

Chapter 6

Family Law in Tribal Communities

Roadmap

- Learn about the historical tribal restorative justice principles that applied to resolving issues involving family interactions.
 - Learn about the impacts of early U.S. Indian policy intended to assimilate American Indian families into a model of Euro-Christian farmers. The assimilation practices implemented during this time period continue to affect tribal families.
 - Understand the development of Tribal Courts as upholding tribal family values in dispute resolution and family law issues.
 - Understand the history leading to the enactment of the federal Indian Child Welfare Act and its continued importance in tribal communities.
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At the heart of every society are the principles that define and shape family life. For tribal peoples, traditionally the domestic sphere of life was in harmony with the governance structure of clans and the roles of each family member. The immediate and extended family formed a circle of relations around each person born or adopted into the Tribe. In Native languages, relative terms were employed to identify the speaker and the listener, underscoring a kinship relationship.

A. Principles of Restorative Justice in Historical Family Law Situations

Historically, family life in tribal communities naturally included common human disagreements and disruptions followed by efforts at reconciliation and resolution. Certain clans could be designated to provide mediators for disputes or certain wise individuals. Disruption to the social fabric was viewed as requiring

a realignment of relationships to bring the society back into balance. Restorative justice principles allowed for families to engage in the resolution process and require actions of the individuals in disharmony to make amends. A common way to conclude a restorative justice event was to provide a feast and dance for the entire community to demonstrate the return to harmony.

Family law as it is understood in contemporary times involves children, juveniles, elders, marriages, and domestic relations. These groups and issues are integral to the expression of values and social norms within tribal communities. From the historical practices of family life to the contemporary, the ability of tribal communities to positively impact family law has been shaken by U.S. Indian laws and policies. In this chapter, the impact of U.S. Indian policy on this aspect of tribal society will be examined in addition to the role of tribal judicial systems over the same time period to the present.

B. Impacts of Early U.S. Indian Policy Eras on Tribal Family Life

The devastation to tribal family life due to early U.S. Indian policies would be difficult to overstate. Inheriting the conflicts of the colonial governments, the newly formed U.S. engaged in warfare against tribal communities, leading to the killing of children, mothers, fathers, and families. When the U.S. Indian policy changed to one of removal and reservation containment, tribal family members died in the hundreds during forced marches, through severe hot weather conditions for some and brutal cold for others, across great expanses of country. The removal policy was intended to open up land areas for the benefit of white land speculators and to encourage white settlement. Once on reservation areas, starvation often set in as hunting, fishing and territorial harvesting were forbidden by U.S. Indian agents. Disease, famine, and warfare were the primary features of U.S. Indian policy for most tribal communities, leading to long term social disruption, deep mourning periods, depression, post-traumatic stress, and a legacy of suicide.

After the removal and reservation eras, U.S. Indian policy switched to assimilation and allotment. A major thrust of the assimilation policy was aimed directly at tribal children. Throughout the late 1800s and up through the mid-1900s, the U.S. Indian policy on education was to remove children from tribal communities and send them to distant boarding schools to receive educational, vocational, and “civilization” training. The trauma experienced by the tribal community in having their children taken and the trauma experienced by the chil-

dren, some as young as young as 4 years old, to be taken to a foreign military-style boarding school environment was intense and long lasting. The Bureau of Indian Affairs provided federal funding, often from treaty payments due to Tribes, for either the direct administration of federal boarding schools or to support Christian religious organizations administering boarding schools.

In 1928, the government authorized a survey on U.S. Indian policy impacts, “The Problem of Indian Administration,” commonly known as the “Meriam Report” after the principal author, Lewis Meriam. The Meriam Report reviewed Indian education policy and the conditions at the boarding schools and strongly condemned both under the Indian Service Administration. For example, the low salaries and qualifications of key personnel in the government-run boarding schools were highlighted as follows.

Matrons and “Disciplinarians.” One of the best illustrations of the need for better equipped personnel is in the case of such positions as “matron” and “disciplinarian.” The very words reflect an erroneous conception of the task that needs to be done; but whatever they are called, the positions need to be filled by people with appropriate training for this work. The matron of an Indian school influences the lives of boys and girls probably more than any other person on the staff. Education is essentially changing human behavior, for good or ill, and the manner in which the matron and disciplinarian handle the children in their care determines very largely the habits and attitudes that will go to make up what the outside world regards as their personality and character.

It seems almost incredible that for a position as matron the educational requirement is only eighth grade—and even this eighth grade standard is comparatively new. (Meriam Report, Chapter 6, 1928).

The disciplinarian nature of these mandatory educational institutions, the long distances from tribal families, and the abuse that was experienced by the children have left lasting impacts on American Indian communities to this day.

Further, the manner of operating the government-run boarding schools added an additional burden on the children forced to attend. The system was set up as a half-day plan with the children serving as the laborers in every capacity for the other half of the day. The Meriam Report took issue with this entrenched practice.

At present the half-day plan is felt to be necessary, not because it can be defended on health or educational grounds, for it cannot, but be-

cause the small amount of money allowed for food and clothes makes it necessary to use child labor. The official Course of Study for Indian Schools says frankly:

In our Indian schools a large amount of productive work is necessary. They could not possibly be maintained on the amounts appropriated by Congress for their support were it not for the fact that students [*i.e.*, children] are required to do the washing, ironing, baking, cooking, sewing; to care for the dairy, farm, garden, grounds, buildings, etc. — an amount of labor that has in the aggregate a very appreciable monetary value. (Course of Study for United States Indian Schools, p. 1 (1922).

