Remarks of Justice Michael F. Cavanagh

State Court Administrative Office–Court Improvement Program

Indian Child Welfare Act Forum

October 6, 2008

Good morning. It is an honor to be here in Mt. Pleasant and to participate in the opening ceremonies for this forum devoted to the Indian Child Welfare Act.

On behalf of the seven justices of the Michigan Supreme Court, I would like to extend sincere appreciation to Chief Cantu and the Saginaw Chippewa Tribe of Michigan for their generosity in hosting this special event. And thank you also to all those present from the other tribal nations that are located in Michigan—your participation in this forum is extremely valuable and appreciated.

In addition, I would like to commend all of the participants—whether you are here to share your knowledge and experience, or to learn from others, or both. The purpose that brings you together could not be more important…

It has been said that "Children are one-third of our population and all of our future."[1] It is in this spirit that, 30 years ago, the U.S. Congress enacted the Indian Child Welfare Act. Perhaps not all of you remember its inauguration, but it came at a time when Congress took notice of some very alarming statistics in the American Indian population—namely, those documenting the then-on-going large-scale removal of Indian children from their communities and culture in the total absence of any understanding of the family traditions and practices of those communities by the removing authorities. Indian children were often placed in non-Indian homes and in institutions.

The congressional findings that form the introductory provisions of the Act are refreshing in their honest and forthright recognition of the problem and its roots—and I quote:

> that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children * * *;
>
> 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
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> that the States * * * 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 USC 1901]

Congress also articulated a remedy for these problems:

> that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and

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> by providing for assistance to Indian tribes in the operation of child and family service programs. [25 USC 1902]

Thus, the stated policy of the Act was three-fold:

(1) To establish workable standards for the removal of Indian children from their families by non-tribal authorities;

(2) To assure that if Indian children are removed, they are placed in homes that reflect their unique cultural background; and

(3) To foster greater involvement by the various tribal governments in the welfare of Indian children.

The Indian Child Welfare Act is designed to achieve these goals through mandatory notice to tribes and an opportunity to intervene whenever the State places an Indian child, as defined by the Act, in foster care or seeks to terminate the rights of the child's parents. It also requires that Indian children be placed, if possible, with relatives or tribal members or in a placement approved by the child's tribe. Although the Act articulates a hierarchy of placement preferences, it should be remembered that each tribal nation may have its own list of preferences. Whenever the possibility of a child's Native American heritage arises, our state authorities should be providing the requisite notice and allowing the tribe or the BIA [Bureau of Indian Affairs], if necessary, to determine whether an American Indian child, as defined in ICWA, is involved.

Through its requirements, ICWA seeks to further a lofty mission—basically, to favorably impact the future existence and cultural strength of the sovereign Indian nations that remain in North America, in addition to serving the best interests of individual Indian children. Because the goals of the Act were broad and long-range in perspective, it is perhaps not surprising that, from a national perspective, we have in many ways fallen short of their execution. And yet, in my view, it is a positive sign that Congress was able to perceive a terrible injustice and to formulate a solution that did not attempt to disown the responsibility of the states in creating it.

In the recent update of his *Indian Child Welfare Handbook,* Professor B.J. Jones concludes that there have been four positive developments as a result of ICWA:

(1) It has fostered a dialogue among state and tribal judges and agencies;

(2) Tribal courts and other tribal agencies have increased their visibility and, to some extent, the non-Indian community is according them greater respect;

(3) The Act has served as a tool for educating state court judges and state social workers about Native American history and culture; and

(4) There has been an actual decrease in the removal practices that ICWA was designed to curb, especially the placement of Indian children in non-Indian homes.

On the negative side, Professor Jones notes that many social ills—especially alcohol and methamphetamine abuse—still afflict many Indian families and that Indian children continue to be removed from their homes at a much higher rate than non-Indian children. Thus, it appears that the central motivation for the enactment of ICWA still remains with us.

Here in Michigan, I think that the *first positive development* that Professor Jones mentions—dialogue among our state and tribal court systems—is definitely in evidence, although not necessarily due to ICWA. The Michigan Supreme Court is very appreciative of the good relationships that are shared between our state court system and the tribal court systems that have been established in 11 of the 12 federally recognized tribes that are located in Michigan. Fostering those continuing good relations is of great interest to our Court.

The ICWA Forum today is part of this positive history that began, on a formal basis, with the 1992 Indian Tribal Court/State Trial Court Forum, which eventually produced Michigan Court Rule 2.615—the enforcement of tribal court judgments rule. Also as a result of the forum, the State Court Administrative Office began working with tribal courts on request to help with administrative and infrastructure issues. The Michigan Judicial Institute began making its training sessions available to tribal judges and staff and started to educate state judges and staff about tribal sovereignty and the existence and functioning of tribal courts throughout the state.

