The Indian Child Welfare Act: From Promise to Practice

Raquel Montoya-Lewis, J.D. M.S.W
Chief Judge, Nooksack Tribal Court
Associate Professor, Western Washington University
Raquel.Montoya-Lewis@wwu.edu
360.306.5125
Learning Objectives

- At the end of this session, participants will be better able to:
- Understand the history of ICWA
- Identify an ICWA case
- Apply the correct legal standards to ICWA cases
- Evaluate who is a qualified expert witness under ICWA
Why was ICWA necessary?

ICWA can only be understood in historical context.

1978: federal policy of self-determination, government-to-government relationships, tribal sovereignty

BUT coming out of centuries of failed policies and practices that had destructive and damaging effects on tribes, Indian families, and children.
THE HISTORICAL CONTEXT

- Allotment Act
- Assimilation
- Termination
Before ICWA

Indian children were removed from their homes and placed in foster and adoptive placements (especially non-Indian placements) and institutional settings at rates far greater than non-Indian children.
Carlisle Boarding School
• “It is admitted by most people that the adult savage is not susceptible to the influence of civilization, and we must therefore turn to his children that they might be taught to abandon the pathway of barbarism and walk with a sure step along the pleasant highway of Christian civilization. . . Comm. Atkins, Comm. Of Indian Affairs, 1886
After
1950s

- Indian Adoption Project
- Joint project of the Child Welfare League and the Bureau of Indian Affairs
- “There are very few services offered to Indian unmarried mothers who may want to give up their babies for adoption...children are shifted from relative to relative.”
• 25 to 35% of all Indian children were removed from their homes.

• In Arizona, Native children were 420% more likely to be placed into adoptive placements than white children.

• In Washington, the number was 1900%.
In ICWA, Congress recognized:

• An alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children…by nontribal public and private agencies.…

• States…have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

• Tribes were losing their members in great numbers.
Purpose: To prevent the break-up of Indian families
Purpose: To protect the best interests of Indian children
Purpose: To promote the continued existence of Indian Tribes
DESPITE ICWA . . .

In the 21st Century, native children are still:

- More likely to be confirmed as experiencing neglect than children from any other race/ethnicity
- Overrepresented in state foster care (1.6 times the expected level, given the population)
- Overrepresented among children waiting for adoption in state child welfare systems
Over-representation

- Washington: 2.0% of the population, but 7.5% foster care population
- Minnesota: 2.0% of the population/12.2% of the foster care population
- South Dakota: 15%/50%
Impact of Non-Compliance

• What are the consequences of failing to apply ICWA?
Baby Veronica

• “This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee.”
ICWA works . . .

By establishing a federal policy that Indian children should remain in Indian communities, and

By eliminating (reducing) cultural mistakes that result in Indian children being placed out of the home & Indian community by . . .
ICWA applies when an *Indian Child* is involved in a *child custody proceeding*. 
Problem 1

• You are the presiding judge at a shelter care hearing. The Petition states several reasons why Shelter Care should be granted. The Petition states “To the best of the Department’s knowledge, this case does not involve an Indian child.” At the hearing, you learn that the mother of the children spent some time living on the St. Croix Chippewa reservation in Wisconsin.
What questions do you ask?

Problem 1
INDIAN CHILD

An unmarried person *under 18* who is either:

- a member of an Indian tribe; or

- eligible for membership in an Indian tribe *and* is the biological child of a member of an Indian tribe.
CHILD CUSTODY PROCEEDING

- Foster care placement
- Termination of Parental Rights
- Preadoptive placement (post-TPR)
- Adoptive placement
Exclusive Tribal Jurisdiction

Tribal Courts:

- have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled on an Indian reservation.

- retain exclusive jurisdiction over any child who is a ward of the tribal court regardless of the child’s residence or domicile.
Emergency Removal

- ICWA allows emergency removal of an Indian child who is temporarily off the reservation in order to prevent IMMINENT PHYSICAL DAMAGE OR HARM.
- The Indian child must be returned home as soon as the threat of imminent physical harm has passed or the tribal court asserts jurisdiction, whichever is earlier.
- Custody proceedings shall be initiated promptly in state court if child is not returned or case transferred.
Heightened Burden of Proof

No foster care placement in the absence of:

- clear and convincing evidence,
  - including testimony of a qualified expert witness
- that continued custody is likely to result in serious emotional or physical damage to the child.
Problem 2

- What findings can you make based on what you know so far?