The term "child labor" is used advisedly. The labor of children as carried on in Indian boarding schools would, it is believed, constitute a violation of child labor laws in most states. (Meriam Report, Chapter 6, 1928).

As several generations of American Indian children were mandated to the government and religious operated boarding schools, the cultural practices of child-rearing, homemaking, plant stewardship, art techniques, tribal languages, and hundreds of years of tribal knowledge were denied to these children as they were brutally punished for exhibiting anything culturally tied to being an American Indian. In the boarding schools and under the Indian agents on reservations, Christianity was imposed as the only acceptable means of spiritual expression.

On the reservations, the Indian superintendent reigned with an iron fist. Any parents refusing to allow their children to be taken to the boarding schools would face any number of punishments by the Indian agent. Those labeled insurgents could face starvation as the Indian agents doled out basic subsistence rations and would withhold rations as punishments. This was especially effective due to the labeling of any American Indians who ventured off the reservation as "hostiles" and subject to being shot by settlers or the U.S. military. Thus, off-reservation hunting was not an option for most of the early and mid-1900s following the establishment of the Indian reservations. The Courts of Indian Offenses were also employed in meting out punishments against those who resisted the U.S. government's assimilation policies.

C. Development and Role of Tribal Courts in Family Law

American Indians were not U.S. citizens unless a specific federal agreement or statute designated the citizenship status. In some treaties and allotment agreements, specific provisions set forth that by accepting an individual tract of land the Indian owner would become a dual citizen with both tribal citizenship and U.S. citizenship. By virtue of U.S. citizenship, tribal citizens would also legally become state citizens as well. The citizenship status of American Indians was important because state and federal courts barred those without U.S. citizenship from bringing cases. A famous example of the importance of American Indian classification under U.S. laws was the 1879 case, *Standing Bear v. Crooks* filed in the U.S. District Court in Omaha, Nebraska over which Judge Dundy presided. A family matter was at the core of the case.

Ponca leader, Standing Bear, had traveled from the Quapaw Reservation located in Indian Territory, present-day Oklahoma, back to his homelands to bury his deceased son in the lands that had become the state of Nebraska. The conditions of the Ponca Indians since removal from their homelands to Indian Territory had resulted in the deaths of almost one-third of the Tribe. In January of 1879, Standing Bear and a small group began the long arduous trek back to their homelands for the burial of his son, Bear Shield. They arrived at the Omaha Reservation in March of 1879 and were soon thereafter arrested and held at Fort Omaha under orders from General Crook. Local sympathy led to two attorneys advocating for Standing Bear and the Ponca group by filing a habeas corpus suit in federal court questioning the order of General Crooks to detain the group and return them to Indian Territory. A central issue to the case was whether Standing Bear was a person under U.S. law.

The attorney representing the U.S. government in the case, G.M. Lambertson, argued that Standing Bear as an American Indian did not exist legally as a person or as a citizen and could not bring suit against the United States government. Judge Dundy allowed Standing Bear to testify in the courtroom with the help of an interpreter. At the conclusion of the case, Judge Dundy issued his decision finding that an American Indian was a person under U.S. law; the habeas petition was properly brought before the court on behalf of Standing Bear; and that the Ponca group had the right to return and remain in their homelands. As a result, Standing Bear and the other tribal members were set free from U.S. military custody and carried forward the burial of Bear Shield on the banks of the Niobrara River. This case serves as an example of the legal standing of American Indians prior to the passage of the 1924 Indian Citizen-

ship Act, 43 Stat. 253 Act of June 2, 1924, and demonstrates the lengths tribal peoples have went to in order to properly carry out family obligations.

With the assimilation policies of the late 1800s outlawing Indian practices, forums to resolve disputes through traditional cultural ways were no longer available to most tribal communities. As discussed in Chapter 3 following the U.S. Supreme Court ruling in *Ex Parte Crow Dog*, 109 U.S. 556 (1883), that the federal courts lacked criminal jurisdiction for tribal member against tribal member crime in Indian Country, the U.S. Congress enacted the Major Crimes Act of 1885, 18 U.S.C. § 1153, asserting federal jurisdiction over crimes where the alleged perpetrator was American Indian and the crime was specifically listed in the Act. See Chapter 3 Criminal Jurisdiction in Indian Country on how federal criminal jurisdiction has since been expanded on tribal lands. Also in 1883, the U.S. Indian Service began setting up Courts of Indian Offenses handling both criminal and civil matters on Indian reservations.

The Code of Indian Offenses enforced by these courts outlawed cultural practices and served as a tool of assimilation for the local Indian agent. To foster the legitimacy of these early courts in Indian Country, tribal people were commonly selected by the Indian agent to serve as tribal judges. As U.S. Indian policy shifted to recognition of tribal constitutional forms of government, tribal courts were formalized in the constitutions. Tribes that did not adopt tribal constitutions also set up tribal court systems during this time period, such as the Navajo Nation.

Many tribal constitutions allow for the appointment and removal of judges to be vested in the tribal council. Thus, tribal councils may have the authority to remove a tribal judge in the aftermath of an unpopular court decision. Some tribal constitutions have been amended or contained provisions allowing for the initial appointment of a tribal judge by the tribal council and then subsequent elections to renew employment for the judge. Tribal governments have the ability to choose the process of appointing and/or electing judges to fit the particular needs of the tribal court. The judicial system is a key component to every modern government and should be insulated from pressure by political bodies to assure parties before the court that they will receive a fair hearing and just resolution.

