

# **The Indian Child Welfare Act**



**Presented by Margaret A. Burt, Esq.  
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# ICWA IS ABOUT...

- **The rights of the tribe - a separate government**
- **The preservation of tribes and native culture**
- **The child's right to political identity**



# **FEDERAL LAW**

**ICWA.**

**25 U.S.C.A.**

**§ 1901**

**1978**

# STATE LAW

- **State can incorporate ICWA into state law**
- **State can add to fed ICWA law**
- **State cannot subtract from fed ICWA law**
- **Fed law applies to states even if there is no reference in state law**



**SSL § 2**

**(35 + 36)**

**SSL § 39**

**18 NYCRR § 431.18**

**An ICWA child welfare case that remains in state court requires following state law and federal ICWA.**



# **WHY?**

- **Stop unnecessary removal of Indian children**
- **Don't disconnect child from culture and tribe**
- **Promote tribal involvement in Indian children's lives**

# **PRIOR TO ICWA**

- **Cultural bias in removals**
- **“Save” child by removing from tribal culture**
- **Policy of assimilation**
- **Boarding schools**
- **Indian Adoption programs**



# What is the purpose?

- Feds determined that states clearly showed “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children.....by nontribal public and private agencies...”

# FEDERAL POLICY



- **Protect Indian children**
- **Preserve Indian families**
- **Place Indian children where culture is valued**

# **WHAT?**

**Special requirements on state courts when Indian children are to be placed outside the home or freed for adoption.**

# Requires

- Courts to make decisions that reflect value of tribe and Indian family connections – requires expert testimony to be heard and considered
- Agency to provide more than diligent efforts – ‘active efforts’ to compensate for children having been more likely to be placed outside of the home
- Higher burdens of proof to remove children and free them for adoption

# **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**

# 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 special evidentiary rules if it stays in state court?
- What are the placement preferences?

# **Who is an ICWA child?**

**A political question, NOT a racial one**

- **Unmarried and**
- **Under 18 years old and**
- **Member/enrolled in a federally recognized tribe or**
- **Eligible/enrollable as a member and the biological child of a member**

# **VERY IMPORTANT NYS ADDS:**

- **Child who is a member or eligible to be of any state recognized tribe**
- **Any child under 21 years of age who came into care before age 18**
- **A biological child of a member of a federally or state recognized tribe and the child lives on reservation or tribal land**

# Biggest Confusion and Misconception

- Bottom Line :

Only the sovereign entity of the tribe can determine if the child is an ICWA child as only they can determine if the child is a member or enrollable as a member and the child of a member or the child of a member who lives on tribal land

# **WHO ARE THE NYS TRIBAL NATIONS?**

**The Haudenosaunee/Iroquois  
Nations: Cayuga, Oneida,  
Onondaga, St. Regis Mohawk,  
Seneca, Tuscarora, Tonowanda  
Band of Seneca**

**The Algonquain Tribal Nations:  
Shinnecock and Unkechang**

# **REMEMBER...**

**There are hundreds of other federal and state recognized tribes in the US, and any child in NYS could be a member or eligible to be a member of those**



# ISSUES

- **How do you know who is a member/enrolled?**
- **Isn't it all about blood quantum?**
- **What do federal guidelines say? "B.1."**
- **What about MEPA?**

# **MORE ISSUES**

- **What about Canadian tribes?**
- **What if one sibling is an Indian child but the other is not?**
- **What if the child is raised in tribal culture but is not enrollable?**
- **Do tribes have to follow ICWA?**

# **TO WHAT LEGAL PROCEEDINGS DOES IT APPLY?**

- **Child being placed in foster care due to abuse/neglect (or transferred)**
- **Child being placed on status offenses or voluntary where child cannot be returned upon demand**

**NYS CLEARLY  
INCLUDES  
“VOLUNTARY”  
PLACEMENTS**

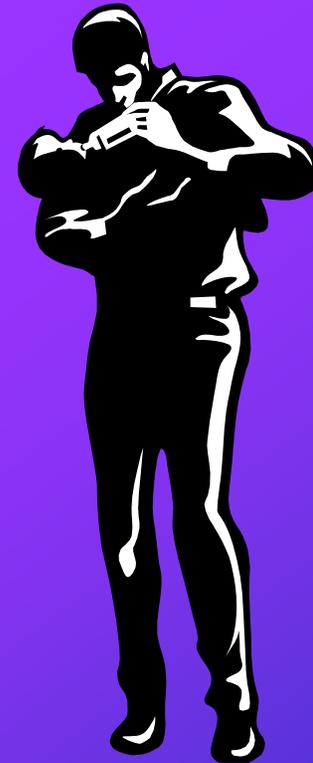


# **MORE APPLICATIONS**

- **Child custody with non-parent**
- **Termination proceedings**
- **Pre-adoptive placements**
- **Adoptions—including stepparent, public and private**

