

Overview of ICWA: “the Most Ignored Federal Law Ever”

by Sherri Eveleth



Introduction

The Indian Child Welfare Act (ICWA) is “the most ignored federal law ever,” said Utah Court of Appeals Judge William Thorne in a 2003 ICWA training. Although the federal law was enacted in 1978, and Nebraska enacted the Nebraska ICWA with substantively the same provisions in 1985, the ICWAs are ignored or misapplied in a large number of ICWA cases. This article is an overview of the ICWAs. It is not meant to be a comprehensive ICWA practice manual, and there are straightforward aspects of the ICWAs, such as the right to inspect documents, that have been omitted from this article.

History of Indian Child Welfare

To understand the purposes and policies of the ICWAs, an understanding of the history of Indian Child Welfare and governmental policies toward Indians and Indian families is helpful. There are historical points that may assist in providing a framework for understanding.

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U.S. governmental policy toward Indians, for many decades, was acculturation and assimilation. There were many ways in which this was accomplished, but a few were particularly devastating to Indian families and Indian children. Boarding schools were instituted in the late 1800s to assimilate Indian children. Although some of the attendance at boarding schools was voluntary, attendance was all too often coerced or forced. While there are positive stories resulting from boarding schools, there are many more stories of children being kidnapped and tortured. Once at a boarding school, many of these children were not allowed to speak their Native languages, and a part of their culture died since not only were they prohibited from their language and cultural practices, but they also did not learn culturally appropriate material while they were away from their families. The parenting skills that they did learn were those that they were exposed to at boarding schools. Also, many of these children were farmed out as day laborers for farms or domestic help, and they were learning, and therefore replacing, their Native cultural practices with new information.

In addition to boarding schools, the 1950s relocation programs for adult Indians and Indian nuclear families separated them from their tribes. Individuals and nuclear families were lured from their reservations with promises of a better life and transported from the reservation to large cities such as Chicago and San Francisco. Often these individuals and families received little more than bus tickets, and when they arrived, they discovered that they had no support system. Extended family, so very important to child rearing and the guidance of young adults in many Indian cultures, was located hundreds of miles away.

While there were well-meaning advocates of boarding schools and relocation, there were many people who believed

that the best interests of an Indian child would be served by placing the child in a non-Indian adoptive home. Other advocates in the growing child welfare systems had no understanding of or misunderstood Native cultures, and children were removed based upon ignorance, misconceptions or misinterpretations. Estimates place the number of Indian children removed at 25% to 35% of all Indian children. Indian children were hemorrhaging from their families and tribes.

During the 1970s, Congress heard testimony about the removals. Congress found “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.” In Nebraska, many rural courtrooms had less than optimum access to federal laws, and the Nebraska ICWA was enacted in 1985.

Why the ICWA is Important in Nebraska

There are four tribes whose governmental headquarters are based within Nebraska’s borders: the Omaha Tribe, the Ponca Tribe, the Santee Sioux Nation and the Winnebago Tribe. The Omaha and Winnebago Tribes have reservation land in Thurston County. The Santee Sioux Nation has reservation land in Knox County. The Ponca Tribe has 12 counties that are designated as service areas by federal law (Boyd, Burt, Douglas, Hall, Holt, Knox, Lancaster, Madison, Platte, Sarpy, Stanton and Wayne) as well as Pottawattamie and Woodbury Counties in Iowa and Charles Mix County in South Dakota. In addition, there are three additional tribes with reservation land in Nebraska: the Oglala Sioux Tribe (The Pine Ridge Reservation extends into Sheridan County), the Sac and Fox Nation (Reservation extends into Richardson County), and the Iowa Tribe (Reservation also extends into Richardson County).