Best practices for tribal judge positions may include the establishment of either a tribal court administrator or a tribal judiciary board to vet candidates and then submit recommendations for appointment to the tribal council. The election process for tribal judges may be another best practice that ensures community engagement in the selection of decision-makers for the tribal court system. Above all the tribal judge position should not be vulnerable to political removal or to influence in the decision-making role of the judge. For the Navajo Nation judicial system, a candidate for a judgeship must be approved by the

Navajo Nation President and the Navajo Council to serve a two-year probationary period. Once that period is satisfactorily completed, then the judge is sent through the approval process once more and if approved has a lifetime appointment in the Navajo Nation judicial system. An online resource on Tribal Court formation, structure, and operation is the Tribal Court Clearinghouse project of the Tribal Law and Policy Institute at: <http://www.tribal-institute.org/lists/codes.htm>.

One of the primary functions of a tribal court is to provide a forum for resolution of family law matters and issues arising from the domestic sphere of tribal life. The formalities involved in marriage, divorce, child custody, child support, familial visitation, adoptions, establishing paternity, and other matters concerning the family are all within the purview of the tribal court. Tribal courts are ideally suited for resolving family law issues as institutions that are tied to the local community, society and norms. Tribal courts apply tribal law and tribal values to resolve disputes, to manage family relations as necessary, to handle the disposition of estates and to distribute property in probate matters. One of the continued barriers to full tribal autonomy lies in the probate arena, where the United States as the legal title holder to Indian lands continues to exert jurisdiction over real property matters at death. As such, tribal courts may hear personal property matters and other end of life issues, but may have to wait for years of federal backlog to have closure on the full range of probate matters.

D. Tribal Children and Contemporary Laws

Tribal children are the ones who will carry forward the tribal culture, the tribal lifeways, the tribal government, and the tribal existence. Tribal Nations depend on tribal children to ensure that the tribal community continues on into the future. Throughout the history of the relationship with the United States, tribal children have been especially vulnerable to the assimilation policies of federal officials. After the devastating impacts of the mandatory government boarding school policies up to the early 1950s, tribal children were once again targeted for incorporation into white mainstream society through the process of state court adoptions.

1. The Systematic Adoption of Indian Children in the 1950s–1970s

Beginning in the late 1950s through the 1970s, American Indian children were removed from their home tribal communities through a concerted effort of

federal, state and private agencies. One such program was the federally-supported Indian Adoption Project. From approximately 1958–1967, the Bureau of Indian Affairs and the U.S. Children's Bureau federally-funded the Indian Adoption Project which was implemented by the Child Welfare League of America. The Project specifically sought out children with one-fourth degree or more American Indian blood on western reservations and placed them in white homes in midwestern and eastern states. Officially, 395 American Indian children were adopted into white families across the United States through the Indian Adoption Project's efforts. This official Project number doesn't represent the full picture of the push for Indian children adoptions. In the report of March 15, 1966 by Project Director Arnold Lyslo, survey results indicated that 696 Indian children had been "adopted out" of tribal communities in the year 1965 alone by over 90 agencies operating in states with large American Indian populations. This removal of American Indian children from tribal communities occurred during the Termination Era of U.S. Indian policy and worked to diminish the number of tribal members under the responsibility of the BIA.

State social workers also played a role in the removal of children from tribal homes during this time period. Using ambiguous characterizations of "neglect" for American Indian children in Indian homes, state and county social workers placed the children into mostly non-Indian foster care homes and eventually into adoptive placements. The Association on American Indians prepared a report for the U.S. Congress in the 1970s finding that from 25–35% of all American Indian children were in placements outside of their homes. Across the country, tribal leaders and organizations began a five-year lobbying effort for federal legislation to address the removal of Indian children from their tribal homes.

2. The Provisions of the Indian Child Welfare Act of 1978

As a result, the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. was passed in 1978. In the first section of the federal law, the congressional findings included the following:

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) 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; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. § 1901 (P.L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069).

In addressing these alarming past practices by state social workers and state courts, the Indian Child Welfare Act (ICWA) operates as a jurisdictional transfer statute for cases involving the placement of Indian children outside of their parental homes. The ICWA provides that such cases are to be transferred from a state court to the appropriate tribal court, 25 U.S.C. § 1911(b). State court transfer of an Indian child placement case may be withheld upon a finding of "good cause to the contrary," an objection by either parent, or declination of the transfer by the tribal court, 25 U.S.C. § 1911(b). Another provision in the ICWA mandates that the child's Indian custodian or a tribal representative has the right to intervene in any state court proceeding involving the placement of the Indian child, 25 U.S.C. § 1911(c).

3. Preliminary Core Principles for the Application of the Indian Child Welfare Act

Two preliminary core principles are important in understanding the operation of the ICWA. First is the definition of Indian child for the law to apply and second is the type of court proceedings where the ICWA becomes operative. The ICWA states the definition of Indian child as follows: "'Indian child' means 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," 25 U.S.C. § 1903(4). Thus, the membership criteria set in each Tribe's laws are of great significance in determining whether the ICWA will apply to a child in a state court placement proceeding. As discussed in the Introduction to this book, tribal membership has been tied to blood quantum standards set by the federal government and such standards are often entrenched in the contemporary tribal constitutions developed by the BIA in the 1930s.

The second preliminary core principle for application of the ICWA is the type of state court proceeding which will involve this federal law. The ICWA ap-

plies to an Indian child subject to a child custody proceeding in state court. As provided in the definition section of the ICWA, a child custody proceeding includes the following: foster care placement, termination of parental rights, preadoptive placement, and adoptive placement, 25 U.S.C. § 1903(1)(i)-(iv). In short, any placement of an Indian child outside of the parental home or the legal guardian home would involve application of the ICWA. Therefore, the ICWA is not operative for divorce proceedings where a child is placed in the custody of one parent or where joint custody is granted to both parents.

