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The Application of the Indian Child Welfare Act to Grandparent Custody Actions

Welfare Reform and Grandparents Raising Grandchildren

State Initiatives Slowly Respond to Kinship Care

Kinship Caregiving
The Application of the Indian Child Welfare Act to Grandparent Custody Actions

By Michelle Monteiro and Mark Fiddler

Michelle Monteiro is a third-year law student at the William Mitchell College of Law, St. Paul, Minnesota, and is a law clerk for the Indian Child Welfare Law Center, 1433 E. Franklin Ave., Suite 18A, Minneapolis, MN; (612) 879-9165. Mark Fiddler is an attorney and executive director of the Indian Child Welfare Law Center and is a member of the Turtle Mountain Band of Chippewa Indians.

I. Introduction

Child protection agencies nationwide are grappling with the task of restraining growth in spiraling foster care budgets while at the same time protecting abused and neglected children. For example, in Hennepin County, Minnesota, where most clients of the Indian Child Welfare Law Center reside, county administrators increasingly count on grandparents to step forward and care for at-risk children as a means of avoiding a foster care placement. /1/ Anecdotal evidence suggests that once a child protection intake worker learns that a responsible grandparent is caring for the children, the child protection agency rarely intervenes, regardless of the seriousness of the parent’s condition. Thus, Indian grandparents, who formerly may have been providing relative foster care for abused and neglected Indian children, must now face the daunting task of establishing legal custody for their grandchildren on their own, often against the wishes of a parent who may be struggling with alcoholism, domestic abuse, or other personal crises. The need for attorneys willing to take on these cases has never been greater.

Thus, it will increasingly fall to legal services attorneys to intervene where child protection will not by filing grandparent custody proceedings. Attorneys who initiate actions on behalf of grandparents of Indian children must be aware of the possible application of the Indian Child Welfare Act (ICWA). /2/ This article describes how the ICWA interacts with state family law. /3/

II. An Introduction to the Indian Child Welfare Act

The ICWA established minimum federal standards for the removal of Indian children /4/ from their families and for the placement of these children in foster or adoptive homes that reflect the unique values of Indian culture. /5/ The ICWA is based on the concept that Indian tribes are sovereign nations with the inherent authority to decide matters relating to their children’s interests. /6/ Congress passed the ICWA to remedy abuses in the placement of Indian children by state courts and welfare agencies. /7/ Specifically, Congress found that an alarmingly high percentage of Indian
families were being broken up by often unwarranted removal of Indian children from their homes and placement in non-Indian foster and adoptive homes and institutions. These inequities occurred because the states failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. The result of these inequities was the destruction of Indian families, tribes, and cultures. Displaced Indian children had difficulty adjusting and coping with living in white society and exhibited higher rates of suicide and alcoholism as adults, which destroyed the family unit. Furthermore, removal of the children threatened the very existence of the Indian tribes themselves by undercutting the tribes’ status as sovereign nations.

III. Grandparents and Involuntary Placements of Indian Children

A. The ICWA’s Application to Grandparent-Parent Custody Disputes

When a grandparent or another extended family member is involved in a custody dispute over an Indian child, the attorney must make a threshold determination as to whether the ICWA applies to the proceedings. In general, the ICWA applies to "child custody proceedings" involving an "Indian child." "Child custody proceedings" include foster placement proceedings, preadoptive placement proceedings, adoptive placement proceedings, and termination of parental rights proceedings. An "Indian child" is defined as any unmarried person who is under age 18 and is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. The simplest and most effective way of establishing whether a child is Indian is to contact the child’s tribe. Only the tribe has the right to determine whether the child is eligible for membership.

When a custody dispute between grandparents and parents arises over an Indian child, the ICWA may or may not be applicable, depending on the jurisdiction. In some jurisdictions, the ICWA does not apply to intrafamily custody disputes. In In re Bertelson, the Montana Supreme Court reasoned that the ICWA’s purpose is not to resolve disputes within Indian families over Indian children; rather, "its intent is to preserve Indian culture values under circumstances in which an Indian child is placed in a foster home or other protective institution." Courts rejecting the Bertelson approach have pointed out that placement of an Indian child under the legal guardianship of a relative is tantamount to a "foster care placement" within the meaning of the ICWA and therefore such a proceeding is a "child custody proceeding." These cases also note that the ICWA expressly allows only two exceptions to its applicability: divorce proceedings and juvenile delinquency proceedings. To hold that the ICWA does not apply to intrafamily custody disputes would, in essence, impermissibly create a third exception to the ICWA. Furthermore, excepting intrafamily custody disputes from the ICWA would defeat the act’s purpose, namely, redressing "problems caused by the failure of state courts and agencies to recognize the culture and social standards prevailing in Indian communities." Thus, outside of Alaska, Minnesota, Oklahoma, and Washington (where the ICWA applies to grandparent custody
actions), and Montana (where the ICWA does not apply), attorneys representing grandparents of Indian children may need to litigate the issue of the ICWA’s applicability as a case of first impression.

