The Indian Child Welfare Act: In the Best Interests of Children?

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Congress passed the Indian Child Welfare Act (ICWA) in response to historic abuses by state child welfare and private agencies resulting in massive removals of Indian children from their parents and Indian communities. However, ICWA, as implemented, has too often placed the interests of Indian tribes above the best interests of the child. The case of *In re: J.T.,* 166 Vt. 288, 693 A.2d 675 (1997) provides a case in point.

Based on overwhelming evidence of physical and sexual abuse of J.T. and her sibling, C.T., and their parents' lack of progress over six years of involvement with child protective services (CPS), the State of Vermont filed a petition to terminate parental rights (TPR). The trial court granted the petition and the parents appealed. By then, the children had been living in a pre-adoptive foster home for years. At no point prior to the appeal had any party mentioned that the children might be of Indian ancestry, thereby triggering the Indian Child Welfare Act's (ICWA) requirement to notify the child's Indian tribe. The mother's counsel first raised the issue on appeal based on a reference buried in a 60-page report, admitted into evidence at the TPR hearing, that the father had mentioned to the psychologist that his father was a "full-blooded Mohican." There is no federally recognized Mohican tribe. The Vermont Supreme Court remanded the TPR order to the trial court for further proceedings consistent with ICWA. As the court noted, ICWA is jurisdictional and its applicability may be raised at any point in the proceedings. The court pointed out that Mohican could be an alternative spelling of the Mohegan or Mahican tribes, one of which is a federally recognized Indian tribe (*In re J.T. & C.T.,* 1997).

Justice James Morse filed a dissenting opinion in the J.T. case, noting that, due to the court's ruling, the TPR order "must be indefinitely delayed, along with all hope of a favorable adoption while the matter winds its way through the federal bureaucracy." Pointing to the "fears of the children regarding the uncertainty of their future," Justice Morse concluded: "The real tragedy of today's decision is the open-ended delay to establishing a permanent and stable home for these abused children." Further adding to the uncertainty of the children's placement was the court's order that "[i] f a [federally] recognized tribe does conclude that the children meet ICWA definition [of an Indian child], further proceedings consistent with the requirements of ICWA will be necessary" (*In re J.T.,* 1997, p. 289). These requirements include higher evidentiary standards, which make it more difficult to remove children from dangerous homes or allow them to be adopted (25 U.S.C. § 1912(d)-(f)).

Unfortunately, the court's ruling in the *J.T.* case is not an isolated ruling. ICWA requires the court and state agencies to notify Indian tribes or the Bureau of Indian Affairs (BIA) any time there is "reason to know" that a child who is the subject of a child custody proceeding is an Indian child (25 U.S.C. § 1912(a); Fed. Reg. § 23.107(b)). State courts have ruled that ICWA's notification requirement can be triggered by the mere possibility that the child involved may be of Indian ancestry. Once a court has "reason to know" that a child is an Indian child, then the court is to treat the

child as an Indian child unless and until it determines the child is not an Indian child. (Fed. Reg. 38870, 2016; 25 C.F.R. § 23.107)

The notification provision of ICWA, as applied in some cases, is a clear violation of the equal protection guarantee of the Fifth and Fourteenth Amendments to the U.S. Constitution. Putative Indian children are treated differently solely on the suggestion that they might be of Indian ancestry (Fed. Reg. § 23.107(b)). The United States Supreme Court has warned that "ancestry can be a proxy for race" and therefore must be viewed as a suspect category requiring the use of the "strict scrutiny" standard in reviewing the constitutionality of the classification (*Rice v. Cayetano*, 2000).

