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The Indian Child Welfare Act

Myths and Mistaken Application

When Congress passed the Indian Child Welfare Act (ICWA),[1] American-Indian children faced a disproportionately high risk of removal from their homes by non-American-Indian social workers. Most of these children ended up in non-American-Indian homes, which led to the break-up of American-Indian families and ultimately to the loss of future tribal members.[2] Since its enactment, the ICWA clearly has had positive results, but mistakes continue to be made in interpretation and application of the ICWA, mistakes that may be easily corrected. Following a brief description of the protections the Act provides, we will discuss a few common myths that lead to mistakes in ICWA cases.

FAST FACTS:

The ICWA provides a variety of procedural and substantive protections in child custody proceedings involving American-Indian children.

Certain ICWA provisions only apply to involuntary proceedings, others apply in voluntary proceedings as well.

Child protection cases often involve the Michigan Indian Child Welfare Agency, a non-profit organization under contract with the FIA to assist in cases involving American-Indian children.

The ICWA provides a variety of procedural and substantive protections in a child custody proceeding involving an American-Indian child. A child custody proceeding is any foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement, other than in the context of a criminal action or a divorce where placement is with a biological parent.[3] An American-Indian child is an unmarried person under age eighteen who is (1) a member of a federally recognized tribe or (2) is eligible for membership in a federally recognized tribe and is the biological child of a member of a federally recognized tribe.[4] Now, back to the myths.

Myth 1: The ICWA Applies Only to Involuntary Proceedings

Some think the ICWA applies only to involuntary proceedings, such as forced termination of parental rights. While it is true that certain ICWA provisions apply only to involuntary proceedings (e.g., tribes have a right to notice in involuntary proceedings only) other ICWA provisions apply in voluntary proceedings as well. For example, Section 1911(a) grants tribes exclusive jurisdiction over any child custody proceeding involving an American-Indian child who resides or is domiciled on a reservation. Section 1911(b) provides a preference for tribal jurisdiction for any state court proceeding for foster care placement or termination of parental rights where the American-Indian child does not reside on the reservation. Section 1911(c) gives tribes a right to intervene in any state court foster care placement of or termination of parental rights to an American-Indian child. Section 1915(a) lists placement preferences for adoption proceedings involving an American-Indian child. Each of these provisions applies whether the proceeding is involuntary or voluntary.

The ICWA also provides specific procedures for voluntary release of parental rights to an American-Indian child.[5] One major concern for American-Indian tribes and American-Indian families in Michigan is the Safe Delivery of Newborns Act ("Safe Delivery Act").[6] The Safe Delivery Act allows a parent to abandon a newborn (defined as a child who is not more than 72 hours old) to an emergency service provider (defined as a fire department, police station, or hospital). The problem with the Safe Delivery Act, from an ICWA perspective, is that it allows parents to abandon a child anonymously. If a court lacks the identity of the parent, it has no way to determine whether the child is an American-Indian child and thus subject to Section 1913 (voluntary termination under the ICWA) or Section 1915 (adoptive placement under the ICWA). Consequently, although the Safe Delivery Act has good intentions, it interferes with the ICWA.

Myth 2: The ICWA Applies Only to Abuse and Neglect Cases

Many of the ICWA cases decided by Michigan courts involve abuse and neglect proceedings. However, it is false to assume that these are the only proceedings to which the ICWA applies. Foster care placements, one type of American-Indian child custody proceeding under the ICWA, have been found to include guardianships and custodial arrangements with third parties.[7] For example, a grandparent's petition for guardianship over a grandchild may implicate the ICWA. The Act probably also applies to step-parent adoptions. Consequently, all family law practitioners should be familiar with the ICWA, regardless of whether they handle abuse and neglect proceedings.

Myth 3: No Tribal Intervention, No ICWA Case

Unfortunately, Michigan case law suggests that a state court need not apply the ICWA if no tribe intervenes.[8] This is false. If the case is a child custody proceeding as defined by the Act, and it involves an American-Indian child, the ICWA applies.[9] Tribes have a right to intervene in many cases (see Section 1911(c)) but lack of tribal intervention in no way relieves a state court of the obligation to apply the ICWA.

Myth 4: The ICWA Applies to Any Custody Proceeding

People often ask us how the ICWA affects divorce cases. Simply put, it doesn't. The ICWA expressly excludes divorce from the definition of child custody proceeding, at least when placement is with one of the parents.[10] Furthermore, the Bureau of Indian Affairs (BIA) Guidelines for State Court Indian Child Custody Proceedings, non-binding guidelines interpreting the Act, call for a broad reading of the divorce exclusion. According to the BIA's interpretation of the Act, the ICWA does not apply to any custody action between biological parents, whether or not in the context of a divorce, where the child is placed with a parent. If a court is adjudicating a custody action between biological parents, the ICWA would apply only if the court placed a child with a third party.

People also often ask how the ICWA applies when a juvenile is removed from the home in conjunction with being charged with a criminal offense. Unless the alleged crime is a juvenile status offense, the ICWA does not apply. The proceeding may become a child custody proceeding, however, if the child is placed outside the home, not as punishment, but because of conditions in the child's home.

