*, note 2 at 10-11, *reprinted in* 1978 U.S.C.C.A.N. at 7532-33.
6. *See* 25 U.S.C. § 1903(1) and (2) (defining "child custody proceeding" and "Indian child").
7. 25 U.S.C. § 1901(1); *see also* H.R. 1386, *supra*, note 2 at 17-18, *reprinted in* 1978 U.S.C.C.A.N. 7540-41.
8. *See* 25 U.S.C. § 1902 ("[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. . .").
9. *See* 25 U.S.C. §§ 1912 and 1915.
10. *See* 25 U.S.C. §§ 1911 and 1912(1).
11. 25 U.S.C. § 1903(4).
12. *In the Interest of A.G.G.*, 899 P.2d 319 (Colo.App. 1995).
13. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (Indian parents cannot defeat application of ICWA).
14. 25 U.S.C. § 1903(1)(iii) and (iv) (defining child custody proceeding to include preadoptive and adoptive placement); *see also Mississippi Band of Choctaw Indians, supra*, note 13 (applying the ICWA to voluntary adoptions).
15. 25 U.S.C. § 1915(a) ("In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.").
16. 25 U.S.C. § 1912(a) (requiring notification of the tribe in "any involuntary proceeding in a State court"). There is no notification requirement explicit in the ICWA for voluntary proceedings in state court, but because the tribe explicitly has a right to intervene and request transfer in such cases, *see* 25 U.S.C. § 1911(b) and (c), and because placement preferences apply to such proceedings, *see* 25 U.S.C. § 1915(a),

it is the better practice, if not the implicit requirement of the ICWA, to provide notice in voluntary proceedings as well.

17. 25 U.S.C. § 1911(c).
18. 25 U.S.C. § 1911(b) (state court can decline to transfer the case only for "good cause"). *See In the Interest of J.L.P.*, 970 P.2d 1252, 1256-7 (Colo.App. 1994) (discussing factors to be considered in good cause determination and finding that filing petition to transfer one year after tribe's receipt of notice was sufficiently timely); *compare In the Interest of A.T.W.S.*, 899 P.2d 223, 226 (Colo.App. 1994) (three-and-one-half-year delay and substantial steps toward permanency sufficient to establish good cause).
19. *See, e.g., In the Interest of A.N.W.*, 976 P.2d 365 (Colo.App. 1999).
20. 25 U.S.C. § 1915(a) and (b).
21. *See id.* (placement preferences are mandatory in absence of good cause to deviate).
22. *See, e.g., In the Interest of A.T.W.S., supra*, note 18 at 227.
23. *See In the Interest of A.N.W., supra*, note 19 at 369-70. However, Minnesota has determined that "a finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child's best interests." (*Emphasis added.*) *In re the Matter of Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994). ■

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