# **PROTECTS:**

- **Indian children**
- **Parents of Indian children (even if they are non-Indian)**
- **Indian custodians**



- **ICWA issues may well be relevant in matters even though statute need not be applied.**
- **Applies to terminations and adoptions even if did not apply to original placement.**

**Does not apply to :**

**DIVORCE  
CUSTODY BETWEEN PARENTS  
JUVENILE DELINQUENCY  
PATERNITY/SUPPORT  
DOMESTIC VIOLENCE  
TOTALLY VOLUNTARY  
PLACEMENT**

# Does not protect:

- Unwed fathers who have not acknowledged paternity
- Non Indian parents who adopted an Indian child

# Where is the case heard?

- Exclusive jurisdiction – only can be handled in the tribal court
- Transfer – can be moved to the tribal court
- Right to intervene – tribe can be involved in the state court action

# **INDIAN TRIBE EXCLUSIVE JURISDICTION**

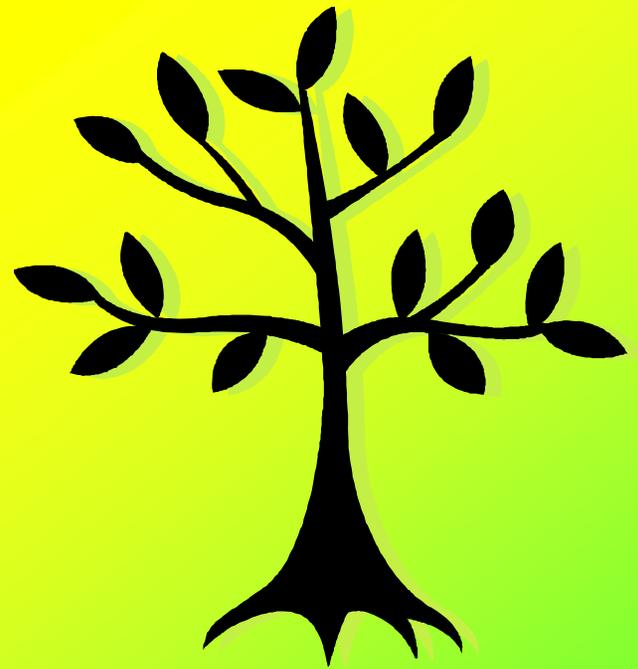


- **Indian child who is a ward of a tribal court**
- **Indian child who resides or domiciled on a tribal reservation**

**Mississippi Band of Choctaw v  
Holyfield**

408 U.S. 15 (1972)

**NYS ALLOWS THIRTY  
DAY PERIOD  
TO HANDLE  
THESE CASES**



# **EXCEPTIONS TO EXCLUSIVE JURISDICTION RULE**

- **PL 280 states  
for  
concurrent  
jurisdiction but  
now some have  
retroceded**



**State CPS can do  
emergency removal of  
an Indian child who is  
temporarily located  
off the reservation  
BUT then the matter  
must be returned to  
tribal jurisdiction.**

# **STATE COURT**

## **JURISDICTION**

**Indian child who does not live  
on the reservation BUT  
subject to transfer to a  
tribal court or to  
intervention by tribe in state  
court proceeding**

**So if it is not exclusive  
jurisdiction to tribal court  
then the two options are :  
Transfer or Intervention**

## Transfers to Tribal Court

- **Tribe or parent can ask for the transfer**
- **Either parent (tribal or not) can oppose and stop the transfer**
- **State court must transfer if both tribe and parents want it and can only retain jurisdiction if there is “good cause”**
- **Court can transfer case but child can stay in DSS care**
- **Adoptive placement transfers?—  
courts have split**

# **GOOD CAUSE TO REFUSE TRANSFER**

## **Guidelines “C3”**

- **Inconvenient forum**
- **Advanced stage/motion untimely**
- **Child over 12 who opposes**
- **Child over 5, parents gone and no tribal contact**
- **No tribal court**
- **Is lack of an “Existing Indian Family” good cause to refuse transfer?**
- **Is “bonding” good cause to transfer?**

# **TRIBAL INTERVENTION IN STATE COURT**

- **Tribe's right**
- **At any time**
- **Parent, agency, child, court cannot prevent**
- **Even where not going to appear in person**
- **Not specifically listed for adoption proceedings**

**MATTER OF BABY BOY C.  
1<sup>st</sup> Dept. June 2005**

**Private adoption case—  
ICWA applied and says tribe  
should be noticed, should be  
allowed to appear to make  
sure placement procedures  
appropriate and says  
“existing Indian family”  
exception will not be  
applied**

# Tribal Intervention in State Court

- Tribes Right
- At any time – including appeal
- Parent, agency, child, court cannot prevent
- Even if not going to appear in person