In addition to tribes in Nebraska, there are many tribal members who live in Nebraska. Although census records are by self report, and ICWA would not necessarily apply to each child, the Census revealed tribal members living in Nebraska who are affiliated with more than 200 tribes. To provide a better grasp of the number of public agency cases to which ICWA applies, recently there were 415 Native American children in out-of-home care in Nebraska. An additional 204 Native American children were receiving state services but were not in out-of-home care.

Legal Resources

Every ICWA practitioner should have the following resources at hand: the federal ICWA, 25 U.S.C. section 1901 et seq.; the Nebraska ICWA, Neb. Rev. Stat. 43-1501 et seq.; the Code of Federal Regulations ICWA provisions, 25 C.F.R. part 23 (contains, inter alia, the requirements concerning notice); and the Federal Register ICWA publications at 68

Fed. Reg. 68179 (2003)(Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs), 70 Fed. Reg. 13518 (2005) (Indian Child Welfare Act; Receipt of Designated Tribal Agents for Service of Notice), and 44 Fed. Reg. 67,584 (1979) (Department of the Interior Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings). Another resource for helpful information is the National Indian Child Welfare Association, found on the internet at nicwa.org.

The ICWAs

Application—The ICWAs are based upon the political distinction of the child as a member or eligible for membership in a federally-recognized tribe; it is not a racial distinction. The constitutionality of the federal ICWA has been upheld, with one court stating that the protection of the integrity of Indian families is rationally related to the fulfillment of Congress’s unique guardianship obligation toward Indians.

There is a two-pronged test to determine if the ICWAs apply. First, is the child an Indian child? “Indian child” is defined as a child who is a member or eligible for membership and whose parent is a member of an Indian tribe. Second, is the proceeding a child custody proceeding? Child custody proceeding is defined as foster care placement, termination of parental rights, preadoptive placement and adoptive placement. The definition of foster care includes placement in the home of a guardian or conservator. The ICWAs are applicable to public (state removal of a child from a home) and private actions (non-parent seeking custody or guardianship of a child). Child custody proceeding does “not include a placement based upon an act which, if committed by an adult, would be deemed a crime.” so if 16-year-old Johnny steals a car, that is not an ICWA case, but if 16-year-old Johnny is a truant, runaway or minor under the age of 18 in possession of alcohol—status offenses—the ICWAs apply to those cases. Confusion seems to set in when Johnny is removed for rehabilitation after stealing a car, but is not returned home after rehabilitation because his parents do not provide adequate supervision. Focus is on the child. If the purpose is rehabilitation after a criminal act, ICWA does not apply. If the child has “done his time,” but cannot be returned home due to reasons of neglect, ICWA applies at the moment that the focus is no longer on rehabilitation of the child. Some of the more advanced thinking agencies have realized that, even in juvenile cases when a child is charged with a crime, working with the child’s tribe provides additional resources or more effective resources since Native children often respond better to culturally appropriate intervention, and some judicial systems have been transferring these juvenile criminal cases to tribal courts.



“THE MOST IGNORED FEDERAL LAW EVER”

To determine whether ICWA applies to a case, many courts have addressed the issue of membership. Membership is not always the same as enrollment or registration with a tribe. In the 1800s, the U.S. government encouraged tribes to adopt blood quantum requirements of 50%. Blood quantum requirements were later reduced to 25% for many tribes. As a matter of sovereignty, some tribes refused to adopt blood quantum requirements, or changed their methods of determining membership, preferring to determine membership in traditional ways. For tribes that use blood quantum, errors have occurred that complicate matters. Often non-Indian employees of the U.S. government determined tribal roles and assigned blood quantum. These may not be accurate, and there may be errors in later calculations. Native Americans have often provided proof that determinations were inaccurate, and a tribe may revise its determination of membership. In addition, if there is doubt about paternity or if paternity is unknown, a father's blood quantum may not be included in the initial calculation and determination. Tribal determinations of membership may be based upon blood quantum, lineal descent, place of birth, residence on the reservation, adoption or any other method that the tribe determines is appropriate. Courts have stated that enrollment is relevant or probative, but not controlling. If a tribe determines that a person is a member, that determination is conclusive, and no state court has the right to look behind that determination.

