

**OVERVIEW FOR JUDGES ON THE  
INDIAN CHILD WELFARE ACT AND DOMESTIC VIOLENCE**

By Jane Larrington  
Southwest Center for Law and Policy

**INTRODUCTION**

A common tactic that batterers use to maintain power and control over their partners or former partners is to threaten the loss of custody or access to their children. They may falsely raise the Indian Child Welfare Act. This can be a very effective threat, especially if the batterer has been successful in the past in manipulating the legal or social service systems. For many victims of domestic violence, losing their children is their single greatest fear. The batterer's threat to keep her away from the children may convince her to remain with the batterer or keep her from asserting her legal rights to child support.

Judges should ensure that their courtrooms do not become another tool of manipulation and coercion in the hands of abusers. Many batterers are skilled at making their partners or former partners appear irresponsible, irrational, and unreasonable. They can be extremely persuasive and present themselves to the court as the responsible and reasonable party. As a judge, it is important to become familiar with the ways in which batterers may try to manipulate the legal system and to prevent such manipulation.

Batterers may attempt to use the Indian Child Welfare Act to intimidate their partners or former partners. Where the victim is non-Native, is not eligible for enrollment with a tribe, or is a member of a tribe other than the one where the children are enrolled, the batterer may try to persuade his victim that she could lose custody of her children under the ICWA. Because the ICWA expresses a preference for children to be placed with members of the Indian child's tribe, she may believe her batterer's threats that he or his family will win custody of the children.

As this article explains, the Indian Child Welfare Act does **not** apply in proceedings between biological parents. Therefore, the batterer's threats to keep the children away from their mother under the ICWA are usually unfounded.

The ICWA may apply in certain domestic violence related child custody proceedings. It can be triggered in domestic violence cases when the court determines that neither biological parent is an appropriate

placement. This situation can arise when the mother is incapacitated, disabled, or hospitalized as a result of the violence and when the abuser is incarcerated, is in long-term drug or alcohol treatment, or is otherwise found to be an inappropriate placement for the child because he is a perpetrator of violence.

## **APPLICABILITY OF THE INDIAN CHILD WELFARE ACT**

The Indian Child Welfare Act applies to child custody proceedings involving an Indian child when the **state** court seeks to place the child, involuntarily, with someone other than a biological parent. Under the ICWA an Indian child is defined as:

- an unmarried person;
- under the age of eighteen;
- who is a member of an Indian tribe or eligible for membership in an Indian tribe; **and**
- who is a biological child of a member of an Indian tribe.<sup>1</sup>

ICWA covers a broad range of child custody proceedings including foster care placement, termination or severance of parental rights, placement for adoption, and pre-adoption placement proceedings. ICWA does not include child custody proceedings between biological parents (such as divorce or separation actions) when the court awards custody of the child to one of the parents. ICWA also does not apply to voluntary temporary guardianship cases.

## **JURISDICTION UNDER ICWA**

Tribal courts have exclusive jurisdiction over Indian children residing or domiciled on the reservation. Tribal courts also have exclusive jurisdiction when the child has been made a ward of the court regardless of the child's domicile. The U.S. Supreme Court has given wide latitude to tribes to assert jurisdiction over children domiciled on the reservation. In *Mississippi Band of Choctaw v. Holyfield*,<sup>2</sup> the U.S. Supreme Court held that an out-of-wedlock child takes the domicile of his or her mother at the time of birth. The Court also held that when a family member removes the child from the reservation and places the child for adoption, the child remains within the exclusive jurisdiction of the tribe if the child's mother is a tribal resident member.

States and tribes have concurrent jurisdiction if the Indian child is not a resident of or is not domiciled on the reservation. A state must notify the child's tribe and the child's parent or custodian by registered

mail if a state seeks to terminate parental rights or to involuntarily place an Indian child in foster care. The state's notice must include a statement informing the child's parent or custodian and the child's tribe of their right to intervene and of their right to petition to have the case transferred to tribal court.