Myth 5: All Tribes Are Created (and Treated) Equally

While this may be true generally, it is not true with respect to the ICWA. By its terms, the ICWA protects only federally recognized tribes and their members.[11] A federally recognized tribe is one with an officially recognized government-to-government relationship

with the federal government. A list of federally recognized tribes can be found in the Federal Register under the heading "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs."

The FIA's policy is broader than the ICWA with respect to this point. According to FIA policy, tribes that have an officially recognized government-to-government relationship with the state of Michigan (i.e., state recognized tribes) are treated the same as federally recognized tribes for purposes of the ICWA. Of course, FIA policy is not binding on the courts. Still, the policy may prove helpful when trying to persuade the FIA to take a certain action regarding a child who is a member of a state-recognized tribe.

Myth 6: All for One, and One Blood Quantum for All

The ICWA contains no blood quantum requirement to determine whether a particular person is an American Indian. Rather, the ICWA hinges on eligibility for membership in a federally recognized tribe. Each of the 562 tribes has its own eligibility criteria. Some have a blood quantum requirement of 1/8 or 1/4, while others have no minimum blood quantum requirement. Thus, you cannot assume that a client or a child is not American Indian for purposes of the ICWA simply because he or she has a small percentage of American-Indian heritage.

What should be done if a party believes he or she has some American-Indian heritage? Notify the court and any petitioning party in the matter, which obligates the petitioning party to notify the child's tribe, if it can be located or determined, or the BIA of the child custody proceeding. This allows tribes to determine for themselves whether a child is a member of the tribe or is eligible for membership, an opportunity envisioned in the ICWA.[12]

Myth 7: No Enrollment Card, No ICWA

A parent in a removal or termination proceeding does not carry the initial burden of proving tribal membership by some concrete means such as possession of an enrollment card.[13] At the outset of any removal or termination proceeding, the court must ask whether the child is a member of or is eligible for membership in a federally recognized tribe.[14] Once a court has reason to believe a case involves an American-Indian child, the petitioning party must notify the tribe or the BIA. Thus, while a case may appear outside the applicability of ICWA at the outset, courts often learn that the ICWA applies only after notifying the tribe or BIA.

Myth 8: Non-American Indian, No Protection

Contrary to popular belief, a non-American-Indian parent of an American-Indian child receives many of the same ICWA protections as an American-Indian parent. Thus, if the FIA seeks to remove an American-Indian child from the home of his American-Indian mother and non-American-Indian father, the ICWA protects both parents. Furthermore, the ICWA does not prefer placement with an American-Indian relative over placement with a non-American-Indian relative. The first placement preference for foster care or adoption of an American-Indian child is simply with a relative. Only after the possibility of placement with a relative has been exhausted does the ICWA prefer placement in an American-Indian home.

Myth 9: MICWA is Always a Non-Adversarial Party

Child protection cases often involve the Michigan Indian Child Welfare Agency (MICWA). MICWA is a non-profit organization under contract with the FIA to assist in cases involving American-Indian children. The MICWA's roles include recruiting American-Indian foster homes, placing children in foster homes, home studies, tribal affiliation identification, and recommending adoptive placements. The MICWA certainly supports enforcement of the ICWA and tribal interests. However, as an FIA contractor, MICWA's position could be potentially adverse to a parent in a child protection or adoption case.

Myth 10: ICWA Information is Scarce

There are many sources of ICWA information. Here are a few suggestions for starting your ICWA resource library:

1. *The Indian Child Welfare Act Handbook—A Legal Guide to the Custody and Adoption of Native American Children,* by B. J. Jones, published by the American Bar Association Section of Family Law, 1995. This resource provides a good overview of the ICWA, including chapters on Applicability, Jurisdiction, Procedure and Placement.
2. *Bureau of Indian Affairs—Guidelines for State Courts; Indian Child Custody Proceedings,* Federal Register, 1979.

The Indian Child Welfare Act is meant to protect the future of American-Indian children, American-Indian homes, and American-Indian tribes. Common myths interfere with that vital protection.

3. *Indian Child Welfare, Foster Care Manual, State of Michigan Family Independence Agency,* check online for latest revisions at: http://www.mfia.state.mi.us/olmweb/ex/cff/cff.pdf.
4. *ICWA Manual,* to be published by Michigan Indian Legal Services in Fall 2004.

Conclusion

The Indian Child Welfare Act is meant to protect the future of American-Indian children, American-Indian homes, and American-Indian tribes. Common myths interfere with that vital protection. We hope our tips will assist practitioners and courts to apply the ICWA properly. Remember our motto: When in doubt, notify the tribe or the BIA and let them decide whether the case involves an American-Indian child. ✦

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Footnotes

1. 25 USC 1901, et seq., in 1978.
2. H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530.
3. 25 USC 1903(1).
4. 25 USC 1903(4).
5. See Section 1913.
6. MCL 712.1, et seq.
7. See *In re Custody of AKH,* 502 NW2d 790 (Minn App 1993).
8. See *In re NEGP,* 245 Mich App 126, 133–34 (2001).
9. See Section 1911(a) and (b), and 1912.
10. 25 USC 1903(1).
11. 25 USC 1903(3).
12. See *In re IEM,* 233 Mich App 438, 447 (1999). Courts are to defer to tribes in determining the eligibility for membership of a given individual.
13. *In re IEM,* supra, at 446.
14. MCR 3.935(B)(5), 3.965(B)(9).