If a tribe does not respond to notice, the other parties to the case should present evidence to allow the state court to determine the status of the child. Tribes may not respond for a variety of reasons, and the child and parents have rights under the ICWAs. Evidence may include documentation of enrollment or registration in a tribe, a Certificate of Degree of Indian Blood, an Indian Health Services card, or any other evidence that would tend to prove that a child is an Indian child.

Within ICWA cases, questions concerning two areas are often heard: the best interests of the child and the rights of the parties. Congress has determined that the application of ICWA is in the best interests of Indian children. ICWA is the starting point and the point to which any best interests analysis should return. The analysis of the rights of the parties begins with the child's status. The laws are the Indian Child Welfare Acts. A non-Indian parent in a case concerning an Indian child has the same rights and responsibilities as an Indian parent, and an Indian custodian, if there is one, has the same rights and responsibilities as the parents of an Indian child. With these rights, no party may waive the application of the ICWAs since to do so would waive the rights of other parties.

Active Efforts—The state or private party seeking the foster care placement of or termination of parental rights to the Indian child must show the court that active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family have been provided

and that the efforts have proved unsuccessful. Although “active efforts” is not defined, a plethora of case law states that active efforts is a concerted level of efforts more than that required for reasonable efforts. Active efforts are required prior to removal and are required throughout the case, and well-reasoned opinions have determined that despite the enactment of the Adoption and Safe Families Act in which reasonable efforts may not be required, the active efforts requirement of the ICWA continues to be valid.

Jurisdiction—If a child resides or is domiciled on a reservation or if the child is a ward of the tribal court, the tribe has exclusive jurisdiction over the child. Domicile is defined by federal law. If a child for whom the tribe has exclusive jurisdiction is located off reservation, the state has authority to remove the child in an emergency, but the state court does not have jurisdiction over the child. The child must be returned to the tribe. If Johnny is a ward of the tribe, but is visiting grandma in Nebraska, Johnny may be removed if grandma is in a car accident and cannot care for Johnny, but Johnny must be returned to the tribe. If Susie lives with grandma on the reservation but is visiting her mother overnight in Nebraska, and her mother disappears to get high, Susie can be removed, but must be returned to the tribe.

Notice—The ICWAs provide that notice in all involuntary proceedings must be sent by registered mail, return receipt requested to the parent (Indian or non-Indian), Indian custodian (if there is one) and all tribes in which the child is a member or may be eligible for membership. An Indian custodian is an Indian person who has legal custody or to whom temporary physical care, custody, and control has been transferred by the parent of such child. So if mom asks her Indian mother or Indian sister to babysit, Indian mother or Indian sister are entitled to the same notice by registered mail as the notice provided to the parent. Notice must also be sent to the Secretary of Interior if the identity or location of the parent or Indian custodian and tribe cannot be determined. Although Nebraska law states that notice may be served by certified mail, the federal ICWA mandates registered mail. Both ICWAs state that the higher standard is to be applied. Another state's case law has stated that certified mail was not acceptable, and a court order was reversed.

Since there are more than 560 federally recognized tribes, and some tribal names are very similar, use caution in identifying a tribe. For example, there is the Ponca Tribe of Nebraska (Northern Poncas) and the Ponca Tribe of Oklahoma (Southern Poncas). They are two separate federally recognized tribes. In addition, there are three Cherokee tribes, many Sioux tribes, and many other tribes with similar names. If there is any doubt, service upon all possible tribes must be notified. The ICWAs mandate notice to the Secretary of the Interior when parents or Indian custodians cannot be located, but it is always prudent to provide notice to the Secretary of the Interior according to the instructions in the Code of Federal Regulations.