4. Exclusive Tribal Jurisdiction and Domicile

Within the ICWA, tribal court jurisdiction is recognized as exclusive for child placement proceedings where either: 1) the Indian child is the ward of the tribal court or 2) the Indian child is a resident or domiciled within the reservation of the child's tribe, 25 U.S.C. § 1911(a). The federal law does not define "resident" or "domicile" in the definitions section, 25 U.S.C. § 1903.

In 1989, the United States Supreme Court in *Mississippi Band of Choctaw v. Holyfield*, 490 U.S. 30, addressed the definition of "domicile" to determine whether the Mississippi Choctaw Tribal Court had exclusive jurisdiction over a voluntary adoption proceeding for twin babies. The case involved unwed parents both of whom were enrolled in the Mississippi Choctaw Tribe, lived on the Mississippi Choctaw reservation, and both of whom signed a consent-to-adoption form for the twins, 490 U.S. at 37-38. The local county court near the hospital where the mother gave birth entered the decree of adoption and did not refer to the Indian Child Welfare Act in the proceeding. Two months after the decree was entered in the county court the Tribe filed a motion to vacate the decree on the ground that exclusive jurisdiction over the infants was in the tribal court. The county court overruled the motion relying on the fact that the mother was off-reservation when the children were born and therefore, the children had never resided on the reservation, 490 U.S. at 38-39. On appeal, the Supreme Court of Mississippi affirmed and stated that the Tribe's argument was creative in asserting that the babies in their mother's womb lived on the reservation. In doing so, the court did not follow state court cases holding that a child's domicile followed that of the child's parents, 490 U.S. at 40.

In the U.S. Supreme Court, the court held that the state courts had failed to correctly apply the ICWA along with the common law principle that children are domiciled where their parents were domiciled. Under the ICWA, the decision stated that the situation was clearly governed by that federal law as the state court proceeding was within the definition of a "child custody proceeding" and the twin babies were "Indian children," 490 U.S. at 42.

Turning to the definition of the word "domicile" as critical to the operation of the federal law, the Court held that Congress did not intend for each state to define the term and give uneven results to the Indian Child Welfare Act. In fact, the Court's opinion pointed out that "the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct," 490 U.S. at 45. In applying the generally accepted definition of a minor's domicile, the Court's opinion stated the following.

It is undisputed in this case that the domicile of the mother (as well as the father) has been, at all relevant times, on the Choctaw Reservation. Tr. of Oral Arg. 28-29. Thus, it is clear that at their birth the twin babies were also domiciled on the reservation, even though they themselves had never been there. The statement of the Supreme Court of Mississippi that "[a]t no point in time can it be said the twins ... were domiciled within the territory set aside for the reservation," 511 So.2d at 921, may be a correct statement of that State's law of domicile, but it is inconsistent with generally accepted doctrine in this country and cannot be what Congress had in mind when it used the term in the ICWA. 490 U.S. at 48-49.

Noting that parents cannot defeat the provisions of the ICWA and cut the children's ties with the Tribe and that three years in litigation may have led to bonding with the adoptive parents, the U.S. Supreme Court concluded by upholding the language of the ICWA and finding exclusive jurisdiction in the tribal court, 490 U.S. at 52-55. In exercising its exclusive jurisdiction, the Mississippi Choctaw Tribal Court then approved the adoption to the non-Indians parents and required the adoptive parents to maintain contact with the children's tribal relatives.

5. The ICWA Procedural Safeguards for Involuntary Proceedings in State Courts

If the child custody proceeding does occur in state court, then the ICWA mandates procedural standards to uphold the purposes of the law. The state court is first mandated to send notice by registered mail to the child's Tribe and parent/custodian of any pending proceeding involving the Indian child and of the right of intervention in that proceeding, 25 U.S.C. § 1912(a). The court may not proceed with a placement or a termination of parental rights until at least ten days after the child's Tribe and parent/custodian have received the notice.

25 U.S.C. § 1912(a). Further, after notice is received, an additional twenty days to prepare may be requested by the child's Tribe and/or parent/custodian, 25 U.S.C. § 1912(a). The parent or Indian custodian of the child may be appointed an attorney for any removal, placement or termination of rights proceeding upon a determination of indigency or financial need by the court, 25 U.S.C. § 1912(b). Finally, the court may appoint an attorney to represent the Indian child when it would be "in the best interest of the child" in any removal, placement or termination of parental rights proceeding, 25 U.S.C. § 1912(b).

On June 25, 2013, the United States Supreme Court handed down its second opinion involving interpretation of the provisions of the Indian Child Welfare Act, *Adoptive Couple v. Baby Girl*, 570 U.S. ____ (2013). The 5-4 decision held that an Indian biological father who did not have physical or legal custody of his daughter was not covered under the protections of § 1912(f). In that case, a Cherokee father sought to intervene in South Carolina state court proceedings where the non-Indian unwed birth mother voluntarily placed their daughter born in Oklahoma up for adoption. The majority concluded: "In sum, when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated," Slip Opinion at 10. The Court cited to the BIA Guidelines, 44 Fed. Reg. 67593 (1979) as supportive of this announced requirement of pre-existing custody by the Indian parent prior to application of the ICWA provisions for parental rights termination under § 1912(f) and the provisions for active efforts to rehabilitate the Indian family under § 1912(d). Further the opinion provided that no other alternative party sought adoption of the child and therefore the placement preferences in § 1915(a) did not need to be applied for the Indian child involved, Slip Opinion at 15. The case was ultimately remanded back to the highest court in South Carolina to determine proper custody of the Cherokee girl.