Separate and apart from ICWA's notification requirement, constitutional problems arise due to the overinclusive definition of an Indian child, as applied by the courts. The term "Indian child" is defined in 25 U.S.C. §1903(4): The child must be "either (a) a member of an Indian tribe; or (b) eligible for membership in an Indian tribe….and the biological child of a member of an Indian tribe." Because courts have recognized the sovereign right of Indian tribes to define their own membership,[1] courts have broadly defined the term "Indian child" in a way that allows ICWA to cast its net over children whose family may have no affiliation with an Indian tribe. They may have never stepped foot on an Indian reservation. They may never have participated in Indian culture, religious or political practices or identified themselves as Indian in any way. The child may never have been in the custody of the Indian parent (Fed. Reg. 2016, 38868).

Some state courts have attempted to limit ICWA's application to only those situations where the child has had some substantial political or cultural connections to the tribe, creating an "existing Indian family" (EIF) exception to the application of ICWA (*Brackeen v. Zinke*, 2018). However, the most recent regulation implementing ICWA that passed in 2016 (hereinafter, "final rule") restricted the use of this exception, making it clear that there is no exception to ICWA's applicability based on factors relied upon by state courts in creating the EIF exception (Fed. Reg. 2016, 38802). The final rule provides that state courts "may not consider factors such as the participation of the parents or Indian child in Tribal cultural, social, religious, or political activities" (Fed. Reg. 2016, 38868, codified at 25 C.F.R. § 23.103(c)).

When enacting ICWA, Congress recognized the absolute right of Indians to expatriate from their tribe, disenroll from the tribal membership, move away from the reservation and voluntarily assimilate into mainstream American society. Granted, in the past the federal government removed many Indians from their families and tribes in an effort to force Indians to assimilate. However, policies attempting to rectify the effects of these misguided efforts should not be imposed, generations later, on children with no real affiliation to an Indian tribe, at the expense of ensuring safety and timely permanence for them. Removing or terminating parental rights to such children does not result in any loss of Indian language and culture that ICWA is designed to prevent. Application of ICWA requirements in these circumstances does not prevent "harms to a child caused by disconnection with their Tribal communities and culture" if there was no such connection in the first place (Fed. Reg. 2016, 38838).

Moreover, ICWA applies even if the child's Indian parent is 1) not the custodial parent; or 2) not a member of an Indian tribe at the time the child is first placed in out-of-home care (*Michelle M. v. Dept. of Child Safety*, 2017). A non-custodial Indian parent, who was duly notified of the initiation of child protection proceedings, may wait until after the filing of a TPR petition to appear in court and to notify the court of his or her newly acquired membership in an Indian tribe. In such cases the Indian tribe would not have received the requisite notification of the child protection proceedings upon filing of the original petition alleging abuse or neglect, and would be allowed to ask the court to invalidate any prior court actions involving custody of the Indian child (25 U.S.C. §1914).

Courts have repeatedly ruled that only the tribes are arbitrators of their own membership. Since ICWA

[1] See, also, 25 C.F.R. §23.108(a), (b).

is jurisdictional and gives rights to the Indian tribe separate and apart from those of the parent, a parent cannot waive the protections offered to Indian tribes in ICWA (25 U.S.C. § 1911(b) (2012)).
Once the court determines that ICWA applies to a child custody proceeding, the Indian child's tribe has a statutory right to intervene and to request that jurisdiction over the proceeding be transferred to a Tribal court. In most cases, there is no statutorily mandated timeline for the exercise of this right (Fed. Reg. 2016, 38827).

Even if the proceedings remain in state courts, the tribe can invoke ICWA's statutory preferences for the placement of Indian children. There are no restrictions placed on Indian tribes as to the amount of time after first notification of the proceedings within which ICWA-preferred placements must be offered by the tribe. Indeed, in the *Brackeen* (2016) case, the Indian tribe did not notify the court of a potential alternative placement for the child until after the TPR order had been issued, one year after receiving notification of the proceedings and placement with the Brackeens. In any foster care, pre-adoptive, or adoptive placement, ICWA requires that a preference be given, in the absence of good cause to the contrary, to placement with (1) a member of the child's extended family (regardless of whether they are members of an Indian tribe); (2) other members of the Indian child's tribe; or (3) other Indian families (regardless of whether they are members of the child's Indian tribe) (25 U.S.C. §1915(a)-(b); ABA, 2018).

