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The Indian Child Welfare Act of 1978

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ICWA: Historical Background

Beginning in the mid-1800s, public and private agencies, with the federal government's consent, routinely removed Indian children from their homes.

A congressional investigation in the 1970s revealed:

1. 25-35% of all Indian children in the US were being taken from their families by state welfare agencies.
2. In some states, Indian children were 7 to 8 times more likely to be removed than white children.
3. The vast majority of these Indian children were placed in non-Indian homes.

Historical Background (cont.)

4. State judges and social workers were often prejudiced against Indians and ignorant of tribal values and customs. Congress found that state officials "have often failed to recognize the . . . cultural and social standards prevailing in Indian communities and families." --25 U.S.C. § 1901

5. These removals were disastrous not only for many Indian children and their families but also for their tribes. Tribes were being robbed of their youth.

ICWA's Purpose

Congress passed ICWA to create "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." --25 U.S.C. § 1902

ICWA contains protections for both Indian families *and* Indian tribes. "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians."

--*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989)

ICWA: Major Provisions

1. If the Indian child resides on an Indian reservation or has been made a ward of the tribal court, the tribal court has *exclusive* jurisdiction over the child in all custody matters. State courts may not adjudicate these cases unless expressly conferred that authority by Congress.

--25 U.S.C. § 1911(a).

Major Provisions (cont.)

2. If the child resides *off* the reservation, the state court and the tribal court have concurrent (shared) jurisdiction. If the proceeding begins in state court, the court must notify the child's parents and tribe, and they each have a right to intervene in the proceeding.

--25 U.S.C. § § 1912(a), 1911(c) respectively.

Major Provisions (cont.)

3. In all cases in state court, if the tribe or a parent requests it, the court must transfer the case to tribal court unless a parent objects or good cause exists to deny the request.

--25 U.S.C. § 1911(b).

Major Provisions (cont.)

4. As the tribal notice and the transfer provisions indicate, although jurisdiction is concurrent, it is "presumptively tribal." *Holyfield*, 490 U.S. at 36. Indian tribes have *independent* rights under ICWA. Thus, they have rights even when both parents want to relinquish custody of their child voluntarily.

Major Provisions (cont.)

5. If the case remains in state court, the court may not terminate parental rights without proof "beyond a reasonable doubt" (or place the child in foster care without "clear and convincing evidence") that continued custody by the child's family "is likely to result in serious emotional or physical damage to the child." (Thus, this is *not* a "best interest of the child" standard.)

--25 U.S.C. § 1912(f) and (e), respectively.

Major Provisions (cont.)

6. If the child's parents are indigent, they have a right to a court-appointed attorney. Separate counsel must be appointed for the child when the best interests of the child require it.

--25 U.S.C. § 1912(b).

Major Provisions (cont.)

7. Before a state court can remove an Indian child from the home for placement in either foster care or for adoption, testimony from "qualified expert witnesses" must be submitted on the issue of whether continued placement in the home is likely to cause serious emotional or physical injury to the child.

--25 U.S.C. § 1912(d).

Major Provisions (cont.)

8. An Indian child may not be removed from the home for foster care or for adoption unless it is proven that "active efforts have been made to provide 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).

Major Provisions (cont.)

9. Before a state court can place an Indian child in a non-Indian adoptive home, the court must give a placement preference to, first, the child's extended family, second, other members of the child's tribe, and third, other Indian families, unless good cause exists to ignore this placement hierarchy. A similar hierarchy is imposed in foster care placements.

--25 U.S.C. § § 1915(a) and (b), respectively.

Major Provisions (cont.)

10. Tribal court custody decisions are entitled to the same "full faith and credit" as state court custody decisions, meaning that they normally must be respected and enforced by other courts.

--25 U.S.C. § 1911(d).

Major Provisions (cont.)

11. The state must keep accurate records of all Indian child placements to which ICWA applies and make them available to the federal government and the tribe. In addition, when an adopted Indian child becomes eighteen years old, the state must provide the child upon his or her request with the names and tribal affiliation(s) of the child's biological parents.

--25 U.S.C. § § 1915(e), 1917, respectively.

Major Provisions (cont.)

12. Whenever a child is removed by state officials in an emergency situation, a hearing must be held soon thereafter and the child must be returned to the parents unless continued removal is "necessary to prevent imminent physical damage or harm to the child." Thus, the state's "best interests of the child" standard does not apply in emergency removals.

--25 U.S.C. § 1922.

Summary

Thus, ICWA is a remedial law designed to protect Indians *and* tribes. Among other things, ICWA gives tribal courts exclusive jurisdiction when the child lives on the reservation. When the child lives off the reservation, there is "concurrent but presumptively tribal jurisdiction," the Supreme Court said in *Holyfield*. 490 U.S. at 36.

Even when a custody case remains in state court, the tribe has a right to intervene, and placement of the child is governed by ICWA's requirements.

South Dakota Facts (2010)

1. State's population: 814,000.
2. 8.9% of which is American Indian or Alaska Native.
3. However, of the children in foster care in 2010: 52.5% were American Indian or Alaska Native, only 30% were white.
4. Thus, an Indian child is 11 times more likely to be taken into foster care than a non-Indian child.

Our Motions for Summary Judgment: Facts

1. Approx. 100 48-hour hearings involving Indian children are held each year in the 7th Cir. Court.
2. The State won 100% of the time (not counting the cases immediately transferred to tribal court).
3. Between 2010 and 2013, 823 Indian children were removed from their homes, two-thirds of them for more than 15 days.
4. The 48-hour hearings “usually last less than five minutes,” and some less than 60 seconds.

