

After Adoptive Couple, ICWA from a Tribal Government Perspective

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I. Tribe's Interest

The Constitution of the Prairie Band Potawatomi Nation states the following: We the Nation, in order that our rights: inherent, United States Constitutional, treaty rights and other rights which arise from statutory law, Executive Order, tribal or other law or judicial administration be fully protected, exercised and preserved, to insure justice and our security, to maintain Potawatomi traditions and customs, to promote harmony, the common good, social and general welfare, and to secure the blessings of spiritual, educational, cultural, and economic development for ourselves and our posterity. (Prairie Band Potawatomi Nation Constitution 2007).

At the heart of the Indian Child Welfare Act, 25 U.S.C. 1901 et al, (ICWA), is the recognition that the best interests of Native American children will be served by protecting the relationships between Indian children and their tribes. *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 50 n.24 (1989). As stated by the Supreme Court of Arizona, [t]he Act is based on the fundamental assumption that it is in the Indian child's best interests that its relationship to the tribe be protected. *In re Appeal in Pima County Juvenile Action*, 130 Ariz. 202, 635 P.2d 187, 189 (1981).

This tribal interest was referred to in Justice Sotomayor's dissent in *Adoptive Couple*:

While there are indications that central among Congress' concerns in enacting ICWA was the removal of Indian children from homes in which Indian parents or other guardians had custody of them, see, e.g. Section 1901 (4), 1902, Congress also recognized that "there is no resource that is more vital to the continued existence and integrity of Indian Tribes than their children. Section 1901 (3). As we observed in *Holyfield*, ICWA protects not only Indian parents' interests but also those of Indian tribes. (See 490 US at 34, 52). A tribe's interest in its next generation of citizens is adversely affected by the placement of Indian children in homes with no connection to the tribe, whether or not; those children were initially in the custody of an Indian parent.

Indian nations have an interest in their children, a separate legal interest which allows them to intervene in a child custody proceeding under the ICWA at any time. There are no time constraints on the intervention right of the Tribe.

II. Tribal Law

The laws and the Constitution of the Prairie Band Potawatomi Nation are found at the Prairie Band Potawatomi Nation website (See www.pbpindiantribe.com). In its Law and Order Code, the Nation shows the importance of preserving the ties between its children and the Tribe. Title VI of the Code addresses neglect, dependency and adoption. The Purpose section of the Code describes the purposes of temporary removal procedures, in cases subject to Title VI (dependency and adoption), are in part to ensure that the interests of the Tribe with its youth are preserved throughout the child custody proceedings (*italics added*).

PBP Law and Order Code Section 6-1-2. Purpose

The purposes of these procedures are to:

- (A) Secure for each child, subject to this Title, such care and guidance, preferably in his own home, as well best serve his welfare *and the interests of the Tribe* and society in general;
- (B) Preserve and strengthen the ties between the child *and its Tribe* whenever possible;
- (C) Preserve and strengthen family ties whenever possible, and, to strengthen and improve the home and its environment when necessary;
- (D) Remove a child from the custody of its parents only when his welfare and safety or the protection of the public would otherwise be endangered; and
- (E) Secure for any child removed from the custody of its parents the necessary guidance and discipline to assist the child in becoming a responsible and productive member of its Tribe and society in general.

III. Tribes are Communities of Extended Families

Tribes are separate sovereign nations; separate political entities, yet Tribes are also networks of families and the families include frequently include extended degrees of familial relationships. Many tribal members are *aunties* and *uncles* to an Indian child even though they are not blood-related. Tribal communities view child-rearing as a community interest. Historically and not so long ago, Indian Tribes were forcibly removed from their original lands and as a result, although a Tribe may have a government center and primary operations on a reservation (although many Tribes are landless or are without a reservation), family members are frequently scattered throughout the United States and Canada. Thus, a relative placement or extended family placement may be outside of the state in which the child custody proceeding is filed. To locate, contact and review these possible placements requires the expenditure of additional efforts and diligence that all too often neither states nor Tribes have time or resources for. Nevertheless, the ICWA mandates that the placement preferences are complied with, and the Tribe's law frequently requires it.

Thus, the tribal community as an extended family network often may offer more relative and familial placement options than non-Indian families. Furthermore, to place a child away from their relations, frequently prevents them from interacting with tribal elders including their own grandparents. Tribes traditionally generally provide deference and respect for their tribal elders. Grandparents and elders have the obligation to instruct tribal youth in the ways and customs of the Tribe.