B. The Standards for Proof in Child Custody Proceedings

In cases involving a family court custody dispute between a grandparent or another extended family member and the parent of an Indian child, the issue arises as to whether state law custody standards or the ICWA should be applied.

Typically, most states have statutory "best interests of the child" standards for determining the custody and support of children as between two parents. /25/ However, under state law grandparents usually have to do more than prove to a state court judge that their grandchildren would be "better off" with them than with the parents. /26/ Rather, in most states, a grandparent or another third-party petitioner must demonstrate that the parent is unfit, that the parent has abandoned his or her right to custody, or that extraordinary circumstances require that the parent be deprived of custody. /27/ This standard is closely analogous to the ICWA’s standard, which requires a grandparent petitioning for custody of an Indian child to produce clear and convincing evidence sufficient to support a finding that the "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." /28/ This finding must be supported by the testimony of "qualified expert witnesses." /29/ Whether the ICWA preempts state law, given the comparability of the state and ICWA standards for removal of a child from a parent, may be a moot question. Nonetheless, attorneys representing grandparents or other third parties in child custody proceedings should be aware that, while the evidentiary and proof standards may be comparable, pleadings still must be drafted to meet the standards of the ICWA.

If a state’s "best interests" standard for third-party custody were lower than the ICWA’s "serious emotional or physical damage" standard, it is questionable whether such a lower burden of proof standard would preempt the ICWA’s higher proof requirements. There is no settled case law on this issue. /30/ However, under the Supremacy Clause, /31/ as well as Indian preemption principles, the ICWA preempts any state law or policy that contradicts it. /32/

IV. Grandparents and Voluntary Placements of Indian Children

Frequently, Indian children are voluntarily placed with their grandparent(s) by their parents. In fact, it is quite customary in Indian communities for grandparents to have physical custody and provide parental care of their grandchildren. The type of legal arrangement this "grandparenting" relationship takes may or may not implicate the ICWA. Although the ICWA sets out strict procedural requirements for voluntary termination of parental rights /33/ and voluntary "foster care placements," /34/ it does not apply to physical custody transfers where the parent has the right to have the child returned upon demand. /35/
Thus, legal practitioners need not be concerned that delegation of parental authority alone (from a parent to a grandparent), such as a simple power of attorney, runs afoul of the ICWA. In such cases, the parent is delegating parental responsibility to another, yet retaining the right to revoke the delegation at any time and to have the child returned on demand. In fact, the ICWA does not apply to such physical custody transfers, which are an everyday reality of Indian life. If, however, a parent voluntarily consents or stipulates to a placement of an Indian child with a relative and the parent cannot have the child returned upon demand, the case becomes a "child custody proceeding" within the meaning of the ICWA, and the provisions of the ICWA apply.

A. Consent Requirements in Voluntary Custody Proceedings

Assuming that a parent is making a foster care placement as defined above, the parent must appear in court to execute a voluntary placement agreement in which the court certifies that the terms and consequences of the placement are understood by the parent. Attorneys for grandparents should, therefore, secure the appearance of the parent in court or obtain a written waiver by the parent of his or her rights under the ICWA.

B. Notification of Tribes in Voluntary Placement Proceedings

To ensure that tribes have the opportunity to exercise jurisdiction over Indian child custody proceedings and to protect their respective interests, the ICWA requires that the Indian child’s tribe be notified of involuntary proceedings involving Indian children. However, the ICWA does not expressly require notice in voluntary placement proceedings. Hence, a voluntary placement of an Indian child may occur absent notification of the tribe and its right to intervene. The absence of a notification requirement frustrates the ICWA’s purpose, which is to restore to Indian tribes the right to participate in court determinations affecting the placement of their members and relatives. It follows from this purpose that the tribes must be given the opportunity to intervene in all placements of Indian children. Moreover, the Supreme Court has observed that Congress intended the ICWA to apply to voluntary placements. Tribes have the right to intervene in state court "foster care placement" proceedings. Thus, concern for the purpose and spirit of the ICWA should lead practitioners to give notification to the Indian child’s tribe, whether expressly required by the ICWA.