During the legal battle, the child had been returned to her Cherokee father in Oklahoma by order of the South Carolina Supreme Court. After the U.S. Supreme Court decision was announced, the father was scheduled to attend a 30 day out-of-state training as part of his U.S. military service. The Cherokee Nation District Court, following an emergency guardianship hearing ordered that the step-mother, and paternal grandparents, which included a Cherokee grandfather to serve as custodians of the child during the father's short military leave. Later the same day, the South Carolina Supreme Court remanded the adoption case back to a lower state court to finalize the adoption to the non-Indian couple and to terminate the Cherokee father's rights, as he was not entitled to the ICWA's parental rights termination protections. With the new

situation that has arisen, more litigation will likely ensue. The litigation over the custody of this child as a citizen of the Cherokee Nation has involved the highest federal court in the United States, the highest state court in South Carolina, the courts of the state of Oklahoma and the District Court of the Cherokee Nation. This is an illustration of the complexity of jurisdiction involved due to the intersection of federal, state and tribal laws regarding tribal children.

Before a state court can order foster care placement of an Indian child or termination of parental rights, the state agency must prove to the court that a high level of efforts were made to support the Indian family and keep the family intact. The law expressly states that these efforts must be "active efforts" demonstrating that the Indian family received "remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful," 25 U.S.C. § 1912(d). For an Indian child to be placed in foster care, the court must determine by the high standard of "clear and convincing evidence" that the placement is necessary to prevent "serious emotional or physical damage" to the Indian child, 25 U.S.C. § 1912(e). When the state court must determine whether parental rights should be terminated, the ICWA asserts a very high standard for such a determination. The state court can only terminate parental rights if there is sufficient evidence to establish beyond a reasonable doubt "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," 25 U.S.C. § 1912(f).

If the state court determines that the Indian child will be placed in foster care, then the ICWA has established placement preferences that are mandatory unless good cause to the contrary is found, 25 U.S.C. § 1915(b). The order for placement of an Indian child in foster care is as follows:

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) 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 court is directed to follow a tribal resolution of the child's Tribe if a different preference order has been designated, as long as the court finds the placement will be "the least restrictive setting appropriate" for the particular child's needs, 25 U.S.C. § 1915(c). For the adoption of an Indian child under state law, the preference for the adoptive home is: "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other In-

dian families” unless there is good cause to the contrary for following this order of preference, 25 U.S.C. § 1915(a). These same placement preferences will apply to any Indian child’s removal from one foster care placement to another type of placement whether another foster care placement, a preadoptive placement or an adoptive placement, 25 U.S.C. § 1916(b).

For both foster care and adoption placement, the court is directed to consider the cultural and social standards of the Indian child’s tribal community in meeting the placement preference requirements. The ICWA identifies the appropriate community as “the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties,” 25 U.S.C. § 1915(d). Also, the court shall ensure that the records of the foster care or adoptive placement are maintained by the state and available for review at any time upon the request of the child’s Tribe or the Secretary of the Interior, 25 U.S.C. § 1915(e).

Within the federal law, the right to petition for the return of the Indian child that has been adopted is also provided for in certain situations. If an adoption decree is set aside or vacated for an Indian child, the Indian parent/custodian has the right to petition for the return of custody. Also if the adoptive parents voluntarily agree to terminate their parental rights to the Indian child, then the child’s biological parent or the prior Indian custodian may file a petition requesting the return of the child, 25 U.S.C. § 1916(a). A court receiving the petition will grant such petition except when it would not be in the best interests of the child applying the evidentiary standards set forth in section 1912 of the ICWA, 25 U.S.C. § 1916(a).

6. Voluntary Foster Care Placement or Adoption of an Indian Child

The Indian Child Welfare Act also governs when the biological parent(s) of the Indian child voluntarily choose(s) to relinquish custody of the child either to foster care placement or the adoption process. This process was at issue in the prior discussion of the U.S. Supreme Court case, *Mississippi Band of Choctaw v. Holyfield*, 490 U.S. 30 (1989). The voluntariness of such an action must meet the strict requirements of the federal law. The consent to terminate parental rights must be in writing, given before a judge and the judge must file along with the consent a certificate verifying “that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian,” 25 U.S.C. § 1913(a). No consent is valid within ten days prior to the birth of an Indian child or within the ten days following the birth, 25 U.S.C. § 1913(a).

As discussed above in *Adoptive Couple v. Baby Girl*, 570 U.S. ____ (2013), the U.S. Supreme Court’s opinion indicated that when an Indian child has a non-

Indian parent with sole custody who enters into a voluntary adoption of the child then the ICWA provisions on termination of parental rights may not apply for the Indian parent. In other words, an Indian parent’s rights are strongest when that parent has had custody of the Indian child. Each fact situation for a voluntary adoption of an Indian child must be carefully considered as a result of that U.S. Supreme Court opinion and the provisions of the ICWA.