The Prairie Band Potawatomi have provided in their law for the rights and obligations of grandparents to continue through a child custody proceeding, including adoption, unless their rights have been formally extinguished. The Prairie Band Potawatomi Nation has adopted in its law, a provision for preferred placements for children who are subjects of tribal and state court dependency and adoption cases as well as laws granting grandparent rights:

PBP Law and Order Code Section 6-4-7. Placement Preferences

State courts shall follow the placement preference rules outlined herein. The Juvenile Court may consider the preference of the parents and the proximity of the prospective foster home to the child's home in applying these preferences. For each possible placement, the Juvenile Court shall

consider the willingness, fitness, ability, suitability, and availability of each person in a placement category before considering the next lower level of placement preference. In making a placement or committing legal custody of a child to some person in the dispositional process whether for foster care or adoption, the Court shall place the child in the following descending order of preference:

(A) The natural parents, adoptive parents, or step-parents as the case may be.

(B) A member of the Tribe over eighteen (18) years of age who is the child's blood-related relative.

(C) A member of another Indian tribe over eighteen (18) years of age who is the child's marriage-related relative.

(D) Any other member of the Tribe and their spouse.

(E) Any other Indian person and their spouse.

(F) An Indian foster home licensed by the social service agency, any other licensing authority within the State or licensed by some other tribe.

(G) An institution for children licensed or approved by the social service agency with a program suitable to meet the child's needs.

25 U.S.C. 1911 (c) and (d) provide that tribal law shall be followed if the Indian child's tribe establishes a different order of preference and so long as it is the least restrictive setting appropriate to the particular needs of the child and that the applicable social and cultural standards applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of 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.

PBP Law and Order Code Section 6-5-10. Grandparents Rights

No dispositional order or decree, including termination of parental rights and adoption, shall divest the child's grandparents of their rights to reasonable visitation and their duty to provide instruction and training regarding tribal customs and traditions provided those rights and duties have not been extinguished in a formal proceeding.

IV. Transfer to Tribal Courts

The ICWA provides for transfer of cases to Tribal Courts. The Prairie Band Potawatomi Nation District Court accepts for its review, motions to transfer state court cases involving child custody proceedings. The Potawatomi law and Order Code provides that transfers shall occur pursuant to the ICWA's provisions in Section 1911 (b). The law includes considerations regarding the best interest of the child and the resources necessary to support the case in tribal court:

PBP Law and Order Code Section 6-1-6. Transfers Between Courts

The Juvenile Court, in its discretion, is authorized to transfer, or accept a transfer, any juvenile case provided that such transfer would not be detrimental to the child's best interests. Transfer

from state courts shall be pursuant to the Indian Child Welfare Act, 25 U.S.C. §1911 (b). Transfers from other courts may be determined by eligibility status, domicile and residency.

PBP Law and Order Code Section 6-1-7. Transfer Criteria.

In making transfers, or accepting transfer, the Juvenile Court will consider:

- (A) The best interest of the child;
- (B) Any special needs and services that may be required and the availability of such resources;
- (C) Emotional, cultural and social ties;
- (D) Any matters which may adversely affect the Tribe's ability to provide treatment or necessary services; and
- (E) The likelihood that the same child and family would require future services of this Court.

V. Continued Development of Tribal Resource Infrastructure

Where possible and where resources allow, tribal governments should continue to create and develop infrastructure to ensure that tribal members are aware and knowledgeable of opportunities for adopting tribal members and tribal member eligible children. Tribes need to develop extensive and solid foster family network including relative placements, temporary and long term placements, Indian family placements and tribal and Indian adoptive parents. Tribes need one or more ICWA contact persons to actively identify, train, and create and maintain a database of viable tribal placements as well as a resource to tribal members who are involved in proceedings under the ICWA.

Tribal member and Indian families must be ready and willing to become adoptive families. The Court's holding in *Adoptive Couple*, is a clear signal to individuals who fall within the placement preferences who may want to adopt (even if that intent is contingent upon whether parents' rights are terminated) they should formally file a petition for adoption if there are other pending petitions for adoption by individuals who are not preferred placements. The costs of legal counsel are a challenge and an obstacle for many Tribes and tribal members. To the extent that state legal aid and/or tribal legal services can provide assistance, this information should be provided to members and families interested in adoption and other placement options.

Unfortunately it is usually a struggle to accomplish some of these things due to a lack of resources including infrastructure, training, and/or other resources including specialized training for foster families and relative placements for children who have special needs. Tribal placements and homes where there are trained providers for children with special needs must be developed as these are almost non-existent. Non-ICWA federal law requires states to include in their State Plan: [T]he diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed (See 42 U.S.C. § 622(b)(7).)

