



Child Custody Proceedings Under the Indian Child Welfare Act (ICWA): An Overview

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Summary

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) in response to legislative findings of harm caused to Indian children, their families, and tribes by the high separation rate of Indian children from their homes and cultural environments. Congress addressed this situation by granting Indian tribes and Indian parents an enhanced role in determining when to remove Indian children from their homes and cultural environments. Specifically, ICWA enumerates provisions for tribal jurisdiction and tribal intervention in state court proceedings concerning the custody, adoption, foster care placement, and termination of parental rights of Indian children.

Although there were no proposals to amend ICWA in recent Congresses, the debate over provisions of ICWA remains an issue of concern. This report provides an overview of some of the goals and provisions of ICWA, and will be updated as warranted.

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Background¹

Congress enacted the Indian Child Welfare Act (ICWA)² in 1978 to address the high rate of separation of Indian children from their homes and cultural environments.³ Prior to 1978, as many as 25 to 35 percent of the Indian children in some states were removed from their homes and placed in non-Indian homes.⁴ This practice of removal fragmented families and threatened the continued survival of Native American tribes. Respect for the self-determination of tribes required, in the view of Congress, that tribes be given a greater say in decisions affecting Indian children.⁵ In evaluating the perceived biases of state agencies, the House report accompanying the legislation cited the apparent inability of social workers to accord proper recognition to factors in Indian environments that tended to mitigate the severe economic deprivations found on many reservations, deprivations that often served as a basis for state agency neglect findings.⁶ The legislative history also indicated that Indian parents often lacked adequate legal representation in child custody proceedings and were frequently coerced into voluntary waivers of their parental rights.⁷ As a result, addressing the situation was thought to require both procedural and substantive components to promote a policy of stability and security for Indian tribes and families while also ensuring that the foster and adoptive homes of Indian children reflected the unique values of Indian culture.⁸

Coverage

ICWA applies to Indian children involved in certain child custody proceedings. For purposes of ICWA, an Indian child is an unmarried individual under age 18 who is either a member of a federally recognized Indian tribe or the biological child of a member of a tribe and eligible for membership in a tribe.⁹ Membership eligibility is evaluated by tribes and the requirements vary widely by tribe.¹⁰ Under ICWA, Indian custodians include any Indian person with legal custody of an Indian child under tribal laws, customs, state laws or “to whom temporary physical care,

¹ This report was prepared on December 14, 2006, by Kamilah M. Holder, a former legislative attorney in the American Law Division.

² P.L. 95-608, 92 Stat. 3069 (1978); codified at 25 U.S.C. §§ 1901 -1963.

³ 25 U.S.C. § 1901(4). This embodies a congressional finding that an alarmingly high number of Indian children were being removed from their homes by nontribal public and private agencies and often placed in non-Indian institutions or homes.

⁴ H.Rept. 95-1386, 95th Cong., 2d Sess. 9 (1978).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ 25 U.S.C. § 1902.

⁹ 25 U.S.C. § 1903(4). Under 25 U.S.C. § 1903(8), “‘Indian tribe’ means any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43.”

¹⁰ Cohen’s Handbook of Federal Indian Law § 3.03[2] (Nell Jessup Newton et al. eds., 2005 ed.) [hereinafter Cohen’s Handbook].

custody, and control has been transferred by the parent of such child.”¹¹ ICWA applies in the following child custody proceedings:

- a foster care placement;¹²
- any action “resulting in the termination of the parent-child relationship”;¹³
- a pre-adoptive placement that consists of “the temporary placement of an Indian child in a foster home or institution after the termination of parental rights but prior to or in lieu of adoptive placement;”¹⁴ and
- an adoptive placement, which refers to the final placement of an Indian child for adoption including any action that results in a final decree of adoption.¹⁵

However, “child custody proceeding” does not include an award of custody in a divorce proceeding; nor does it include a placement based upon an action by the child that would be a crime if committed by an adult.¹⁶

Jurisdiction

Among the most important elements of ICWA are its jurisdictional provisions. In enacting ICWA, Congress recognized that Indian tribes have distinct societal interests in the lives of Indian children that can be distinguished from that of the parents. In preserving these interests, ICWA both enhances the jurisdictional reach of tribal courts and provides a right of intervention in state court proceedings that involve Indian children.¹⁷ In part, the act delineates areas of exclusive tribal jurisdiction and those of concurrent state and tribal jurisdiction.

Exclusive Tribal Jurisdiction

Under ICWA, an Indian tribe generally has exclusive jurisdiction over an Indian child who resides or is domiciled within the tribe’s land.¹⁸ Indian tribes also have exclusive jurisdiction over Indian children who are wards of a tribal court that has previously exercised jurisdiction over their cases.¹⁹ There are two exceptions to the grant of exclusive tribal jurisdiction. Tribal courts do not have jurisdiction where jurisdiction is “otherwise vested in the State by existing Federal law.”²⁰ The other exception is the emergency removal of a child who resides or “is domiciled on

¹¹ 25 U.S.C. § 1903(6).