Right to Counsel—In any case in which the court determines indigency, Parents and Indian custodians, but not tribes, are entitled to court-appointed counsel. Tribes are entitled to counsel at their own expense. Many tribes appear through a tribal ICWA Specialist. In the only published decision ruling on tribal appearance by a non-attorney representative, the Oregon Supreme Court ruled that the tribe's right to have a voice in the proceeding outweighed the state court's right to expedient proceedings by having counsel appear to represent the tribe.

Emergency Removal of an Indian Child—The ICWAs allow for the emergency removal of an Indian child by the state in order to prevent imminent physical damage or harm to the child. When the emergency has ended, the state must initiate a child custody proceeding, transfer the child to the jurisdiction of the tribe or return the child to the parent or Indian custodian.

Intervention—A child's tribe may intervene at any point in the proceedings. Some tribes intervene in every case in which they have a child. Many tribes have few resources, and some tribes monitor cases without formal intervention. Only when a problem arises do some tribes choose to intervene.

Transfer—A parent, Indian custodian or child's tribe may request that the case be transferred to the jurisdiction of the tribe absent objection by either parent. The state court must transfer the case, subject to declination by the tribal court, in the absence of good cause to the contrary. The good cause exception should be utilized only in extreme circumstances.

Creative professionals have developed ways in which to support the spirit of the ICWAs. Distant tribal courts have convened in locations close to the families involved in proceedings. Local tribes have allowed distant tribes to use local tribal courtrooms; state courts could do the same. Some states and tribes have entered agreements to transfer the legal portions of the case to the tribal court while the state remains financially responsible for services; in these cases, culturally appropriate services are provided, services that the state would have been responsible for if the case had remained in the state court, and the state saves the costs of litigation.

Burdens of Proof—The burden of proof to place a child in foster care is of clear and convincing evidence, including the testimony of qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage. The burden of proof to terminate parental rights is beyond a reasonable doubt.

Consent to Foster Care and Relinquishment of Parental Rights—Consent to place an Indian child in foster care or to relinquish parental rights to an Indian child must be executed in writing before a judge. The judge must certify that the terms

and consequences of the consent were fully explained, interpreted into another language if necessary, and understood. Any consent prior to, or within 10 days after, the birth of an Indian child is not valid.

Placement—The ICWAs specify adoptive and foster care or preadoptive placement preferences. The preferred placement for either is with a member of the child's extended family. Adoptive placement preferences also include other members of the child's tribe and other Indian families. Foster care or preadoptive placement preferences include a foster home licensed, approved or specified by the child's tribe, an Indian foster home licensed or approved by an authorized non-Indian licensing authority and an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs. The child's tribe may establish a different order of placement preferences by resolution. The ICWAs allow the placement preferences to be avoided if there is good cause, but this exception should be used only in extreme circumstances.

Return of Custody—When an adoption has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights, a biological parent or Indian custodian may petition for custody. The state court shall grant the petition unless a child custody proceeding shows that return of custody is not in the best interest of the child.

Noncompliance and Collateral Attacks—Any parent, Indian custodian or tribe may petition to invalidate actions upon a showing that the action violated any of the following ICWA provisions: jurisdiction, transfer, intervention, full faith and credit to public acts, records and judicial proceedings of Indian tribes, notice, time, appointment of counsel, examination of reports or other documents, active efforts to provide remedial services and rehabilitative programs, burdens of proof, failure to provide the testimony of expert witnesses, and consent.

In addition to petitioning to invalidate for violations, a parent may petition the court to vacate an adoption if the consent of the parent was obtained by fraud or duress. The federal ICWA limits this provision to adoptions that have been effective for less than two years unless otherwise permitted under State law, and some states have found that there is no time limit for a collateral attack based upon allegations of fraud or duress.

Responsibility for noncompliance rests with the state in public agency removals of children or with the private party seeking the placement of the child. The party seeking the placement of the child jeopardizes the permanency of the child when there is noncompliance with the ICWAs. 