When voluntary consent allows for placement of an Indian child in foster care, the parent or Indian custodian may withdraw his/her consent “at any time,” 25 U.S.C. § 1913(b). The Indian Child Welfare Act provides that once consent is withdrawn the child must be returned. In the situation of voluntary termination of parental rights, the parent may withdraw consent at any time up until the final decree of termination for any reason and the child shall be returned, 25 U.S.C. § 1913(c). When an Indian child is voluntarily placed for adoption, the parent may again withdraw consent for any reason up until the final decree of adoption and the child shall be returned, 25 U.S.C. § 1913(c). Further, the parent has the right to assert a challenge that his/her voluntary consent was obtained through fraud or duress within two years of an adoption decree. The parent may file a withdrawal of consent and petition the court to vacate the adoption decree for the return of the Indian child, 25 U.S.C. § 1913(d). If state law provides for a longer time period than two years to assert a challenge, then that will be available to the parent, 25 U.S.C. § 1913(d).

7. The Washington Indian Child Welfare Act and Tribal Court Exclusive Jurisdiction

The state of Washington’s actions involving the federal Indian Child Welfare Act provide an example of the complexity and need for clarification that can arise in this area of family law. Under Public Law 280, the federal government delegated its criminal and limited civil forum access for certain matters arising in Indian Country to specific states; see Chapter Three for more information on this federal law. In the Washington state legislation accepting the federal Public Law 280 delegation, the state explicitly asserted jurisdiction over a number of areas involving American Indian children, including compulsory school attendance, domestic relations, adoption proceedings, and dependent children, RCW 37.12.010. State courts in Washington and elsewhere exercising such jurisdiction would still be subject to the case transfer provisions of the ICWA under 25 U.S.C. § 1911(b) discussed previously. Further, the intervention rights in any state court child custody proceeding for the Indian parent/custodian and the child’s Tribe would continue intact under 25 U.S.C. § 1911(c). The interaction between the ICWA’s designation of exclusive tribal jurisdic-

tion and Washington Public Law 280 jurisdiction involving Indian children would be decisively clarified in state legislation in 2011.

The state of Washington provides an example of state proactive efforts through its Department of Social and Health Services (DSHS) to better implement the provisions and purpose of the ICWA. Following passage of the ICWA, the DSHS developed a manual on Indian Child Welfare policy for state caseworker practices and entered into specific tribal-state agreements on procedures. In 2004, tribal officials and DSHS officials held a summit to discuss solutions to the on-going problems and differing interpretations of the ICWA in state placement proceedings involving Indian children. From the summit, efforts turned to introducing state legislation incorporating the provisions of the ICWA and therefore, domesticating the federal law into state law. After almost seven years of revising draft legislation to meet concerns of legislators, adoption attorneys, foster care organizations, and tribal officials, the state law became effective July 22, 2011, RCW 13.38.010.

The relationships developed between the state DSHS and tribal officials provided the basis for incorporation of the ICWA into Washington state law and serves as a model for other state and tribal governments. By passing this state legislation, state legislators set forth the following intention.

The legislature finds that the state is committed to protecting the essential tribal relations and best interests of Indian children by promoting practices designed to prevent out-of-home placement of Indian children that is inconsistent with the rights of the parents, the health, safety, or welfare of the children, or the interests of their tribe. Whenever out-of-home placement of an Indian child is necessary in a proceeding subject to the terms of the federal Indian child welfare act and in this chapter, the best interests of the Indian child may be served by placing the Indian child in accordance with the placement priorities expressed in this chapter. The legislature further finds that where placement away from the parent or Indian custodian is necessary for the child's safety, the state is committed to a placement that reflects and honors the unique values of the child's tribal culture and is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, social, and spiritual relationship with the child's tribe and tribal community.

It is the intent of the legislature that this chapter is a step in clarifying existing laws and codifying existing policies and practices. This chapter shall not be construed to reject or eliminate current policies and practices that are not included in its provisions, RCW 13.38.030 Findings and intent.

The state law did provide clarification in many important respects. While other state courts across the country may still be embroiled in controversies over the interpretation of key provisions of the federal ICWA, Washington has straightforward state law to sidestep such controversies when Indian children are involved in placement proceedings.

Within the Washington Indian Child Welfare Act, the definitions section provides clear guidance on terms that had previously been subject to dissimilar treatment depending on the presiding judge or caseworker. For example, an express definition for "active efforts" and the minimum standards necessary to accomplish such efforts in reuniting an Indian family where a child is subject to a state placement proceeding is now available at RCW 13.38.040(1). Another significant provision of the state law was to address tribal exclusive jurisdiction. The state law largely tracks the ICWA provisions set forth at 25 U.S.C. § 1911(a). The following are the provisions from the Washington Indian Child Welfare Act, RCW 13.38.060:

- (1) An Indian tribe shall have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of that tribe, unless the tribe has consented to the state's concurrent jurisdiction, the tribe has expressly declined to exercise its exclusive jurisdiction, or the state is exercising emergency jurisdiction in strict compliance with RCW 13.38.140.
- (2) If an Indian child is already a ward of a tribal court at the start of the child custody proceeding, the Indian tribe may retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

Subsection 1 limits state concurrent jurisdiction assumed under Public Law 280 to instances where a Tribe has expressly consented to the state's concurrent jurisdiction, otherwise the tribal court will have exclusive jurisdiction over a tribal child residing or domiciled on the Tribe's reservation. With this clarification, Indian child placement proceedings no longer require a full analysis of the state's delegated jurisdiction under Public Law 280 to determine whether an Indian child on his/her home reservation is subject to a state court proceeding or is under the jurisdiction of the local tribal court.