Facts (cont.)

5. In 77 of the 78 transcripts: no reference to the ICWA affidavit or to ICWA at all.
6. Judge Davis "never advised any Indian parent"
   a. of a right to contest the petition.
   b. of a right to call witnesses.
   c. of a right to testify.
   d. of a right to counsel for the hearing.
7. Judge Davis "never required the State" to present evidence in the hearing.
8. Judge Davis always used a "checklist" order.

Eight Precedent-Setting Rulings

1. **The two tribes have standing to sue *parens patriae* (that is, on behalf of their members).**

"The court finds this action is inextricably bound up with the Tribes' ability to maintain their integrity and 'promote the stability and security of the Indian tribes and families.' 25 U.S.C. § 1902. The motions to dismiss for lack of standing are denied."

8 Rulings (cont.)

2. **The three parents have a right to sue on behalf of a class of all Indian parents in the county.**

The court granted our motion for class certification, agreeing that "each member of the class would be entitled to the same injunctive or declaratory relief," therefore making it appropriate to certify this case as a class action.

8 Rulings (cont.)

3. **The standard that must be used to determine whether to return the child to the home is not the state's "best interest of the child" standard but rather the standard set forth in Sec. 1922 of ICWA.**

Sec. 1922 provides that whenever state officials remove an Indian child from the home on an emergency basis, those officials "shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent *imminent physical damage or harm* to the child."

8 Rulings (cont.)

4. The Right to Notice

The Court held that parents are entitled to adequate notice of the charges against them.

The Court found that the Defendants had no procedure "ensuring that Indian parents or custodians are given copies of the petition for temporary custody and the ICWA affidavit at 48-hour hearings." Parents were kept in the dark as to the allegations against them. This violated the Due Process Clause.

8 Rulings (cont.)

5. The Right to Contest the Charges Against Them

The Court held that parents have a right to contest the charges against them and present evidence in their defense at the 48-hour hearing.

The Court found that Judge Davis violated the Due Process Clause in this regard: “Judge Davis does not permit Indian parents to present evidence opposing the State’s petition for temporary custody.” Parents were not permitted to testify in their own behalf or call witnesses.

8 Rulings (cont.)

6. The Right to Confront and Cross-Examine

Another fundamental aspect of Due Process is the right to confront and cross-examine adverse witnesses.

Indian parents were denied this right. "Judge Davis prevents Indian parents from cross-examining any of the State's witnesses."

In fact, "Judge Davis does not require the States Attorney or DSS to call witnesses to support removal of Indian children."

8 Rulings (cont.)

7. The Right to Counsel in the 48-Hour Hearing

Judge Davis claimed that counsel wasn't necessary at the 48-hour hearing because counsel could be appointed after the hearing, and a full hearing could be held later.

"The practice defies logic because the damage is already done – Indian parents have been deprived of counsel" when they needed one to prevent the continued retention of their children. The failure to appoint counsel for the hearing violated both ICWA and the Due Process Clause.

8 Rulings (cont.)

8. The Right to A Decision Based on Evidence Presented in the Hearing

The Due Process Clause guarantees that a judge's decision must be based on evidence presented at the hearing. It can't be based on secret evidence.

The Court found the judges used a "checklist" order that listed findings "that had never been described on the record or explained to the Indian parents." The reliance on "undisclosed documents" violates the Due Process Clause.

The Court's Conclusion

"The Court finds that [the four defendants] developed and implemented policies and practices for the removal of Indian children from their parents' custody in violation of the mandates of the Indian Child Welfare Act and in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. . . . Plaintiffs' motions for partial summary judgment are granted."

Alaska Court Cases

1. 1988: “There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law.” *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32, 36 (Alaska 1988).

2. 1993: BIA includes Alaska Tribes on official list.

3. 1998: Land acquired through ANSCA is not “Indian country.” *Alaska v. Native Vill. of Venetie Tribal Govt.*, 522 U.S. 520 (1998).

Alaska Court Cases

4. 1999: *John v. Baker*, 982 P.2d 738 (Alaska 1999), the court overturns *Native Village* and recognizes Alaska Tribes as sovereign governments.

Alaska Court Cases

5. In *John v. Baker* and other decisions, the Alaska Supreme Court has recognized that Tribes in Alaska have the *inherent* right to exercise all powers of a sovereign that are not tied to a land base, such as

(a) form a government;

(b) determine tribal membership;

(c) enter into agreements, including ISDEA;

(d) regulate domestic relations, including child custody and ICWA matters.

Alaska Court Cases on Child Custody Issues

Tribes in Alaska:

1. Can accept *transfer* of ICWA cases from state court.

   --*In re C.R.H.*, 29 P.2d 849 (Alaska 2001)

2. Can *initiate* child custody proceedings. And tribal court orders are entitled to full faith and credit.

   --*Alaska v. Native Vill. of Tanana*, 249 P.2d 734 (Alaska 2011)

3. Have the authority to terminate parental rights.

   --*Simmonds v. Parks*, 329 P.2d 995 (Alaska 2014)

Alaska Court Cases on Child Custody Issues

4. Can determine child support obligations for tribal children.

--*State v. Central Council of Tlingit & Haida Tribes of Alaska*, 371 P.3d 849 (Alaska 2016)

The issue is not whether a federal law expressly confers the right. "The key inquiry . . . [is] whether the tribe needs jurisdiction over a given context to secure tribal self-governance."

--*John v. Baker,* 982 P.2d 738, 756 (Alaska 1999).