¹² 25 U.S.C. § 1903(1)(i). “Foster care placement” encompasses placements in which the parent or Indian custodian cannot have the child returned upon demand but the parent’s rights have not been terminated.

¹³ 25 U.S.C. § 1903(1)(ii).

¹⁴ 25 U.S.C. § 1903(1)(iii).

¹⁵ 25 U.S.C. § 1903(1)(iv).

¹⁶ 25 U.S.C. § 1903(1).

¹⁷ 25 U.S.C. § 1903(12) defines tribal court as “a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.”

¹⁸ 25 U.S.C. § 1911(a).

¹⁹ *Id.*

²⁰ 25 U.S.C. § 1911(a). This exception most often applies in states that have assumed civil jurisdiction over Indian (continued...)

the reservation, but temporarily located off the reservation, from his parent or Indian guardian in order to prevent imminent physical harm.”²¹ Under ICWA, federal, state and tribal courts must all afford full faith and credit to the orders and judgments of a tribal court that has exercised jurisdiction in an Indian child custody proceeding.²²

Concurrent Jurisdiction

In child custody proceedings involving Indian children not residing or domiciled on the tribe’s land, ICWA confers concurrent jurisdiction on tribal and state courts.²³ ICWA expresses a preference for tribal jurisdiction in child custody proceedings involving Indian children. As such, state court proceedings that address foster care placement or termination of parental rights and involve Indian children residing or domiciled off the reservation may be transferred to tribal courts. This transfer shall take place upon the petition of either parent, the Indian custodian or the child’s tribe unless one of the child’s parents objects, the tribal court declines jurisdiction or good cause to deny transfer exists.²⁴ The first two exceptions present very little room for judicial analysis; however, the “good cause” exception is a broader area of judicial interpretation. Guidelines, issued by the Department of the Interior, state that a party opposing transfer to a tribal court bears the burden of demonstrating good cause to deny transfer.²⁵ The Guidelines also provide examples of what constitutes good cause.²⁶

Judicial Decisions

The only U.S. Supreme Court case to address ICWA dealt with the statutory construction of the act’s domicile provision and how it was to be interpreted. In *Mississippi Band of Choctaw Indians v. Holyfield*, the Supreme Court determined that for purposes of ICWA a child’s domicile at birth is that of his or her parents at the time of birth.²⁷ In reaching this decision, the Court reasoned that the purpose of the statute indicated congressional intent to establish uniformity in the application of ICWA, instead of allowing varied state court definitions of a key term to dictate ICWA application. Thus, the Court held that an Indian tribe had jurisdiction over twin baby girls whose parents took care to have the children born off the reservation in order to put the children up for adoption under state law.

State courts have developed different approaches to addressing general questions of ICWA applicability and such other concerns as the grounds for invoking the “good cause” exception to transfer. For example, some state court judicial decisions scrutinize the level of contact between

(...continued)

reservations under laws such as Public Law 280 (25 U.S.C. §1321-25). (Public Law 280 is the popular name of P.L. 83-280, as amended, a law conferring jurisdiction over activities in most of the Indian country in specified states to state courts.) However, in these circumstances, 25 U.S.C. §1918 authorizes tribes to retake jurisdiction over child custody proceedings upon approval by the Secretary of the Interior.

²¹ 25 U.S.C. § 1922.

²² 25 U.S.C. § 1911(d).

²³ 25 U.S.C. § 1911(b).

²⁴ 25 U.S.C. § 1911(b).

²⁵ Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (November 29, 1979).

²⁶ See id. at 67,591 (Guideline C.3(b)(i) and (iii)).

²⁷ 490 U.S. 30 (1989).

an Indian child and the Indian tribe or reservation, while other courts engage in a “best interests of the child” analysis in assessing possible reasons for transfer.²⁸ Other courts have dealt with the issue of applying the judicially crafted “existing Indian family exception” with varying results.²⁹

Procedural Protections in State Courts

In expanding the ability of tribes to strengthen and preserve Indian families, ICWA not only enhances tribal jurisdiction but also provides comprehensive procedural protections for Indian tribes, parents and custodians throughout state court proceedings. For example, where a state court knows or has reason to know at the outset of an involuntary custody proceeding that the child at issue is an Indian child, ICWA requires that the party seeking termination of parental rights or foster care placement notify the child’s parent or Indian custodian and tribe.³⁰ Notice must be given at least ten days before the advancement of the state proceedings.³¹ Tribes must be notified of their unconditional right to intervene in the state court proceeding and their right to examine all relevant documents as well as their ability to obtain a delay of the proceedings.³² These provisions are all aimed at ensuring that parents, custodians and tribes are aware of their rights under ICWA and are given adequate time to exercise these rights.