Each state may enact its own version of the Indian Child Welfare Act to provide uniform application by state agencies and courts. Washington serves as a recent model of this process. California, West's Ann. Cal. Fam. Code § 170, and Iowa, I.C.A. § 232B.1, have also incorporated provisions of the federal ICWA into state law. It should be noted that problems may still arise in these states interpreting the state law. For example in the 2008 case, *In the Interest of N.N.E. 752 N.W.2d 1* (2008), the Iowa Supreme Court held that the Iowa state

ICWA's placement provisions were unconstitutional in a voluntary termination of parental rights proceeding by finding that under the federal ICWA the placement preferences could be disregarded on a finding of "good cause" which was not available under the Iowa ICWA, I.C.A. § 232B.9.

Another trend developed in the late 1980s has been to apply a standard known as the "existing Indian family" doctrine to allow state court judges to evaluate whether the Indian parent(s) of the child met the state judge's definition of an Indian family as a prerequisite for following the ICWA provisions. State court judges finding that the parent(s) did not culturally participate in their tribal heritage could then rule that there was no concern for the ICWA to address in placing the Indian child in a non-Indian home. This doctrine has been severely criticized for the subjective discretion of state court judges to define "Indian families" and add new requirements to the federal law, but remains active in some state court jurisdictions. For example, the Indiana Supreme Court has upheld the "existing Indian family" doctrine in the 1988 case *Matter of Adoption of T.R.M.*, 525 N.E.2d 298, and the lower state courts continue to follow that decision. Tennessee state courts also apply the doctrine following the Tennessee Court of Appeals decision in the case, *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997).

There has been another very recent trend in some jurisdictions to abandon this doctrine. In 2004, the Oklahoma Supreme Court determined that the doctrine "was no longer viable" for cases involving application of the ICWA in the state court case, *In the Matter of Baby Boy L.*, 103 P.3d 1099. Kansas state courts were the first to develop the doctrine and in 2009 the Kansas Supreme Court expressly rejected its further application in the case, *In re A.J.S.*, 204 P.3d 543.

Further, many states have passed laws known as "Safe Haven Acts," which give immunity from criminal prosecution to any parent(s) or legal guardian who(m) abandons a child to a state agency or medical facility. The standard provisions under these state laws provide that no identifying information can be required from the parent about the child. Without identifying information, the provisions of the ICWA can be easily circumvented when the abandoned child is an Indian child. Resolving the intersection between state safe haven laws and the federal mandates of the ICWA will require on-going communication between state, tribal and federal agencies.

8. The Bureau of Indian Affairs Guidelines on the Indian Child Welfare Act

On the federal level, the Bureau of Indian Affairs (BIA) has published guidelines as direction to state courts on the application of the ICWA. Appearing in 67584 Federal Register Vol. 44 No. 228 on Monday, November 28, 1979, "The Bureau of Indian Affairs, Guidelines for State Courts; Indian Custody Proceedings" (hereinafter, "BIA Guidelines") continue to be relevant and referenced in state court decisions. Most recently the BIA Guidelines were relied upon by the U.S. Supreme Court in the *Adoptive Couple v. Baby Girl* 2013 decision interpreting the parental rights termination provisions of the ICWA. The "BIA Guidelines" expand on some of the provisions of the ICWA and provide the federal agency's interpretation on some key terms of the federal law.

For example, the Indian Child Welfare Act does not address the situation where an Indian child is enrolled in one Tribe and eligible for enrollment in another Tribe or where the child is not enrolled in any Tribe, but is eligible for enrollment in several Tribes. The "BIA Guidelines" contain direction to contact only the Tribe where the child is an enrolled member in the first situation and in the second, directs that all Tribes where the child is eligible for enrollment receive notice of the placement proceeding, "BIA Guidelines B.2. Determination of Indian Child's Tribe."

One of the most expansive interpretations provided in the "BIA Guidelines" concerns the term "good cause" as applied to determine that "good cause" exists to halt transfer of the child placement proceeding from state to tribal court. The Indian Child Welfare Act does not define what is "good cause"—the standard necessary to prevent the child's case from being transferred to the child's tribal court, 25 U.S.C. § 1911(b). In Section C.3(b) Determination of Good Cause to the Contrary, the "BIA Guidelines" provide a list for a state court judge to consider to determine whether the Indian child placement proceeding should not be transferred to the child's tribal court.

b. Good cause not to transfer this proceeding may exist if any of the following circumstances exists:

- (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
- (ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

b.[sic] Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

c. The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

The basis for the factors listed are not supported by any explanation in the "BIA Guidelines" and seem to contradict the federal trust responsibility to Indian Tribes by articulating numerous ways to block transfer of an Indian child placement proceeding, including by determining that a child over the age of five "has had little or no contact with the child's tribe or members of the child's tribe."

The incorrectly lettered section contains two subsection "b"s. The second subsection b. does address part of the legislative history that led to the passage of the Indian Child Welfare Act. The perception of inadequate socio-economic conditions in Indian homes by state social workers or judges is expressly disavowed as a basis to block transfer of the proceeding to a tribal court.

Another provision of the "BIA Guidelines" establishes a right for an adult adoptee eighteen years or older to request from the state court the person's tribal affiliations. Section G.2(c) Adult Adoptee Rights provides: "[w]here state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record." Further in Section G.4, state courts are required to establish a recordkeeping location for all Indian child placement proceeding records and have them available "within seven days of a request by an Indian child's tribe or the Secretary [of the Interior]." These provisions support the return to tribal communities of Indians adopted out of Indian homes pursuant to state court proceedings.

E. Tribal Law and Tribal Families

Tribal governments may enact tribal laws on a wide variety of subjects that support tribal families and tribal values. The tribal value of gaining knowledge and wisdom is supported by tribal laws requiring children to attend school and holding parents responsible for truancy or excessive absences during the school year. Child protection and juvenile codes serve to translate tribal values into the societal norms enforceable in tribal communities to guide and protect the Tribe's youth.

