

Indian Child Welfare Act

Presented by:

Chief Judge P.J. Herne

St. Regis Mohawk Tribe

- ▣ Total Enrollment: 14,269
- ▣ Residing on Reserve: Approx. 5,500
- ▣ Children Under the Age of 18: 2,700

Tribal Membership Rules

- Each Tribe has their own membership rules
 - To qualify for membership in the St. Regis Mohawk Tribe a person must prove 25% blood quantum ancestry of the St. Regis Mohawk Tribe.
 - Onondaga is Matrilineal and must prove mother-child relationship
 - A person must prove at least 1/16 blood quantum for enrollment in the Mashantucket Pequot Nation
 - Cherokee Nation: NO blood quantum, prove at least one ancestor on the Dawes Roll.

Tribal Membership Cont'd:

The determination of Tribal membership is within the sole authority of the Tribal Nation (Exclusive Jurisdiction); it is not shared or dependent upon any other sovereign (state or federal government). See Felix Cohen, Handbook of Federal Indian Law (Nell J. Newton et. All. Eds. 2005) at 176 citing Delaware Indians v Cherokee Nation, 193 US 127 (1904)

Why ICWA Was Needed

- It is a fact worthy of remark here that the constitution of the Indian youth is not adapted to the change which is required when it leaves its simple home and takes place in a school room. The alteration of habits, the loss of unrestrained exercise, the confined atmosphere of the school room, change of diet and mode of living, all combine to prostrate his physical powers, and have a decided tendency to induce disease and death. About one in five who have been placed in the normal and other high schools away from their homes have died within a year from the time of entrance, while the health of others has been materially impaired."

See NYS Assembly Doc No. 43, Jan 31, 1855; Report of Committee on Indian Affairs, on petitions for an orphan asylum, and certain schools on Indian Reservations, in this State.

Why ICWA:

One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal governmental authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution can only benefit an Indian child.

-Chief Isaac

ICWA provides many things to Tribal Nations with respect to removal, placement, and adoption of Indian Children. These include notice of a 'removal' of an Indian child (§ 1912), a 'right' to intervene in pending state court actions (§ 1911 (c)), exclusive jurisdiction (§ 1911 (a)), full faith and credit (§ 1911(d)), and Tribal preferences for placement of an Indian Child (§ 1915).

Indian Child Welfare Act

▣ Key Definition:

- “‘Indian Child’ 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 biological child of a member of an Indian tribe;” See 25 USC § 1903 (4).

▣ What is missing?

ICWA and Residency

There is NO residency definition provided in ICWA! Therefore, the 'right' of a Tribal Nation/or a member thereof is **NOT** contingent upon actually residing on an Indian Reservation. This is most unique when one understands that nearly all jurisdictional laws are usually associated with some type of geographical requirement or limitation, but ICWA has no such language.

Therefore, jurisdiction over an Indian child can theoretically be exerted wherever the child is found!

Mississippi Band of Choctaw vs. Holyfield 490 US 30 (1989)

- The congressional findings that were incorporated into the ICWA reflect these sentiments. The Congress found:
- (3) that there is no resource that is more vital to the continued existence and integrity of Indian Tribes than their children...?;
- (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non tribal 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
- (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, 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 U.S.C. §1901.

Final Disposition of Holyfield

After the Supreme Court's decision, the Mississippi Choctaw Tribal Court appointed a guardian ad litem for the twins, demanded proof of paternity from the father, and conducted a home investigation of Ms. Holyfield. On February 9, 1990, the Tribal Court granted adoption of the children to Ms. Holyfield, after deciding it was in the children's best interest that they remain with her. Coyle, *After the Gavel Comes Down*, NAT'L L.J. Feb 25, 1991 at 1.

Forgotten ICWA Provision: Remedial and Rehabilitative Programs

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful." See 25 USC § 1912 (d)

NYS Responses

- “The office of children and family services may enter into an agreement with an Indian tribe for the provision of foster care, preventative and adoptive services to Indian children .” See NY SSL § 39 (2).

Other ICWA Problem:

- For the purpose of this title, *expenditures made by any Indian tribe for the care and maintenance of neglected, abused, abandoned or destitute children who have been remanded, discharged or committed pursuant to the family court act of the state of New York* shall, if approved by the department, *be subject to reimbursement.*" See NY SSL § 153 et. al., and as provided above.

NY Court Rule

- §205.51 Proceedings Involving Custody of a Native American Child
 - In any proceeding in which the custody of a child is to be determined, the petition shall set forth whether the child is a Native American child subject to the Indian Child Welfare Act of 1978 (25 U.S.C. § §1901-1963) and the Court shall proceed further, as appropriate, in accordance with the provisions of that Act.

NY Court Rule

- §202.68 Proceedings Involving Custody of an Indian Child
 - In any proceeding in which the custody of an child is to be determined, the court, when it has reason to believe that the child is an Indian child within the meaning of the Indian Child Welfare Act of 1978 (92 St. 3069), shall require the verification of the child's status in accordance with that Act and, proceed further, as appropriate, in accordance with the provisions of that Act.

Fundamental Problems

- ❑ The failure to identify a child as an Indian child
- ❑ The failure to follow the specific mandates of ICWA
- ❑ The failure to seek appropriate permanency for Indian children, particularly post-AFSA

Is this a State action that is covered by ICWA?

- Foster care placement under Art. 10
- Transfer between foster care placements
- PINS and child is being placed
- “Voluntary” placement under SSL
- Surrenders
- Termination of parental rights
- Pre-Adoptive placement
- Adoption-including private adoptions
- Custody to a non-parent

The Key Questions

- Is this an ICWA child?
- Is this an ICWA action?
- What is the proper jurisdiction?
- Who needs to be noticed?
- What are the placement preferences?

What if the Judge Denies that it is an ICWA Case?

□ Prove it

- Tribes determine membership, which then determines if it is an ICWA Case
- Who do you contact?
- Which tribe?
- Where is it located?
- Have you ever been there?

Then contact the tribe

Contact Us

- SRMT Court 518-358-6300
- SRMT DSS 518-358-4516

Even if you are not dealing with a Mohawk child, our ICWA Director can point you in the right direction.

REMEMBER: the Tribe can intervene at any time