Additional provisions, applicable in both voluntary and involuntary cases, are also intended to ensure that Indian parents, custodians and tribes are not misled or coerced into losing their rights to rear Indian children. As such, cases that proceed in state courts are subject to a number of procedural protections, whether the proceeding is voluntary or involuntary. Voluntary proceedings consist of tribal member parents choosing termination of parental rights and adoption or foster care placement of their child. Involuntary proceedings involve state attempts to terminate parental rights or place Indian children in foster care. Tribes may intervene in both involuntary and voluntary proceedings. Also, an Indian child’s tribe, parent, Indian custodian or an “Indian child who is the subject of an action for foster care placement or termination of parental rights under state law” may seek to invalidate the action upon a showing that the action violated ICWA provisions.³³

Voluntary Proceedings

For any voluntary placement to be valid, the consent of the Indian parent must be in writing and executed before a judge of a court of appropriate jurisdiction. The judge must certify that the consequences of the action to be undertaken are explained to the parent in a language that the parent understands. The consent to the termination of parental rights cannot be executed until

²⁸ Cohen’s Handbook § 11.03.

²⁹ *Compare, e.g., In re Adoption of Baby Boy L*, 643 P.2d 168 (Kan. 1982) (court did not apply provisions of ICWA over the objections of a child’s Indian father and his tribe after finding that the child had no ties to his Indian father or the tribe and was not part of an existing Indian family) and *In re Baby Boy C*, 805 N.Y.S.2d 313, 27 A.D.3d 34 (N.Y. 2005) (court declined to adopt the “existing Indian family exception” on the grounds that it was inconsistent with the provisions of ICWA).

³⁰ 25 U.S.C. § 1912(a).

³¹ *Id.*

³² *Id.*

³³ 25 U.S.C. § 1914.

after the child is 10 days old.³⁴ Indian parents can revoke their consent at any time during their child's foster care placement or before a decree of termination or adoption has been entered.³⁵ Upon revoking consent, the parent would be entitled to the immediate return of the child. However, in cases of adoption where an order accepting the voluntary termination of parental rights has been entered, then the parent may not revoke consent.

Involuntary Proceedings

First, the party seeking foster care placement or the termination of parental rights must provide notice of the proceedings to the parent or Indian custodian and the child's tribe.³⁶ ICWA gives indigent parents or Indian custodians the right to court-appointed counsel in any involuntary removal, placement or termination proceeding.³⁷ In involuntary proceedings, the parties also have the right to examine all reports or other documents filed with the court on which any decision may be based.³⁸ Furthermore, a state court cannot order an involuntary foster care placement unless it determines that the parent's or Indian custodian's continued custody of the child is likely to result in serious emotional or physical damage to the child.³⁹ The determination must also meet the clear and convincing standard and be based on evidence that includes testimony from at least one qualified expert witness.⁴⁰ In order to terminate parental rights or initiate foster care placement in regard to an Indian child, a state court must ensure that "active efforts" have been taken to provide remedial services and rehabilitative programs to Indian parents and custodians in order to prevent the breakup of the Indian family.⁴¹ The state of the law, as reflected in a recent Maryland opinion, is that active efforts involve assisting a parent through the steps of a rehabilitation program; simply requiring a parent to implement a program on his or her own is merely a "reasonable" effort and fails to satisfy ICWA.⁴²

Adoptive Placements

ICWA also addresses adoption. ICWA establishes an order of preference for adoptive placement of an Indian child under state law, "in the absence of good cause to the contrary," that looks to placing a child with extended family members, other members of the tribe or Indian families.⁴³ Also, ICWA establishes a placement preference plan to be followed in foster care and preadoptive placements.⁴⁴ Tribes may establish a different order of preference by resolution, to be followed in the aforementioned placements.⁴⁵

³⁴ 25 U.S.C. § 1913(a).

³⁵ 25 U.S.C. § 1913(b).

³⁶ 25 U.S.C. § 1912(a).

³⁷ 25 U.S.C. § 1912(b).

³⁸ 25 U.S.C. § 1912(c).

³⁹ 25 U.S.C. § 1912(e).

⁴⁰ 25 U.S.C. § 1912(f).

⁴¹ 25 U.S.C. § 1912(d).

⁴² *In re Nicole B. and Max B.*, 927 A.2d 1194 (Md. App., 2007). See also *A.M. v. State*, 945 P.2d 296 (Alaska 1997); *In re Michael G.*, 63 Cal. App. 4th 700 (Cal App. 1998).

⁴³ 25 U.S.C. § 1915(a).

⁴⁴ 25 U.S.C. § 1915(b).

⁴⁵ 25 U.S.C. § 1915(c).

Legislation

ICWA issues have been raised in earlier Congresses,⁴⁶ and may recur in the 111th Congress, although there were no legislative proposals to amend the act in either the 110th or the 109th Congress.

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⁴⁶ Marcie Yablon, *The Indian Child Welfare Act Amendments of 2003*, 38 Fam. L.Q. 689 (2004-2005) (discussing proposals to, e.g. address judicial decisions that put certain children beyond the reach of the ICWA because they were not part of an “existing Indian family”).