ICWA's first placement preference is for the Indian child to be placed with a member of the child's extended family, regardless of whether or not that family member is a member of an Indian tribe. While placement with kin is recognized as best practice in child welfare under most circumstances, the preference for kin placements is already written into most states' statutes and policies.[2] In order to obtain federal matching funds, states are required to give preference to adult relatives "provided that the relative caregiver meets all relevant State child protection standards" (42 U.S.C. § 671(a)(19), (29)). Recognizing the importance of placement within the child's community, Congress also requires states receiving federal funds to "prioritize placement in close proximity to the parents' home" (42 U.S.C. § 675(5)(a)).

The "best interests of the child" standard remains the polestar in all child custody proceedings in state courts when ICWA does not apply. There are clearly circumstances when placement with extended family members is not in a child's best interests. Before children are placed with kin, most state child welfare policies require agencies to look at such factors as the:

1. Nature of the relationship between the child and the kin caregiver;
2. Geographic proximity to a child's home and community;
3. Child's existing attachments to fictive kin, foster parents, school, and community;
4. Impact of the placement with a kin caregiver on reunification efforts;
5. Kin caregiver's ability to meet the child's needs;
6. Kin caregiver's willingness to be a permanent placement for the child if reunification efforts fail;
7. Timeliness of the kin caregiver's response after

[2] "All but two states give preference to extended family placements." Amici Curiae brief of Casey Family Programs and 30 Child Welfare Organizations in the case of Brackeen v. Zinke, citing Child Welfare Information Gateway, Placement of Children with Relatives 2 (2018) ("Placement with Relatives") (48 states require consideration of "giving preference to relative placements"); Amici curiae briefs available at https://turtletalk.blog/2019/01/17/merits-and-amicus-briefs-filed-in-brackeen-et-al-v-zinke-et-al-yesterday/

[3] In foster and pre-adoptive placements, ICWA does require placement in the least restrictive, most family-like setting within reasonable proximity to the child's home, "taking into account any special needs of the child" (25 U.S.C. §1915(b)). However, the placement preferences apply even if there is no preferred placement meeting these requirements.

[4] In attempting to clarify what constitutes a" placement that does not comply with ICWA," commentary to the final rule suggests that "placing a child in a non-preferred placement would not be a violation of ICWA if the State agency and court followed the statute and applicable rules in making the placement" (Fed. Reg. 2016, 38846). However, it is still not clear what this means in light of the fact that courts, with "reason to know" the child is an Indian child, must act as if ICWA applies "unless and until it is determined that the child is not an Indian child" (Fed. Reg. 2016, 38803; 25 CFR Part 23).

[5] ICWA also requires the testimony of an expert witness in Indian tribal culture and childrearing practices before parental rights to an Indian child can be ordered. Such expert witnesses are hard to find in states like Vermont with no federally recognized tribes and a child welfare system that can hardly afford to fly such witnesses in from other states.

notification;
8. Suitability of the kin caregiver

Consideration of these factors does not necessarily come into play when Indian tribes invoke ICWA's placement preferences. The statute presumes that the preferred placements are in the best interests of the Indian child.[3] However, this presumption is unwarranted in many types of cases.

There is a "good cause" exception to the application of these statutory preferences. However, the final rule prohibits state courts, in making determinations of "good cause," from considering the best interests of the child (81 Fed. Reg. 38847). Moreover, state courts are not allowed to consider "ordinary bonding or attachment that results from time spent in a non-preferred placement that was made in violation of ICWA" (Fed. Reg. §23.132(d), (e))[4].