V. Grandparents and Placement Preferences Under the ICWA

The ICWA articulates specific placement preferences that the courts must follow when placing an Indian child in foster care or preadoptive placement. For both foster care and adoptive placements, absent a showing of "good cause" to the contrary, preference is given to placement in the home of an "extended family" member, which includes the home of a grandparent. The preferences are to be met by applying the prevailing social and cultural standards of the community in which the parent or extended family lives or maintains social ties. If a grandparent is
available to care for the child, the ICWA creates a presumption that it is in the child’s best interests to be placed with the grandparent.

Placement with grandparents more readily fulfills the ICWA’s purpose of placing Indian children in homes that reflect the unique values of Indian culture. /47/ Typically, grandparent custody proceedings are by stipulation or default and do not involve competing placement options. To the extent that contests do occur in family court proceedings, they usually take place between members of the child’s extended family. In the latter situation, the ICWA favors no one since extended family members, whether a first or second cousin, uncle, or grandparent, all fall within the first order of the preference under the ICWA. /48/

In contested grandparent custody proceedings, the opinion of the tribe’s representative can be decisive in determining not only whether the child should be removed from the parent but also which relative seeking custody would best meet the child’s needs. Advocates are advised to solicit the opinion of a tribal ICWA representative before initiating a child custody action. Frequently, tribal officials possess valuable and relevant facts about families -- facts that sometimes elude the attorneys who represent those families.

VI. Conclusion

Grandparent custody proceedings, as they implicate both state family law and federal Indian law, present attorneys with unique challenges. While most proceedings are not contested, attorneys should be extremely cautious in ensuring that the ICWA is nevertheless followed. Unlike many state family law proceedings, a "botched" ICWA grandparent custody action is subject to collateral attack resulting in invalidation of the placement. /49/

Compliance with the ICWA will not only serve clients’ legal interests but also advance the stability and integrity of Indian extended families, promote permanency for Indian children, and provide for the long-term survival of Indian tribes. The era of social workers removing Indian children from their homes on the basis of unwarranted charges of neglect is thankfully over. Now, however, Indian families -- in particular Indian children’s grandparents -- face new challenges as they struggle to protect the children from neglect and other effects of poverty that show no sign of abating. This is even more true when budget cuts mean that child protection agencies cannot be counted on to protect at-risk Indian children. Few cases confronting attorneys are as demanding on their skill and compassion as these. Fewer still are as rewarding.

Footnotes

/1/ Founded in 1993, the Indian Child Welfare Law Center, a non -- Legal Services Corporation funded program, provides legal representation for low-income Indian children, families, and tribes in cases governed by the Indian Child Welfare Act (ICWA).
/2/ Indian Child Welfare Act, 25 U.S.C. Secs. 1901 -- 23 (1978). At press time, legislation had been introduced to amend the ICWA. See The Adoption Promotion and Stability Act of 1996, H.R. 3286, 104th Cong., 2d Sess. (1996), which has been passed by the House. Title III of H.R. 3286 would allow state courts to determine whether a parent has sufficient tribal affiliations to justify application of the ICWA. See also S. 1962, 104th Cong., 2d Sess. (1996), which would mandate notice to Indian tribes in all voluntary child custody proceedings, provide for a tribal right of intervention, and create penalties for fraud or misrepresentation about a child or parent’s tribal identity. The Senate Indian Affairs Committee has rejected title III of H.R. 3286 in favor of S. 1962, which is supported by the National Congress of American Indians. As of mid-July 1996, S. 1962 was still before the Indian Affairs Committee. Since these amendments would significantly change the ICWA’s provisions, advocates are advised to verify the status of the legislation before handling any child custody cases involving Indian children.

/3/ This article assumes that most grandparents seeking custody of Indian children are themselves "Indian." The ICWA does not require that grandparents be Indian to have standing under the ICWA. 25 U.S.C. Sec. 1903(2) (definition of "extended family member" does not require that extended family members be biologically related to the Indian child or that they be Indian).