1. Tribal Law and Domestic Relations

Social cohesion as a tribal value is enhanced with tribal laws that recognize legal unions in marriage. Marriage licenses are issued by tribal courts and marriage ceremonies take place in tribal courts. Tribal courts are employed to handle marriage dissolutions, child custody matters in the event of divorce or death of the child's parents, and property distribution as a result of a divorce. Recently, the traditions of same-sex marriage have been passed into official tribal law in several tribal communities. The Coquille Tribe of Oregon legalized same-sex marriage in May 2009 and the Suquamish Tribe of Washington in August 2011. In many pre-Christian tribal communities, same-sex couples were viewed as an important part of the community. The transgender and/or intersex individual was referred to in some tribal traditions as a "two-spirit" person with special spiritual gifts to assist the tribal community.

a. Tribal Communities and Domestic Violence

Also in support of healthy tribal families, tribal codes include provisions to address, appropriately punish and rehabilitate those engaging in the abuse of family members. Domestic violence laws may apply to any family member or may be written in separate codes to address particular family relationships. Spousal abuse and intimate relationship partner abuse are often the focus of tribal domestic violence protection laws. Elder abuse laws may also be enacted to protect the senior members of families from injury and harm. A tribal legislature may broadly define those protected by domestic violence provisions as simply "household members."

An Indian victim of domestic violence in a tribal community may seek a temporary protection order by filing a petition with the tribal court on an emergency basis. The temporary order will be enforceable by tribal law enforcement on tribal lands against an Indian defendant named in the order. The tribal court will schedule a hearing on the temporary order to allow for the al-

leged victim and defendant to each present testimony and evidence on whether the order should become a permanent protection order or should be dismissed. The hearing will often lead to other family law filings if the parties are married or have children together. Violation of a civil protection order may result in criminal prosecution if the tribal law provides for this in the criminal domestic violence laws.

Tribal Nations are increasingly dedicating funding and prioritization to domestic violence shelters for victims, counseling services for those involved in domestic violence, and rehabilitative services for perpetrators. Intertwined with issues of domestic violence may be substance abuse issues, lack of anger management skills, mental health issues, and other issues. Tribal courts are in a position to order a wide variety of program attendance and community service engagement for tribal members to resolve domestic violence situations in a holistic manner. In some instances, Tribal Wellness Courts have been established to bring community services into the lives of tribal members dealing with a host of issues.

As discussed in Chapter 3 Criminal Jurisdiction in Indian Country, creating safe tribal communities often involves navigating jurisdictional issues for the proper law enforcement and court authority to address the actions of an alleged perpetrator. When the alleged perpetrator is non-Indian, then tribal law enforcement and tribal courts are challenged to handle the domestic violence situation without local county and state partnerships. Tribal courts may order civil sanctions to a non-Indian perpetrator such as exclusion from tribal lands, civil fines or ordering participation in rehabilitative service programs. Due to the limitations on tribal criminal prosecution of non-Indians, cooperation with state law enforcement and courts is necessary to fully resolve such situations and hold accountable a non-Indian committing domestic violence acts against an Indian woman or Indian man on tribal lands and/or in tribal communities. In meeting these challenges, some tribal government officials have entered into agreements with local state officials to provide for recognition of tribal orders in state courts and vice versa.

With the 2013 amendments to the provisions in the Indian Civil Rights Act allowing for “special tribal domestic violence” jurisdiction, Tribes may choose to meet the federal requirements to assert jurisdiction over non-Indians committing domestic violence in the tribal community. There are significant requirements for a tribal judicial system to meet which will involve a weighing of advantages and disadvantages on these new provisions. See Chapter 3 for a fuller discussion of these amendments.

b. Mental Health and Substance Abuse Issues in Tribal Communities

In dealing with the changing eras of U.S. Indian policies, the vast majority of tribal families have experienced intergenerational poverty, dealt with racism, and experienced severe cultural transition and trauma. As tribal governments have rebuilt community infrastructure through social services and tribal courts, a priority has been to assist family members with mental health issues and/or who suffer from the effects of substance abuse. Many Tribal Nations have developed a tribal drug court program and/or a tribal wellness court program that is available to address all of the issues arising when a family is in crisis through ordering family members to attend substance abuse programs or mental health counseling programs. Often these services become necessary after a child neglect or abuse proceeding has been brought against parents in crisis. Tribal programs can be structured around the traditional tribal values that re-align families with the parenting and lifestyle practices known prior to the government boarding school era. Thus, these types of individual and family services can provide healing over generations and a return to wellness in tribal family life.

Checkpoints

- The domestic sphere of tribal law is an area where tribal values, culture and wisdom form the core. Tribal courts generally have exclusive authority in handling domestic issues occurring on tribal lands involving American Indians.
- Due to the U.S. Indian policy of assimilation, tribal members have suffered from the removal of children from tribal homes and federal conditioning to alter tribal culture and lifeways. Many tribal governments have prioritized protection of tribal languages, tribal knowledge, and tribal education systems to remedy the traumas from that policy era.
- The federal Indian Child Welfare Act (ICWA) was enacted to remedy cross-cultural misunderstandings of state agencies towards tribal families and provide a transfer process for cases involving placement of Indian children from state courts to tribal courts. Some states have passed their own state laws to further implement the provisions of the ICWA.
- Tribal family law continues to develop to address contemporary needs of tribal families. Tribal Wellness Courts are a current trend in addressing family issues in a holistic manner.