Too often, parents or Indian tribes do not raise the applicability of ICWA until a petition to TPR has been filed. In some cases, parents will quickly become members of an Indian tribe only after the filing of the TPR petition, hoping to invoke the stricter evidentiary criteria and higher burden of proof ICWA requires before a court can order termination of their parental rights.[5] Moreover, parents and tribes can argue for ICWA protections even if the court met ICWA's notification requirements at the commencement of the child protection proceedings when a child was first placed in foster care. The anguish that these eleventh-hour interventions by a tribe can cause for pre-adoptive foster parents and Indian children is well-illustrated by the three cases in *Brackeen v. Zinke* (2018). See also Deutch (2019), Sandefur (2017), Laird (2016), and Bakeis (1996), all of which cite other cases where placements proposed by tribes would disrupt children's attachments to non-ICWA preferred caregivers.

In their amici curiae brief in the appeal of *Brackeen*, Casey Family Services and 30 other child welfare organizations emphasize the importance of maintaining children's ties to their birth families as well as ties to the other "valuable connections children have with friends, extended family, neighbors, and perhaps most importantly, their school" (Brief of Casey Family Services, *Brackeen v. Zinke*, 2018). They argue that "placement within a child's broader community or network can help ensure a core group of adults whom a child can rely upon for different forms of support, mentoring, and guidance, sometimes called 'relational permanency.'" No child welfare professional would dispute this "gold standard" of child welfare policy. However, the imposition of ICWA's placement preferences can result in the exact opposite of this "gold standard," i.e., placement of the child with strangers far from his or her home and community and, in some cases, away from the only parents the child has ever known.

Congress and the BIA can address concerns listed above by making modifications to ICWA and its regulations. These modifications may solve some of the problems noted above. Regulators can implement these proposed changes without threatening the sovereignty of Indian tribes or allowing for unwarranted removals of Indian children from their tribal communities while at the same time protecting children's basic interests in safe, permanent, and loving homes:

1. Parents must be *enrolled* members of an Indian tribe at the commencement of child custody proceedings when the child is first removed *from the custody of the Indian parent* in order for ICWA to apply.
2. It is important to respect tribal sovereignty and recognize that only Indian tribes can determine their own membership. However, it would not be too burdensome to require Indian tribes to maintain with the BIA a registry of enrolled tribal members.
3. Tribes must be required to intervene and offer ICWA-preferred placements in a timely manner once they have received notification of the child custody proceeding. They should not be allowed to wait until a TPR proceeding has commenced before they seek to invoke the protections of ICWA.
4. ICWA's notification requirement must not be allowed to take effect upon the mere mention of a child's possible Indian ancestry. Without some changes to the way ICWA is applied, ICWA's notification requirement is based on

a racial classification, not a political one, and cannot pass strict scrutiny review under the equal protection and due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

5. Provided the state agency and court have made sufficient inquiries as to the parents' possible membership in an Indian tribe, as required by the final rule, the failure to comply with ICWA's notification requirement should not result in the invalidation of court orders, a delay in child protection and adoption proceedings, and the disruption of the putative Indian child's foster, pre-adoptive, or adoptive placement.
6. Similarly, in order to demonstrate that the statute is narrowly tailored to achieve its compelling interest in ensuring tribal survival and preserving Indian culture, Congress should limit ICWA's application to only those families meeting the "existing Indian family" (EIF) criteria set forth in state courts that have adopted the EIF exception (Bakeis, 1996; Kennedy, 2003).
7. The statutory preference for placement with an Indian child's extended family should be amended to parallel the existing federal placement preference by adding the same statutory language set forth in 42 U.S.C. § 671(a)(19), (29): Preference should be given to adult relatives "provided that the relative caregiver meets all relevant State child protection standards."
8. ICWA's preference for placement with *any* Indian family should be repealed. This provision is clearly based on a racial classification that bears no rational relationship to the stated goals of ICWA which are specific to the *child's* tribe.