Since the time of the 1992 forum, there have been many other developments, including the formulation of judicial departments in 11 of the 12 federally recognized tribes located in Michigan and the creation of the Michigan Indian Judicial Association. Our Michigan Supreme Court website now depicts the location of all the federally recognized tribal nations in Michigan and provides contact information as well as links to both the tribal websites and the tribal codes and court rules. This information is important and is hopefully being utilized, in part, to accomplish the notice and transfers to tribal courts and the other procedures that the Indian Child Welfare Act requires. It is important to note that ICWA mandates that tribal court judgments under the Act be accorded "full faith and credit" by state courts, not just recognized as a matter of comity (as our MCR 2.615 would require in a non-ICWA case).

THE "FAMILY GROUP DECISION MAKING" PROGRAM FEATURES A "FAMILY CONFERENCE," TO WHICH THE CHILD'S FAMILY MAY INVITE ANYONE WHO IS CONCERNED ABOUT THE WELFARE OF THAT CHILD.

Without their children and without the daily exposure of those children to their important heritage, languages, and cultural ties, the tribal nations in Michigan will not fully realize the long-term benefits of tribal sovereignty.

A very recent effort by our State Court Administrative Office draws on this positive history to provide a focus on ICWA in Michigan as we go forward. Perhaps some of you are already aware of the special ICWA Committee that has been assembled through the coordination of the State Court Administrative Office Court Improvement Program. Some of you may also be members of the committee, which is comprised of representatives from many of the courts of the 12 federally recognized tribes, tribal government officials, state Department of Human Services experts on tribal-state relations, and other interested persons. Its mission will be to develop a resource guide devoted to ICWA for use in state courts in order to assist state courts in notifying, and, where appropriate, transferring cases to, tribal courts and generally making Michigan's trial courts more cognizant of ICWA and its mandates.

Thus, I think that Professor Jones's *second positive development* since ICWA—increased tribal government involvement in child custody proceedings—is also present here in Michigan, if not yet fully realized. Various tribal courts and tribal administrative agencies are on the ascendance among the tribes located in Michigan. Tribes are developing their own codes in the family law area. Tribal courts and agencies are highly respected and will soon take over many more of the child custody proceedings involving Indian children who qualify under ICWA.

It has come to my attention that the U.S. Congress has just recently passed House Resolution 6893—The Fostering Connections to Success and Increasing Adoptions Act—which allows tribes or tribal consortia to directly access and administer Title IV-E funds, without the need for a tribal-state agreement. It also will provide technical assistance, implementation services, and grants to assist tribes in the transition to administering their own programs. If this bill is signed into law, it will mark another step toward independence and full tribal sovereignty in this area. In the past, some tribes may have declined to transfer jurisdiction to their tribal courts because of a lack of such funding.

With regard to Professor Jones's emphasis on education about Native American history and culture, here again, I think that our tribal-state partnership in Michigan has produced a great working relationship. This is not to say that our work is done. As the participants in the 1992 forum realized, and as is equally, if not more, applicable in the ICWA context, the continuing education of Michigan judges, lawyers, and other members of the legal and social work communities is absolutely essential if the goals of ICWA—protecting the best interests of Indian children and fostering tribal sovereignty—are to be realized.

One specific example of the kind of education that can result in meaningful real-world changes to the way that we approach family law issues that touch Indian children is the experience of the Leelanau County DHS, working together with the Grand Traverse Band of Ottawa and Chippewa Indians. By piloting a "family group decision making" program, which is modeled on the kinship practices of indigenous peoples throughout the world, that county succeeded in cutting by half the number of Indian children in foster care. The centerpiece of the program is a "family conference," to which the child's family may invite anyone who is concerned about the welfare of that child. The program represents a great example of cooperation between state and Grand Traverse Band authorities to achieve a central goal of ICWA. It also furthers traditional practices, which, I understand, have also been borrowed for use in proceedings involving non-Indian children.

The scope of such education about the goals of ICWA is broad because the Act can potentially come into play in all—as ICWA terms them—"child custody proceedings" that take place in Michigan family courts. Under ICWA, the phrase "child custody proceeding"—unlike the narrower range of cases to which we normally apply the term "custody"—encompasses foster care placements, termination of parental rights proceedings, and preadoptive and adoptive placements. (It currently does not apply to custody disputes between parents or to delinquency proceedings against juveniles who commit adult criminal acts.) I imagine that the total number of judges, lawyers, social service professionals, and staff involved in these proceedings is rather staggering. I sincerely hope that this forum, and others like it, will continue to "get the word out" about ICWA and its goals and strict requirements on behalf of Indian children.

As to the *fourth positive development* that Professor Jones identifies—the actual decrease in the removal practices that ICWA was designed to curb—I am not sure what statistics about Indian children in Michigan since 1974 would demonstrate. A 2004 *Michigan Bar Journal* article suggested that many mistakes continue to be made here in Michigan regarding the proper interpretation and application of ICWA. Perhaps it is time to compile some comprehensive data on this topic and begin to quantify our

degree of success or failure on a state level with regard to the ICWA goals.