In cases where a state cannot readily determine the child's tribe or the identity or location of the child's parent or custodian, the state must provide written notice to the Secretary of the Interior. The Secretary of the Interior then has 15 days to identify and contact the appropriate parties.

The child's tribe or the child's parent or custodian may petition a state court to have the matter transferred to tribal court. The request for transfer to tribal court may be done either orally or in writing. However, a request to transfer the proceedings to tribal court should be made promptly upon receiving notice from the state court. If the tribe or parent/custodian wait too long to make the transfer request the state court can use the delay as "good cause" not to transfer the matter.

The state cannot begin the proceedings until 10 days after the parent/custodian and tribe or the Secretary of the Interior have received notice. Under ICWA the parent/custodian and tribe may request a continuance of the matter for an additional 20 days in order to prepare for the proceedings.

### ***Determining the Child's Tribe***

States must abide by the determination of a tribe as to whether or not the child and biological parent(s) are members of the tribe or are eligible for enrollment. Unless the tribe has made a membership determination to the contrary, the Bureau of Indian Affairs may determine whether or not the child and biological parent(s) are members of the tribe or are eligible for enrollment.

If a child is an enrolled member of one tribe, that tribe is designated as the child's tribe for purposes of the ICWA. This is true even if the child is eligible for membership in other tribes as well.

If a child is not enrolled as a member of any tribe but is eligible for membership in more than one tribe, the state court must give notice to all of the tribes where the child is eligible for enrollment. The state's notice must specifically name the tribes that are being considered and

must request each tribe's opinion on the child's appropriate tribal designation under the ICWA. The state court can use the following factors (as well as other relevant factors) to determine which of the multiple tribes to designate as the child's tribe:

- the child's length of residence on or near the reservation of each tribe and frequency of the child's contacts with each tribe;
- the child's participation in activities of each tribe;
- the child's fluency in the language of each tribe;
- whether there has been a previous court determination with respect to the child by a court of one of the tribes;
- residence on or near one of the tribe's reservation by the child's relatives;
- tribal membership of the custodial parent or Indian custodian;
- each tribe's position as to the child's appropriate tribal designation under ICWA; and
- the child's self identification.<sup>3</sup>

New membership with a tribe does not retroactively affect any previous child placement decisions, but can be considered in future child placement decisions.<sup>4</sup> This is to preserve stability in child placements.<sup>5</sup>

### ***Transfer & Intervention***

State courts must notify tribal courts in writing whenever the state court receives a request for transfer in a foster care placement or termination of parental rights proceeding. The notice must give the tribal court at least 20 days to decide whether to accept or decline the transfer. Parties to the action may make oral or written arguments to the tribal court in favor of or against transfer to the tribal court.<sup>6</sup> Tribal courts may decline to exercise jurisdiction over the proceedings and allow the state court to assert jurisdiction. If the tribal court chooses to accept jurisdiction, the state court must transfer the proceeding to the tribe unless a parent objects to the transfer or the state court finds "good cause" to deny the transfer petition.<sup>7</sup> The party opposing the transfer has the burden of proof to show that good

cause exists not to transfer the matter. Good cause not to transfer the matter to tribal court includes the following:

- The Indian child's tribe does not have a tribal court or administrative body vested with authority over child custody proceedings.
- The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
- The Indian child is over twelve years of age and objects to the transfer.
- The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
- The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.<sup>8</sup>

In making its determination, the state court cannot consider the socio-economic conditions of the tribe or the adequacy of tribal or BIA social services.