Other legitimate concerns arise from the fact that ICWA imposes "a set of legal disadvantages that make it harder to protect Indian children from abuse, and to find them permanent adoptive homes" (Sandefur, 2017, p. 22). ICWA requires that state courts meet a higher legal standard for the removal of and termination of parental rights to Indian children than states typically require in child protection proceedings involving non-Indian children. The standards governing state court proceedings involving non-Indian children are designed to strike a balance between parents' fundamental right to custody of their children and children's interests in safe, permanent homes that meet their basic needs. Child abuse and neglect are often difficult to prove, occurring as they do behind closed doors. Requiring proof of serious physical damage and "active efforts" (25 U.S.C. § 1912(d)-(f)), is likely to prevent or delay the removal of children from dangerous homes (Sandefur, 2017; Edwards, 2019) because the active efforts requirement in ICWA imposes a greater burden on states than reasonable efforts requirement imposed by federal law in non-ICWA state cases.

Moreover, ICWA requires proof beyond a reasonable doubt before a state may terminate parental rights, an evidentiary standard that the court in *Santosky v. Kramer* (1982) specifically rejected. In *Santosky*, the court noted that evidence in TPR cases is usually not susceptible to proof beyond a reasonable doubt, and such a burden of proof might "erect an unreasonable barrier to state efforts to free permanently neglected children for adoption" (Sandefur, 2017, p. 43). Too many Indian children may be left in abusive homes or foster care limbo because of ICWA's evidentiary standards.[6]

Indian children are U.S. citizens, too, and, as such, they have the same basic need for safe, nurturing, and stable homes as non-Indian children. As Sandefur (2017, p. 16) points out:

> [T]he Act itself defines children as "resources" that should be managed to achieve "the continued existence and integrity of Indian tribes." But Indian children are not resources. They are persons- citizens of the United States- and it is improper for government to treat any individual, or group of citizens defined by their ethnicity, as a means to achieve some third party's ends.

[6] Unfortunately, data to support this supposition are hard to find. There are no data elements in the National Child Abuse and Neglect Data System (NCANDS) or Adoption and Foster Care Analysis and Reporting System (AFCARS) indicating the applicability of ICWA (Children's Bureau, 2018). There is a compelling need to conduct further research into this issue.

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References

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American Bar Association (ABA). (2018). ICWA final rule: Summary of provisions. Retrieved from web.

Bakeis, C. D. (1996). The Indian Child Welfare Act of 1978: Violating personal rights for the sake of the tribe. *Notre Dame Journal of Law, Ethics & Public Policy, 10*(543).

Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018), appeal filed sub nom Brackeen v. Bernhardt, (5th Cir. 2018).

Brief Of Casey Family Programs And 30 Other Organizations Working With Children, Families, And Courts To Support Children's Welfare As Amici Curiae In Support Of Appellants, Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex.), (2018), appeal filed sub nom Brackeen v. Bernhardt, (5th Cir. 2018). Retrieved from web.

Children's Bureau, ACF, US DHHS (2018). AFCARS data elements side-by-side comparison. Retrieved from web.

Deutch, G. (2019). A court battle over a Dallas toddler could decide the future of Native American law. *The Atlantic*.

Edwards, L. (2019). Defining active efforts in the Indian Child Welfare Act. The NACC Guardian, 41(1).

In re J.T. & C.T., 166 Vt. 173 (1997).

Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778 et seq., 25 C.F.R. § 23 (2016).

Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 et seq.

Kennedy, R. (2003). Race, children and custody battles: The special status of Native Americans. *Interracial Intimacies: Sex, Marriage, Identity, and Adoption*, 115–135. Pantheon Books.

Laird, L. (2016, October 1). Children of the Tribe: Lawsuits claim the Indian Child Welfare Act is not always in the best interests of those it's meant to protect. *ABA Journal*. Retrieved from web.

Michelle M. v. Dept. of Child Safety, 243 Ariz. 64 (2017).

Rice v. Cayetano, 528 U.S. 495 (2000).

Sandefur, T. (2017, June 15). Escaping ICWA penalty box: In defense of equal protection for Indian children. *Children's Legal Rights Journal, 31*(1).

Santosky v. Kramer, 455 U.S. 745, 769 (1982).

U.S. Const. Amend. V and XIV.