VI. Remedial and Rehabilitative Services

Tribes may be able to provide “remedial and rehabilitative services” to private and state agencies who are involved in child custody proceedings under the ICWA. Tribal governments may have vocational rehabilitation, independent living, housing, language, commodity, transportation and numerous other services that they may be able to provide the tribal member parent for remedial and rehabilitative services. Families involved in a child custody proceeding may prefer to work with tribal services and may be more inclined to partake in these services if offered by a tribal entity

Common Issues and Misconceptions and Recommended Practice in ICWA Cases:

The following are common misconceptions that arise in ICWA cases as well as recommended practices. (For further information see National Council of Juvenile and Family Court Judges ICWA Facts and Fiction Series, Technical Assistance Bulletin, 2013)

1. Issue: Notice to Tribe

Notice should be sent by registered mail to the Tribal Chairperson or ICWA representative and contact should be initiated through other avenues of communication such as email and telephone, in conjunction with registered mail, to facilitate response. Use the internet, contact the BIA or State Indian Affairs Office to find tribal addresses and contact information. Notice is required to be provided to the tribe, parents, and Indian custodian in all ICWA proceedings.

Common Misconceptions

- A child must be a tribal member for the ICWA notice requirements to be triggered. (Fact: A child must only be eligible for enrollment and be the biological child of a member of an Indian tribe. Eligibility for enrollment differs by tribe and can only be determined by the tribe. A lack of response from a Tribe is not proof of non-eligibility.)
- Notification is required only at the beginning of the case. (Fact: If notice is not provided to the tribe at the beginning of a case and the tribe is later identified, the tribe must be notified as soon as possible thereafter.)
- Tribes are difficult to notify because it is confusing to locate the right person(s) to give notice to and even when notice is given, tribes tend not to respond or intervene. (Fact: There are many tools available to identify tribes and to locate the correct address or contact information to contact a tribe. The BIA publishes a list of ICWA Federally Designated Agents found online on the BIA website. Tribes’ ability to respond and participate actively in a case varies with each tribe’s resources and budget, but each tribe has the right to notice and the right to participate.)
- Rather than give notice to the actual tribe, notice to the Bureau of Indian Affairs (BIA) is sufficient. (Fact: Where the identity or location of the parent, Indian custodian, or the Tribe cannot be determined, giving notice to the BIA is required.)

2. Issue: Tribal Membership

Membership and eligibility for membership in an Indian tribe can be a complicated issue because every tribe has different membership requirements, especially for a child who may be eligible for

membership in more than one tribe. While tribes have exclusive authority to determine membership, in cases where children may be members of more than one tribe the court may have to make a determination as to which tribe is the Indian child's tribe for purposes of the ICWA case. This decision affects all parts of an ICWA proceeding, including which tribe will participate in a case and where the child may be placed.

Common Misconceptions

- ICWA does not apply to a child who is not an enrolled member of a tribe. (Fact: A child who is eligible for membership in a tribe is covered by ICWA so long as one biological parent is a member of a tribe.)
- Tribes try to get as many members as possible, even children who do not really qualify for membership. (Fact: Tribes have exclusive authority to determine their own membership. Membership is a political classification under the United States Constitution, not a racial one, and special treatment of tribes and Indians under federal law is justified. Tribal constitutions and laws provide requirements for tribal membership. Many tribes have a tribal enrollment department that processes applications.)
- Indian children can be members of more than one tribe at a time. (Fact: Membership criteria and qualifications vary between tribes. Most tribal constitutions as well as some federal requirements prohibit a person from being a member of more than one tribe at the same time even though they may be eligible for membership in more than one tribe, and it is eligibility that triggers ICWA.)

3. Issue: Tribe's Right of Intervention

Tribes should be allowed to participate in court proceedings when necessary by telephone, video conferencing, or other media and to the extent possible, court hearings could be scheduled to facilitate the attendance of tribal participants.

Common Misconceptions

- If a tribe does not intervene in an ICWA proceeding, ICWA does not apply. (Fact: Whether a Tribe intervenes or not does not affect the applicability of ICWA)
- If a tribe does not immediately intervene after receiving notice, the tribe loses its right to intervene later. (Fact: Tribes have the right to intervene at any time in the proceeding including intervening for the first time on appeal)
- If a parent objects, the tribe cannot intervene in an ICWA proceeding. (Fact: Parents cannot object to tribal participation in a case; the tribe's right to intervene exists independently of parental rights.)

4. Issue: Transfer to Tribal Court

The ICWA does not require a Tribe to file a motion to transfer within a certain time frame. ICWA presumes that transfer of jurisdiction is in the best interests of the child and tribe, and requires good grounds before such a motion can be denied, unless a parent or child objects. Reasons that might constitute good cause are set out in the 1979 BIA Guidelines. The good cause language of § 1911(b) is designed to give the state court flexibility to meet the best interests of the Indian child, for reasons consistent with the intent of ICWA. If applied at all, the

best interest standard should be reconfigured so as to give full consideration to the distinct cultural interests of Indian children, and to the finding of Congress that it is in the best interests of Indian children to foster their knowledge of, understanding and involvement with their native heritage and Indian communities.