/4/ 25 U.S.C. Sec. 1903(4) (an "Indian child" is defined as any unmarried person who is under the age of 18 and is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe).


/8/ 25 U.S.C. Sec. 1901(4); see also Manuel P. Guerrero, Indian Child Welfare Act of 1978, 7 Am. Indian L. Rev. 51, 57 n.8 (1979) (citing Indian Child Welfare Hearings Before the S. Subcomm. on Indian Affairs, 93d Cong., 2d Sess. 15 (Apr. 8, 1974), reprinted in 1978 U.S.C.C.A.N. 7530, 7531 (statement of William Byler, Executive Director of the Association on American Indian Affairs)). The Association on American Indian Affairs (AAIA) is a nonprofit organization, founded in 1923, to assist American Indian and Alaska Native communities in their efforts to achieve full economic and social equality. At a Senate subcommittee hearing, the AAIA executive director said: [I]n Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and, in 1971 -- 72, nearly one in every four Indian children under one year of age was adopted. . . . The disparity in placement rates is shocking. In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State Department of Public Welfare since 1967 -- 68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The number of South Dakota Indian children living in foster homes is, per capita, nearly 16 times greater than the non-Indian rate. In the State of Washington, the Indian adoption rate is 19 times greater and the
foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 16 times greater than it is for non-Indian children. . . . In sixteen states surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes.

/9/ 25 U.S.C. Sec. 1901(5). Gorman & Paquin, supra note 7, at 313 (decisions to place Indian children in foster care were often based upon white social workers’ culturally biased perceptions of Indian people’s use of alcohol, child-rearing practices, and the use of multigenerational nuclear families for child care).

/10/ Gorman & Paquin, supra note 7, at 313 (citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 n.1 (1989)) ("They were raised with a white cultural and social identity. They are raised in a white home. They attended predominantly white schools, and in almost all cases, attended a church that was predominantly white, and really came to understand little about Indian culture, Indian behavior, and virtually had no Indian viable identity... [D]uring adolescence, they found that society was not to grant them the white identity that they had. . . . [T]hey were finding that society was putting on them an identity which they did not possess and taking from them an identity that they did possess.").

/11/ Id.

/12/ Id. (the effect of the child’s removal caused separation of the parents; exacerbated the problems of alcoholism, unemployment, and emotional distress; and increased the likelihood that the other children would be removed).

/13/ Holyfield, 490 U.S. at 34 (Chief Calvin Isaac of the Mississippi Band of Choctaw testified: "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribe’s ability to continue as self-governing communities.").


/16/ Id. Sec. 1903(4).

/17/ Membership in an Indian tribe is determined by each tribe according to tribal law. Eligibility requirements vary from tribe to tribe. "The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive. . . . This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe’s prerogative to determine membership criteria and to decide who meets those criteria." Bureau of Indian Affairs Guidelines for State Courts, 44 Fed. Reg. 67586, 67583, 67586 (Nov. 26, 1979).
In re Bertelson, 617 P.2d 121 (Mont. 1980). In Bertelson, the non-Indian mother of an Indian child gave custody of her child to the child’s paternal grandparents, both enrolled members of an Indian tribe. When the mother sought to regain custody of the child, the grandparents refused. The court denied the tribe’s motion to intervene in state court, holding that the ICWA did not apply to intrafamily custody disputes, and therefore the tribe had no right to intervene.

Id. at 125 -- 26


Custody of A.K.H., 502 N.W.2d 790.

25 U.S.C. Sec. 1903(1) (“Such terms . . . shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.”).

Custody of A.K.H., 502 N.W.2d at 794 (“[T]he Act makes no reference to exceptions for custody disputes within the extended family. Congress did, however, explicitly exclude custody disputes resulting from divorce proceedings and juvenile delinquency actions from the protections of the Act.” Thus, courts cannot create “judicial exceptions” to the ICWA’s coverage). See also Custody of S.B.R., 719 P.2d at 155.

Custody of A.K.H., 502 N.W. 2d at 795 (statement of Commissioner of Indian Affairs rejecting Bertelson analysis).

