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The Indian Child Welfare Act: a Brief Overview to Contextualize Current Controversies.

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Congress passed and the president signed the Indian Child Welfare Act (ICWA) into federal law in 1978. Because the Constitution grants to Congress the authority to make law regarding Indian tribes, ICWA's provisions are mandatory, unlike other federal child welfare legislation such as the Child Abuse Prevention and Treatment Act, which are voluntary. State authorities handling any case involving an "Indian child" must comply with ICWA.

ICWA has two overarching rationales. First, because "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" child welfare agencies and "an alarmingly high percentage of such children are in non-Indian foster and adoptive homes and institutions" (25 U.S.C. § 1901(4)). The second reason was that courts and child welfare agencies "have often failed to recognize the essential tribal relations of Indian people" (25 U.S.C. § 1901(5)).

ICWA's intent is to make it more difficult for state child protection authorities to remove Indian children from their parents' custody. It uses a number of procedural mechanisms to accomplish this goal. On October 4, 2018, in a case brought by three states and seven individuals against the federal government, a judge of the Federal District Court for the Northern District of Texas found ICWA's provisions unconstitutional because they violate the Equal Protection Clause of the Constitution. It also held that the Final Rule implementing the law issued in 2016 is unconstitutional in that it violates the Constitution's non-delegation, which prohibits an executive branch administrative agency from exercising legislative powers that the Constitution reserves to Congress[1]. On appeal, a three-judge panel of the Fifth Circuit Court of Appeals overturned the District Court's decision and found that neither the ICWA nor the 2016 Final Rule implementing it are unconstitutional.

This case, which may be appealed further, has touched off a national debate about the ICWA and whether it best serves the interests of children. What follows is a brief summary of ICWA's most salient procedural requirements.

Definitions

For purposes of this overview of ICWA, two definitions are important. As used in the statute, the term "Indian child" is a term of art and means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the

[1] Brackeen v. Zinke, 338 F.Supp 3d 514 (N.D. Tex 2018). In 1979, the Bureau of Indian Affairs within the Department of the Interior issues non-binding Guidelines to help guide state courts' implementation of the ICWA's provisions. The Final Rule issued in 2016 is binding and has the force of law.

biological child of a member of an Indian tribe" (25 U.S.C. § 1903(4)). Note that the law does not apply to all Native American children, but only those who are members or who are eligible for membership in a federally recognized tribe.

An "Indian tribe" means a tribe, band, nation, or other group recognized by the Secretary of the Interior; this may include an Alaska Native Village (25 U.S.C. § 1903(8)).

Jurisdiction

Legally, jurisdiction addresses a court's authority to act in a particular type of case or over a particular litigant. Where an Indian child resides on or is domiciled on a reservation, the tribal court of that reservation has jurisdiction over the case rather than the state court (25 U.S.C. § 1911(a)). Where a child who resides on a reservation, is temporarily off the reservation, a state court may remove the child from parental custody on an emergency basis, if the child's circumstances place him or her at an imminent risk of harm. Once the imminent risk has passed, the court must return custody of the child to the parent (25 U.S.C. § 1922)

Where an Indian child resides off the reservation, a state court must transfer the case to the tribal court unless one or both parents object; the tribe may decline to accept transfer of the case (25 U.S.C. § 1911(b)).

If the case remains in the state court system, the child's tribe "shall have a right to intervene at any point" (25 U.S.C. § 1911(c)). Thus, the child's tribe is a party to any state child protection case involving an Indian child.

Whenever a State court "knows or has reason to know" that an Indian child is involved in a case, the party who has brought the case must notify the child's parent and the child's tribe of the proceedings in writing, which they must provide by registered mail, return receipt requested. If the identity of the child's tribe is unknown, the party bringing the case must notify the Secretary of the Interior (25 U.S.C. § 1912(a)).

Active Efforts Requirement

Before the court may remove an Indian child from parental custody, the state court must make a finding that the petitioner has made "active efforts" to prevent the child's removal, and that those efforts must have proven unsuccessful. Similarly, before a state court may terminate the rights of an Indian child's parents, the party seeking termination must demonstrate that state child protection authorities or another entity has made "active efforts" to reunify the child with his or her parents or Indian custodian (25 U.S.C. § 1912(d)). Generally, "active efforts" require more diligence on the part of state child welfare agencies than the "reasonable efforts" required by federal funding statues.

Evidentiary Requirements

Before the court may remove an Indian child from parental care and place him or her in foster care, the state court must determine that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" (25 U.S.C. § 1912(e)). That finding must be supported by clear and convincing evidence and must include the testimony of at least one expert witness. By comparison, in most non-Indian child cases, the court may remove a child from parental custody on a much less demanding showing of harm or potential harm, typically probable cause that the child may be at risk. Similarly, in addition, the clear and convincing standard of evidence is typically required to permanently terminate a parent's parental rights (*Santosky v. Kramer,* 1982).

Before a state court may terminate the parental rights of an Indian child's parent, it must find that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" (25 U.S.C. 1912(f)). The petitioner seeking to terminate the

parent's rights must present the testimony of "expert witnesses" to make the case. The evidence presented must support a finding by the state court that there is proof beyond a reasonable doubt, which is the highest standard of proof known in the law, and which is otherwise used only in criminal cases where a loss of physical liberty through incarceration is at stake.

Voluntary Placement

The ICWA also protects the rights of Indian tribes and parents in certain voluntary proceedings (25 U.S.C. § 1913). Specifically, the law protects the rights of tribes against Indian parents who would seek to adopt a child outside the tribe without the tribe's involvement. That was the case in *Mississippi Band of Choctaw Indians v. Holyfield* (1989). In that case the parents, who resided on their reservation, identified an adoptive home for their twins. When it was time for the twins to be born, the parents traveled off the reservation to the community in which the prospective adoptive parents, who were not Indian people, lived. After the children were born, their parents placed them with the adoptive family. The tribe challenged the adoption as violating its rights. The case made its way to the Supreme Court, which agreed with the tribe and invalidated the adoption because the tribe was not properly notified of the proceedings and was not allowed to intervene. Where, however, a child's Indian parent never had custody of the child, a non-Indian parent with sole custodial rights to the child may place the child for adoption without invoking ICWA's heightened procedural protections (*Adoptive Couple v. Baby Girl*, 2013).

Placement Preferences

When the courts properly remove an Indian child from a parental custody, or place him or her for adoption, the statute establishes a set of placement preferences for the child with which state courts must comply in the absence of good cause not to follow the preferences in a particular case (25 U.S.C. § 1915). If the child is being placed for adoption, the descending order of preference is: 1) placement with a family member; 2) placement with other members of the Indian child's tribe; 3) another Indian family. When courts place children into the foster care system, the descending order of preference is: 1) member of the child's extended family; 2) foster home licensed by the child's tribe; 3) Indian foster home licensed by a non-Indian licensing authority; 4) an institutional setting approved by the child's tribe or operated with an Indian organization. An individual tribe may alter the placement preferences established in the statute.

Conclusion

All professionals who work with children in the child welfare system should be aware of ICWA and its requirements. The procedural protections outlined here, as the following articles illustrate, have been controversial since the ICWA's enactment four decades ago.

About the Guest Editor

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