Placement of the Indian child is always of paramount concern to the tribe and parents. The court and state social services agency should not impose the dominant culture's notions of what constitutes a normal family and home situation for the adequate family conditions on the reservation. The Act requires consideration of the prevailing standard of the Indian Community.

5. Issue: Active Efforts

State and Tribal social services workers should jointly develop a case plan designed to meet the needs of the Indian family to achieve reunification. Tribal services should be an integral component of any such case plan. Social services workers should actively assist family members in accessing and completing recommended services. Service provision designed to address the specific needs of the particular family and active participation in assisting the family in accessing and participating in those services will allow permanency to be achieved more quickly for Indian children, whether that permanency is reunification or an alternative permanent placement.

Common Misconceptions

- If aggravated circumstances exist under state law, the State does not have to provide remedial and rehabilitative services to the Indian family. (Fact: ICWA active efforts standard exists independently of standards enacted pursuant to ASFA that allow remedial efforts to be terminated when aggravated circumstances exist, and case law consistently confirms the requirement to provide remedial efforts under ICWA even when the ASFA standard has been met.)
- Whatever is required under state and federal law meets the active efforts requirement under ICWA. The family is responsible on their own for complying with the service requirements of the case plan. (Fact: The remedial and rehabilitative services requirement of § 1912(d) requires something more than is required under general state law. The social services agency must actively assist the Indian family in achieving the case service plan objectives.)
- Tribes are too under-resourced and do not have anything to offer with regard to providing services to the family. (Facts: Tribes can be valuable partners in providing services in general as well as culturally appropriate services that will meet the active efforts standard even if they have few resources.)
- No services have to be provided if a parent is in prison. (Fact: Active efforts for a parent in prison are judged by the services available in that environment.)

(Except that pursuant to Adoptive Couple, § 1912(d) ICWA does not apply to a parent who has not had prior legal or physical custody of an Indian child, because § 1912(d) applies only in cases where the “breakup” of the Indian family would be precipitated by termination of the parent's rights, and in the case of a parent without prior legal or physical custody, there is no Indian family relationship that would be discontinued. Baby Girl Veronica involved a voluntary adoption, and this holding likely does not apply in an involuntary ICWA child custody proceeding.)

6. Issue: Placement Preferences

Placement of an Indian child may be the tribe's highest interest in an ICWA case. In many cases the tribe may defer to the state primary responsibility to try to reunite a family while still remaining involved. But when reunification does not work, the Tribe has primary interest in continuing or developing its relationship to a child or children, and ensuring placement of tribal children within the extended family and/or tribal community. Normal practice and procedure in state courts, including the general placement of Indian children in non-Indian foster or adoptive homes, is in conflict with the placement requirements of ICWA.

Common Misconceptions

- A parental preference as to placement of an Indian child is controlling and overrides the preference of the Tribe and relatives as to placement of that Indian child. (Fact: Parental preference in placement of an Indian child is a factor to be considered "where appropriate" but should not automatically override the right of the Indian child to be placed pursuant to ICWA).
- ICWA does not apply and the tribe does not need to be notified if the parent wants to remain anonymous in a voluntary placement. (Fact: The tribe's right to participate in an ICWA proceeding cannot be affected by the wishes of the parent for anonymity.)
- The placement preferences in ICWA trump a tribe's placement preferences. (Fact: If the tribe's preferences are different from the ICWA preferences, the court must follow the tribe's preferences.)
- Bonding of an Indian child with non-Indian caretakers is good cause not to follow ICWA placement preferences. (Fact: In most cases, bonding cannot be used as grounds to avoid the placement preferences. There may be a few cases with extraordinary circumstances that could be considered, along with other factors, in determining whether good cause to avoid the placement preferences exists.)
- A general placement search conducted by the agency will suffice in ICWA cases. (Fact: The placement provision is the most important section of the Act. ICWA sets out specific preferences for placement of an Indian child which must be followed in the absence of good cause to the contrary. The burden of proof is on the party opposing application of the placement preferences. A comprehensive and diligent search of placements within the placement preference order must be conducted. A home within the placement preferences must be found unsuitable before an alternative placement can be considered.)

Resources and Further Reading

Bureau of Indian Affairs, Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (1979)

www.pbpindiantribe.com

www.narf.org/icwa/

www.ncjfcj.org