See, e.g., Minn. Stat. Sec. 518.17 (“The best interests of the child means all relevant factors to be considered and evaluated by the court including: (1) the wishes of the child’s parent or parents to custody, (2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference, (3) the child’s primary caretaker, (4) the intimacy of the relationship between each parent and the child, (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child’s best interests, (6) the child’s adjustment to home, school and community, (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining community, (8) the permanence, as a family unit, of the existing or proposed custodial home, (9) the mental and physical health of all individuals involved . . . , (10) the capacity and disposition of the parties to give the child love, affection and guidance, and to continue educating and raising the child in the child’s culture, religion or creed, if any, (11) the child’s cultural background, (12) the effect on the child of the actions of an abuser, if related to domestic abuse . . . that has occurred between parents, and (13) . . . the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.”).

See Laurie Hanson & Irene Opsahl, Kinship Care Giving: Law and Policy, in this issue.

25 U.S.C. Sec. 1912(e), (f); see also Bureau of Indian Affairs Guidelines for State Courts, 44 Fed. Reg. 67584, 67593 (Nov. 36, 1979) [hereinafter BIA Guidelines] ("The trial Court should consider the following two criteria in determining whether the burden has been met: is it likely that the conduct of the parents will result in serious physical or emotional harm to the child, and if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?").

The ICWA does not define what constitutes a "qualified expert witness." The BIA Guidelines, 44 Fed. Reg. at 67593, state that a qualified expert witness could be (1) a member of the child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices, or (2) a lay expert witness having substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child’s tribe, or (3) a professional person having substantial education and experience in his or her specialty. However, two cases have held that the third exception, a mere "professional person," does not meet the ICWA standard for a qualified expert witness. In re Custody of S.E.G., 521 N.W.2d 357, 364 -- 65 (Minn. 1994); In re Welfare of B.W., 454 N.W.2d 437 (Minn. Ct. App. 1990).


U.S. Const. art. I, Sec. 8, cl. 3. Congress has the power to regulate commerce with the Indian tribes; 25 U.S.C. Sec. 1901.

Under the general supremacy principles, state law cannot be permitted to operate as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . . [W]here Indian affairs are concerned, a broad test of preemption is to be applied.

25 U.S.C Sec. 1913(a).

Id. Sec. 1913(b).

Id. Sec. 1903(1)(i).

Id. Sec. 1913(a) ("Where any parent or Indian custodian voluntarily consents to a foster care placement or to a termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge’s certificate that the terms and consequences were fully explained in detail and were fully understood by the parent or Indian custodian. . . . Any consent given prior to, or within ten days after, birth of the Indian child, shall not be valid.").
The Indian child's tribe is defined as (1) the tribe in which a child is a member or is eligible for membership or (2) the Indian tribe that the child has the more significant contact with if the child is a member of or eligible for membership in more than one tribe.

"[I]n any involuntary proceeding in state court, where the court knows or has reason to know that an Indian child was involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right to intervention.")

Gorman & Paquin, supra note 7, at 320 (citing In re Adoption of Child of Indian Heritage, 543 A.2d 925, 932 (N.J. 1988)).

Holyfield, 490 U.S. at 50 n.25.

/41/ 25 U.S.C. Sec. 1913(c)

In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with (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 approved by a non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child’s needs.

/43/ Id. Sec. 1915(a). In any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family, (2) other members of the child’s Indian tribe, or (3) other Indian families. See also Custody of S.E.G., 521 N.W.2d 357.

Custody of S.E.G., 521 N.W.2d 357, 362 (good cause may be established by (1) the request of the parent or a child of sufficient age, (2) the extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness, or (3) the unavailability of suitable families for placement after a diligent search has been completed for families meeting the preferences). See also BIA Guidelines 44 Fed. Reg. at 67594. But see, e.g., In re Adoption of F.H., 851 P.2d 1361, 1163 -- 64 (Alaska 1993) (whether there is good cause to deviate in a particular case depends upon many factors including, but not necessarily limited to, the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement, and the child's ties to the tribe); Erik W. Aamot-Snapp, When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in Indian Child Welfare Act Adoptive Placements, 79 Minn. L. Rev. 1167, 1182 (May 1995) ("State courts persistently evaluate Native American children’s best interests by considering what courts perceive as their needs for permanent placement and psychological attachment.").

/45/ 25 U.S.C. Sec. 1915(a), (b).

/46/ Id. Sec. 1915(d).
/47/ Id. Sec. 1902.

/48/ Id. Sec. 1915(a)(1), (b)(i).

/49/ Id. Sec. 1914.