# REMEMBER

Court must apply ICWA rules even if tribe does not appear or is unable to be involved

# Notice

- Formal notice must be done exactly as law describes – by registered mail with return receipt requested
- Each “new” proceeding requires notice
- Notice goes to all parents and custodians – even if not tribal
- Notice goes to any tribe that might be child’s tribe or BIA

# **BASIC RULE**

## **FOSTER CARE OR TERMINATION**

**If know or have reason to know case involves an Indian child:**

**NOTIFY tribe or Secretary of Interior by registered mail, also notify parent and custodian**



**BEST PRACTICE:**



**If not sure, NOTIFY!**

# **NOTICE QUESTIONS**

## **Guidelines “B2”**

- **Member of more than one tribe?**
- **Not sure if child is a member or eligible for membership?**
- **Child’s parents?**
- **Unwed fathers?**
- **Timing?**
- **Who actually sends the notice out?**

# **What are special rules for REMOVAL?**

**Guidelines “D4, D3c, B**



- **Qualified expert witness**
- **Likely to result in serious emotional or physical damage if child remains**
- **Clear and convincing burden of proof**
- **“Active efforts”**

# What are “active efforts”?

- Efforts by DSS to provide remedial services and rehabilitative programs that have not been successful
- MORE than “reasonable efforts”
- CLEARLY meant to include working with the tribe and seeking tribal resources

# **VOLUNTARY PLACEMENT OR SURRENDER ISSUES**

- **Consent must be in writing and before a family court judge**
- **Judge's certificate**
- **Language**
- **More than ten days after the birth**
- **Can withdraw consent to a voluntary--child is returned**
- **Can revoke surrender before an adoption--child is returned**

**NYS regulations also require that there be “reasonable efforts” made to prevent a placement of an ICWA child in Art. 10, voluntary, and JD proceedings**



**NYS regulations have a  
“tighter” description of  
“qualified expert witness”  
than the feds do**

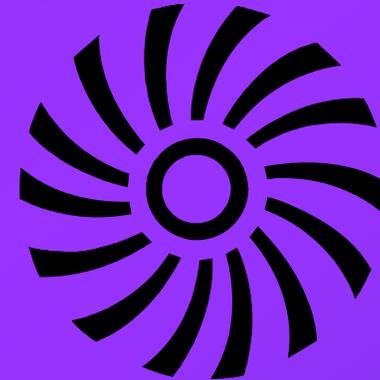


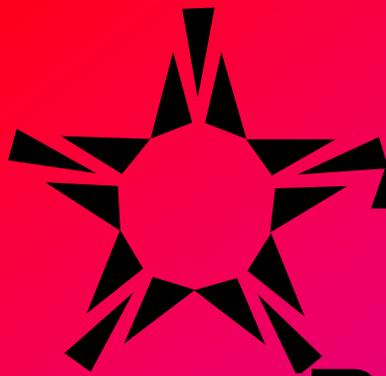
**No temporary removal of a child for more than 90 days without the proper notice and findings**



# TPR ISSUES

- **ASFA applies**
- **Timing**
- **Qualified expert**
- **Return home would likely result in serious emotional or physical damage**
- **Beyond a reasonable doubt burden of proof**





# **ADOPTION ISSUES**

- **Revocable before final decree--return to parent**
- **Adoption can be vacated on fraud/duress grounds--return to parent**
- **No adoption can be vacated after two years**

**WHAT IF ADOPTIVE  
PARENT IS LATER  
TPRed OR  
SURRENDERS INDIAN  
CHILD?**

**There can be a petition  
to return the child to  
the birth parent**

# **FOSTER CARE PLACEMENTS**



- **Least restrictive setting**
- **Reasonable proximity to their home**
- **Special needs**
- **Preferences**
  - **extended family**
  - **foster home specified, approved, or licensed by tribe**
  - **Indian foster home licensed by state/county authority**
  - **approved Indian institution**

# **ADOPTIVE PLACEMENTS**

## **Preferences:**

- **Extended family members**
- **Tribal members of child's tribe**
- **Other Indian families**
- **Other non-Indian families**



# **GOOD CAUSE TO MODIFY PLACEMENTS**

## **Guidelines “F3”**

- **Parents or child have different wishes**
- **Tribe has different preferences**
- **Child has extraordinary needs**
- **Anonymity**
- **Can't find placement**



# **RIGHT TO COUNSEL FOR PARENTS AND CUSTODIANS**



**RIGHTS OF  
ADULT ADOPTEEES  
TO RECORDS**



# **FAILURE TO FOLLOW ICWA?**

**Parent, Indian custodian  
or tribe may petition to  
invalidate the order.**

# **ASK, ASK, ASK**



- **Make it routine to ask**
- **ICWA findings at every stage clearly documented in court order**

# STEPS

- **Training**
- **Agency forms and procedures**
- **Court procedures**