- What particularized ICWA findings must you make?
Concurrent Jurisdiction

Tribes and states have concurrent jurisdiction when the Indian child is not domiciled or residing on a reservation.

BUT

Concurrent jurisdiction under § 1911(b) is presumptively tribal jurisdiction according to the US Supreme Court.
Notice Requirements

In any involuntary proceeding in a State court, the party seeking foster care of or TPR to an Indian child shall notify:

- the parent or Indian custodian AND
- the Indian child’s tribe or tribes

about

- the pending proceedings AND
- the right to intervene.
Problem 3

• Who will you notify of pending proceedings?

• How will you locate them?
Notice Requirements

• Registered mail with return receipt requested.
• When the identity or location of the parent, Indian custodian, or tribe is unknown, notice shall be given to the Secretary of the Interior.
• No foster care or TPR proceeding until at least 10 days after receipt of notice by the parent or custodian and the tribe or Secretary.
• The state court shall grant up to 20 additional days if so requested by the parent, Indian custodian or tribe.
Transfer of Proceedings

A **state court** shall transfer to **tribal court** a child custody proceeding involving an Indian child not domiciled or residing within the reservation of the child’s tribe when:

- requested to do so,
- there is no good cause to the contrary,
- neither parent objects, and
- the tribal court does not decline jurisdiction.
Right to Intervene

In any state court proceeding for the foster care placement or TPR of an Indian Child, the child’s Indian custodian and tribe have:

- the *right to intervene*
- at any point in the proceeding.
Problem 4: Standards for TPR

• What kinds of efforts toward reunification can you identify here?

• Has ICWA been satisfied?
Active Efforts

Any party seeking foster care placement or TPR of an Indian child shall satisfy the court that:

- active efforts have been made to provide remedial services & rehabilitative programs designed to prevent the break up of the Indian family; and

- these active efforts have been unsuccessful.
Active Efforts

Active efforts shall:

- take into consideration the prevailing social and cultural conditions and way of life of the Indian child’s tribe, and

- involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.
Active Efforts and ASFA

ASFA does NOT alter ICWA’s active efforts requirement.

✓ Even where ASFA may relieve the State from proving reasonable efforts (e.g., when aggravated circumstances exist), active efforts must be proved.

ACTIVE EFFORTS ARE REQUIRED IN EVERY ICWA CASE.
Heightened Burden of Proof

No TPR in the absence of evidence:

- beyond a reasonable doubt,
  - including testimony of a **qualified expert witnesses**
- that continued custody is likely to result in **serious emotional or physical damage** to the child.
Qualified Expert Witness

BIA guidelines identify three types of experts:

- A member of the Indian child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family or organization in childrearing practices.

- A lay expert witness having substantial experience in the delivery of child and family services to Indians and an extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child’s tribe.

- A professional having substantial education and experience in the area of his or her specialty.
“An expert witnesses must be able “to provide the Court with knowledge of the social and cultural aspects of Indian life [in order] to diminish the risk of any cultural bias.”
Priorities for Placement
25 U.S.C. 1915

Absent good cause to the contrary, a State court shall follow these preferences for the foster care placement of an Indian child:

1st Extended Family
2nd Foster home licensed by Tribe
3rd Indian foster home licensed by State
4th Institution approved by Tribe
5th Other foster homes licensed by State
Priorities for Placement
25 U.S.C. 1915

Absent good cause to the contrary, a State court shall follow these placement preferences for the adoption of an Indian child:

1st  Extended Family
2nd  Member of child’s tribe
3rd  Member of another Indian tribe
4th  Other adoptive homes
Priorities for Placement

The tribe may change the placement preferences by resolution.

– The state court shall follow the tribe’s preferences so long as the placement is the least restrictive setting appropriate to the particular needs of the child.

In determining the proper placement of an Indian child, the Court shall apply the prevailing social and cultural standards of the Indian community

– in which the parent or extended family resides or
– with which the parent or extended family members maintain social and cultural ties.
Full faith and credit

State courts shall give full faith and credit to the

• public acts,
• public records, and
• judicial proceedings

of any Indian tribe that apply to Indian child custody proceedings to the same extent that they give this full faith and credit any other entity.
Summary

At custody hearing, adjudication, TPR, & disposition, court must make findings re:

- Indian Child
- Jurisdiction
- Adequate Notice
- Intervention
- Active Efforts
- Burden of Proof
- Expert Witness
- Placement preferences
Always Ask
ISSUES?