Although the jury may still be out on the question of whether ICWA has been an overall success story, I think everyone can agree that there is more work to be done. Here in Michigan, the requirements of the Act, while not ignored, have not been as much a part of our day-to-day child welfare proceedings as they should be. There is not as much institutional awareness of the Act as there should be in all of our state family courts. For example, in *In re NEGP,*[2] a Court of Appeals decision from 2001, the court determined that the ICWA's notice procedures were not followed—both the court and the petitioner knew or had reason to know that the child was potentially a member of a particular tribe, but failed to send the tribe the required notice and failed to wait at least 10 days after the respondent's lawyer informed the court that the respondent had an affiliation with a Native American tribe. The trial court decision was conditionally reversed and the matter was remanded to provide proper notice to the tribe and to determine whether the child was an Indian child under the Act. Another recent (2008) unpublished Court of Appeals decision,[3] involving the same type of notice problem, followed *In re NEGP*. While it is good that such errors are being caught and corrected, better education of our state court judges and social service workers about ICWA will prevent such decisions having to be made at the appellate level. Some courts in other states have persisted in using an "existing Indian family" exception to the definition of "Indian child" under the Act, despite the United States Supreme Court's suggestion that such an exception is flawed,[4] but the Michigan Court of Appeals has expressly rejected such a gloss on the language of ICWA.[5]

Although Michigan has a court rule—MCR 3.980—that addresses the ICWA requirements, it is my understanding from discussions with persons active in the State Bar American Indian Law Committee that the current court rule language is deficient in several respects and does not, in fact, sufficiently communicate the dictates of ICWA. For example, in the case of an Indian child who resides or is domiciled within the jurisdiction of a tribe, the court rule should perhaps emphasize the need for an expeditious transfer, when transfer is appropriate, to the tribal court having jurisdiction over that child. In such a situation, it is the tribal court that is best equipped to determine that child's fate, and a quick transfer is essential. In addition, as to an Indian child not domiciled within the jurisdiction of a tribe, the current court rule refers to the requirement of "reasonable efforts" being made to prevent removal, whereas ICWA requires that there be "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. I am hopeful that the Court Improvement Program Committee that I mentioned earlier will take a serious look at our current court rule and, perhaps in collaboration with the State Bar American Indian Law Committee, propose changes to the rule that would bring it into better alignment with the federal law.

I note, as an aside, that the Court of Appeals has very recently issued a published decision with regard to ICWA requirements—specifically, the "active efforts" requirement. The name of the case is *In the Matter of Roe,* Court of Appeals Docket No. 283642. Although I cannot comment on the substance of the decision, it is interesting that this important ICWA question is just now reaching our appellate court here in Michigan. Perhaps there will be more clarification of the Act in time as more Michigan courts become better apprised of its basic requirements.

Speaking on behalf of the entire Michigan Supreme Court, I would like to commend the Court Improvement Program of the State Court Administrative Office, and specifically, Maribeth Dickerson, for envisioning and organizing this forum in order to renew and re-energize our state's commitment to the goals of ICWA, to improve the level of compliance with ICWA here in Michigan, and to educate and raise the awareness of those who participate in the state family court proceedings to which ICWA applies.

After all, it was Congress's recognition of the vital importance of Indian children to the continued existence and integrity of Indian tribes that motivated the enactment of ICWA. We must never lose sight of that. Without their children and without the daily exposure of those children to their important heritage, languages, and cultural ties, the 12 federally recognized tribal nations located in Michigan will not fully realize the long-term benefits of tribal sovereignty. Through the work of this forum, I hope that the solid pattern of cooperation and mutual assistance between Michigan's state and tribal courts will continue to thrive and develop and that many more participants in the child welfare proceedings that ICWA governs will become cognizant of the Indian Child Welfare Act and zealous advocates of its requirements and goals.

I commend all the presenters and participants in this two-day forum for your willingness to set aside your daily routine, which is no doubt of great importance, to participate in this renewal of ICWA's important messages. I sincerely hope that your efforts will result in the furtherance of the goals of the Indian Child Welfare Act in Michigan and in the greater cultural nurturance of the children whose tribal nations make their home in Michigan.

Thank you for your time and efforts, and again, thank you to Chief Cantu and the Saginaw Chippewa Tribe of Michigan for their gracious hospitality. ■

Justice Michael F. Cavanagh was elected to the Michigan Supreme Court in 1982 and began his fourth term on the Court on January 1, 2007. He served two terms as chief justice from 1991 through 1995. Justice Cavanagh was instrumental in the development of the Michigan Indian Tribal Courts/Michigan State Trial Courts Forum in 1992 and has served as the Supreme Court liaison since 1990.

FOOTNOTES

1. Select Panel for the Promotion of Child Health (1981).
2. *In re NEGP (FIA v Hosler),* 245 Mich App 126; 626 NW2d 921 (2001).
3. *In re Burgett,* unpublished opinion per curiam of the Court of Appeals, issued March 11, 2008 (Docket No. 280642).
4. *Mississippi Band of Choctaw Indians v Holyfield,* 490 US 30; 109 S Ct 1597; 104 L Ed 2d 29 (1989).
5. *In re Elliott,* 218 Mich App 196; 554 NW2d 32 (1996).