Upon transfer, the state court must provide the tribal court with all available information in the case.<sup>9</sup>

If, for any reason, the state court retains jurisdiction over the proceedings, the tribe and the Indian custodian of the child have the right to intervene at any time in state court proceedings for foster care placement or termination of parental rights.<sup>10</sup> When the tribe was not able to act quickly enough to request a transfer of the proceeding, intervention may be a good option. A late intervention is not as disruptive as a late transfer.<sup>11</sup>

## **PARENTAL/CUSTODIAL RIGHTS PROVISIONS OF ICWA**

### ***Right to Court-Appointed Counsel***

The parent or custodian of the child is entitled to court-appointed counsel in any state court removal, placement, or parental termination case if the state court determines the party to be indigent.<sup>12</sup> An

attorney may also be appointed for the child if it is determined to be in the child's best interests.<sup>13</sup>

### ***Demonstrated Efforts to Preserve the Indian Family***

Before the state court can order a foster care placement or termination of parental rights, the state court must find that "active efforts" were made to provide "remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" and that they were unsuccessful.<sup>14</sup> These efforts must take into account the "prevailing social and cultural conditions and way of life" of the child's tribe. The efforts must also consider any available resources of the child's extended family, tribe, Indian social services, and any other Indian caregivers.<sup>15</sup>

### ***Standards of Proof; Serious Emotional or Physical Damage to the Child***

In a foster care placement proceeding, there must be *clear and convincing* evidence, including testimony of qualified expert witnesses, that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.<sup>16</sup> In a termination of parental rights proceeding, there must be evidence *beyond a reasonable doubt*, including the testimony of qualified expert witnesses, that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.<sup>17</sup>

Evidence about poverty in the child's community or family, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior is not enough to prove that continued custody is likely to result in serious emotional or physical damage to the child. It is not enough to prove that the parent or custodian is "unfit" or that there is someone else willing and better able to raise the child. The party must show that there are particular conditions in the home that are likely to result in serious emotional or physical damage to the child. The evidence must clearly prove how the particular conditions will cause damage to the child.<sup>18</sup>

Before removing the child, the state court must hear testimony from a qualified expert witness.

The following people are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

- A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs regarding family organization and childrearing practices.
- Any expert witness with substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
- A professional person with substantial education and experience in the area of his or her specialty.<sup>19</sup>

### ***Consent by Parent or Custodian***

A valid consent by the parent or Indian custodian to a foster care placement or termination of parental rights must be in writing and recorded before a judge. The consent must include a judge's certificate stating that the terms and consequences were fully explained and understood in English or interpreted into a language understood by the parent or custodian.<sup>20</sup> Consent is not valid if given prior to the birth of the child or within ten days after the child's birth.<sup>21</sup>

A parent or custodian's consent to a foster care placement may be withdrawn at any time and the child returned to the parent or custodian.<sup>22</sup> A parent or custodian's consent to termination of parental rights or adoptive placement may be withdrawn for any reason any time prior to entry of the final decree and the child returned to the parent or custodian.<sup>23</sup>

After the entry of a final decree of adoption, the parent's consent may be withdrawn on grounds of fraud or duress.<sup>24</sup> If the court finds that the consent was obtained through fraud or duress, the parent's petition to vacate the decree shall be granted and the child returned to the parent.<sup>25</sup> An adoption that has been effective for two or more years cannot be invalidated under this ICWA provision, although it could be invalidated under state law if the state law so provides.<sup>26</sup>

Any parent or Indian custodian from whom the child was removed or the child's tribe may petition a state court to invalidate an action for foster care placement or termination of parental rights on grounds that the action violated ICWA provisions regarding jurisdiction, notification to the parent/custodian and tribe, or validly obtained consent.<sup>27</sup>

## **CHILD PLACEMENT PROVISIONS OF ICWA**

### ***Order of Preferences***

In a state court adoptive placement proceeding, unless the court finds “good cause” to the contrary, preference is given to: (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.<sup>28</sup>

When a state court places an Indian child in a foster care or preadoptive placement, the placement must be the “least restrictive setting which most approximates a family.” The placement must meet any special needs of the child. The placement must be within reasonable proximity to the child’s home. Unless the court finds “good cause” to the contrary, preference must be given to: (1) a member of the Indian child’s extended family; (2) a foster home licensed approved, or specified by the Indian child’s tribe; (3) an Indian foster home licensed or appropriated by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization which can meet the Indian child’s needs.<sup>29</sup>