- Lack of (timely) notice to Tribes
- Pressure to comply with ASFA timelines
- Failure to identify Indian children
- Lack of Indian foster homes
More ISSUES?

- Lack of active efforts
- Difficulty identifying ways to maintain cultural ties for Indian children not domiciled or residing on the reservation
- Difficulty locating an appropriate expert witness
Additional Considerations

Mandatory ICWA & cultural competency training for state social workers

Better screening tools to identify Indian children at intake

**More tribal – state interaction**

More education for state judges, attorneys, & social workers

Increased recruitment of Indian foster care and adoptive homes
Additional Considerations

State acceptance of tribal foster home licensing standards

Use of tribal-state cooperative agreements

Better sharing of concurrent jurisdiction

More frequent exercise of tribal court jurisdiction

State collection of data for all key child welfare performance indicators by race of child

Establishing aggressive goals for eliminating racial disparities in child welfare
CASE STUDY
PROBLEM 1

Jasmine and her three children, aged 2, 4, and 11, came into contact with Idaho Child Protective Services on July 4, 2011. On that date, a 911 call came in from an anonymous caller stating that the three children were left in a city park for the last three hours and that when the caller asked where their parents were, they answered “We don’t know. They said they’d come back later.” Officers responded to the call, located the children who said their parents often dropped them at the park and came back later, sometimes several hours later. While officers were talking to them, Jasmine arrived, driving erratically. She asked officer what they were doing and officers immediately identified her as being under the influence of an intoxicant. When officer inquired as to the family’s residence, Jasmine answered that they sometimes stayed at a motel in the city, sometimes slept in the car. They had been living this way for over a year.

CPS workers were called and the children were removed from Jasmine’s care. At the 72 hour hearing, you need to make an initial determination as to whether these three children are covered by ICWA.

What questions will you ask?
PROBLEM 2

(Use the same facts that you have in Problem 1)

At the 72-hour hearing, you learn that Jasmine say she is “from” the Mohican tribe in Wisconsin. You have inquired whether she is enrolled (yes) and have asked her if her children are enrolled (she’s not sure, but she thinks so). You have concluded that this is likely to be covered by the ICWA.

At the hearing, you learn the following:

Jasmine moved to your city 12 months ago, after leaving the Stockbridge Munsee Community of Wisconsin (Mohican tribe) to be with the father of her youngest child who moved to your city for work. Her family lives in Stockbridge Munsee.

Jasmine has a long-standing addiction to alcohol and has recently begun using methamphetamine. She and her children have no stable place to live. The father of her youngest child has disappeared and she has no way to support herself. They have been living in hotels and in their car. The oldest child reports that she has been helping to take care of the younger two children while her mother goes to “work.” It appears that Jasmine has been engaged in prostitution and selling drugs at a local motel. She is open to transitional housing, but there is a waiting list in your area. She is open to drug and alcohol treatment, but only wants to go where she can practice her traditional healing practices.
PROBLEM 3

This is the first time you’ve heard of the Stockbridge Munsee Community of Wisconsin. How will you identify whom to provide notice to? How can the attorneys in the case assist you in providing notice? Are there other places and people you would enlist to assist you in providing notice?
PROBLEM 4

Jasmine’s case has been open for 14 months. Initially, the Court granted an in-home dependency to Jasmine with the 11 year old child, placing the two younger children in out of home care. However, four months after the initial hearing, Jasmine failed to complete treatment and as a result, she lost her transitional housing. The 11 year old was placed in foster care. Jasmine has been in and out of outpatient treatment. She has expressed a desire to be clean, but cannot find housing because her children are not placed with her. Thus, she is living on the streets or in motels and finds it difficult to maintain sobriety in that situation. The children are placed in three separate foster placements.

The Stockbridge Munsee tribe has said they will assist with paying for housing if she can locate housing, but she has been unable to do so. She has been unable to raise the money to return to Stockbridge Munsee, although there is housing available there for her and the children.

She has attempted treatment several times while her children have been in care. She has had weekly visitation with each child for three hours per week. Visitation has been supervised.

Jasmine’s three children have three different fathers. Two of them live in Stockbridge Munsee, one is an enrolled tribal member and the other is not. The father of the youngest child lives in your community and has appeared at hearings sporadically. None of the fathers have engaged in services in any consistent manner.