### ***Grounds for Variation from Preferences: (1) Tribe’s preferences; (2) Good Cause***

ICWA allows for a variation from the above preferences where the Indian child’s tribe establishes by resolution a different set of preferences. The state agency or court conducting the proceedings must follow the tribe’s preferences so long as they result in a placement that is the least restrictive setting appropriate to the child’s needs.<sup>30</sup> ICWA also allows the agency or court to consider the preference of the child or parent, if appropriate.<sup>31</sup>

“Good cause” not to follow the orders of preference set out above must be based on one or more of the following:

- The request of the biological parents (or the child if the child is old enough)
- Extraordinary physical or emotional needs of the child (must be established by testimony of a qualified expert witness)

- The unavailability of suitable families for placement after a diligent search is made<sup>32</sup>

### ***General Considerations***

The state court or agency must apply the “prevailing social and cultural standards” of the parent’s or extended family’s Indian community.<sup>33</sup> If the state court makes a placement, the court must maintain a record that shows all efforts to comply with the order of preference. The record must be available upon request by the Secretary of the Interior or the child’s tribe.<sup>34</sup>

If a final decree of adoption is later vacated or set aside or the adoptive parents voluntarily terminate their parental rights to the Indian child, the biological parents or prior Indian custodian can petition the court to regain custody of the child.<sup>35</sup> This petition must be granted unless the court is convinced that it would not be in the child’s best interest.

If an Indian child who was placed in foster care or in an institution is later removed from that placement, the new proceedings must be conducted in compliance with ICWA provisions (unless the child is being returned to the parent or Indian custodian from whom the child was originally removed).<sup>36</sup>

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<sup>1</sup> 25 U.S.C. §1903(4).

<sup>2</sup> 490 U.S. 30 (1989).

<sup>3</sup> BIA Guidelines B.2.

<sup>4</sup> See Id.

<sup>5</sup> BIA Guidelines B.2. Commentary

<sup>6</sup> See BIA Guidelines C.4.

<sup>7</sup> See 25 U.S.C. §1911(a) & BIA Guidelines C.2.

<sup>8</sup> BIA Guidelines C.3.

<sup>9</sup> See BIA Guidelines C.4.

<sup>10</sup> See 25 U.S.C. §1911(c).

<sup>11</sup> See BIA Guidelines C.1. Commentary.

<sup>12</sup> See 25 U.S.C. §1912(b).

<sup>13</sup> See id.

<sup>14</sup> See 25 U.S.C. §1912(d).

<sup>15</sup> BIA Guidelines D.2.

<sup>16</sup> See 25 U.S.C. §1912(e).

<sup>17</sup> See 25 U.S.C. §1912(f).

<sup>18</sup> BIA Guidelines D.3 & Commentary.

<sup>19</sup> BIA Guidelines D.4.

<sup>20</sup> See 25 U.S.C. §1913(a).

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- <sup>21</sup> See id.  
<sup>22</sup> See 25 U.S.C. §1913(b).  
<sup>23</sup> See 25 U.S.C. §1913(c).  
<sup>24</sup> See 25 U.S.C. §1913(d).  
<sup>25</sup> See id.  
<sup>26</sup> See id.  
<sup>27</sup> See 25 U.S.C. §1914.  
<sup>28</sup> See 25 U.S.C. §1915(a).  
<sup>29</sup> See 25 U.S.C. §1915(b).  
<sup>30</sup> See 25 U.S.C. §1915(c).  
<sup>31</sup> See id.  
<sup>32</sup> BIA Guidelines F.3.  
<sup>33</sup> See 25 U.S.C. §1915(d).  
<sup>34</sup> See 25 U.S.C. §1915(e).  
<sup>35</sup> See 25 U.S.C. §1916(a).  
<sup>36</sup> See 25 U.S.C. §1916(b).