Print This Page | Close Window

GP|Solo
ABA General Practice, Solo & Small Firm Division

General Practice, Solo & Small Firm Division

The Indian Child Welfare Act
The need for a separate law

BY B.J. JONES

B.J. Jones is litigation director for Dakota Plains Legal Services, which provides legal assistance to the indigent residents of eight South Dakota and North Dakota Indian reservations and their adjoining counties. He is author of The Indian Child Welfare Act Handbook (ABA Family Law Section, 1995).

Because few federal laws govern the disposition of state court cases involving adoption, guardianship, and abuse and neglect, the existence of the Indian Child Welfare Act (25 U.S.C. 1901 et seq.) may come as a surprise to lawyers handling Indian child custody cases for the first time.

The Indian Child Welfare Act (ICWA), which was adopted by Congress in 1978, applies to child custody proceedings in state courts involving "Indian" children--children of Native American ancestry. The provisions of the ICWA represent a dramatic departure from the procedural and substantive laws that most states have enacted to govern child custody proceedings. Because Indian children are treated uniquely in the legal system, and because there is an increasing number of court proceedings involving Indian children, the need for lawyers to understand the ICWA is fast becoming imperative. (Since the ICWA was enacted, more than 250 state and federal court decisions have been rendered.)

Ensuring a Future

A look at history reveals why Congress determined a special law was needed to protect the rights of Indian children and their parents. Before 1978, as many as 25 to 35 percent of the Indian children in certain states were removed from their homes and placed in non-Indian homes by state courts, welfare agencies, and private adoption agencies. Non-Indian judges and social workers--failing to appreciate traditional Indian child-rearing practices--perceived day-to-day life in the children's Indian homes as contrary to the children's best interests.

In Minnesota, for example, an average of one of every four Indian children younger than age one was removed from his or her Indian home and adopted by a non-Indian couple. A number of these children were taken from their homes simply because a paternalistic state system failed to recognize traditional Indian culture and expected Indian families to conform to non-Indian ways.

Other children were removed because of the overwhelming poverty their families were facing. Although, admittedly, poverty creates obstacles to child rearing, it was used by some state entities as evidence of neglect and, therefore, grounds for taking children from their homes.

It was not only the high number of children being removed from their homes, but also the fact that 85 to 90 percent of them were being placed with non-Indians that caught the attention of Congress. Congress was actively promoting the continued viability of Indian nations as separate sovereigns and cultures at that time. By enacting the substantive placement preferences in ICWA--which require that Indian children, once removed, be placed in homes that reflect their unique traditional values (25 U.S.C. 1915)--Congress was acknowledging that no nation or culture can flourish if its youngest members are removed. The act was intended by Congress to protect the integrity of Indian tribes and ensure their future.

When Does the ICWA Apply?

The ICWA applies to four types of Indian child custody proceedings:

1. Foster care placements. The ICWA applies to the temporary removal of an Indian child from his or her home, for placement in a foster home or institution, when the parent or Indian custodian (defined as an Indian person with custody of the child under tribal or state law or who has the child pursuant to a parental placement) cannot regain custody upon demand (25 U.S.C. 1903(1)). The latter provision exempts ICWA application from voluntary religious or school placements, as well as voluntary placements with private or public agencies where the parent or custodian can regain custody at any time. However, the ICWA would apply to a guardianship in which a child is placed with a nonparent, as this fits the definition of a foster care placement.

   Be aware that certain state courts have limited the applicability of the ICWA by holding that the law does not apply to proceedings involving the removal of an Indian child from a non-Indian family; for example, a case that involves an Indian child raised by a non-Indian mother. Known as the "existing Indian family" exception, this exception has generated some controversy. Refer to your own state's laws to determine its status in your state.

2. Termination of certain parental rights. The ICWA applies to any proceeding that may result in the termination of the parental rights of the Indian child's parents or the custodial rights of the child's Indian custodian, including stepparent adoption proceedings and delinquency proceedings that lead to an attempt to terminate parental rights. (These generally are not governed by the ICWA.)
3. Pre-adoption placements.
4. Adoption placements. The ICWA applies to proceedings that lead up to and culminate in the adoption of an Indian child. It imposes an obligation on both public and private adoption agencies to comply with its provisions.

   The ICWA does not apply to custody disputes between divorcing parents or custody disputes related to any other proceedings, nor does it apply to delinquency proceedings involving an Indian child who has committed an act that would constitute a crime if it were committed by an adult (except where the state is using the delinquent act as the gravamen for termination of a parental rights petition). However, it would apply if the act committed by the child did not constitute a crime, e.g., an act of truancy or incorrigibility.

Is the Child an Indian?

To apply the provisions of the ICWA to a particular child custody proceeding, the court must first determine that the child is an Indian. Much litigation has ensued over this distinction. The ICWA defines "Indian child" as a child who is a member of a federally recognized Indian tribe, or is eligible for membership in such a tribe and the biological child of a member (25 U.S.C. 1903(4)). Parties to a state court proceeding must defer to Indian tribes on questions of membership.

There are a variety of ways Indian tribes determine membership, ranging from blood quantum requirements to residency requirements; no set formula applies to all tribes. At present, there are more than four hundred Indian tribes and Alaskan native villages that are recognized by the U.S. Department of the Interior and, therefore, governed by the provisions of the ICWA. (A list is published annually in the Federal Register.) Children who are members of Canadian tribes or tribes that have state-government recognition only are not governed by the act.

Procedural Recognition

The provisions of the ICWA require that lawyers adhere to numerous specific procedures. First and foremost, because the act vests Indian tribal courts with exclusive jurisdiction over Indian children who live on Indian reservations (25 U.S.C. 1911(a)), state courts, with limited exceptions, cannot exercise jurisdiction over child custody proceedings that involve such children or children whose custodial parents were living on a reservation

immediately prior to a foster care or adoption placement. These types of proceedings must be adjudicated through the tribal court of the relevant tribe.

If the Indian child lives off the reservation, the state court may exercise jurisdiction over the child custody proceeding, but the party invoking the state court's jurisdiction must comply with certain procedures: If the proceeding involves the involuntary removal of a child, the petitioning party must notify the Indian child's tribe and the Department of the Interior by certified mail of the pendency of the state court action if the party knows or has reason to believe that the child is Indian.

When a child's tribal affiliation is unknown, the party must notify all tribes that may have some connection to the child as well as the Department of the Interior, which may have information that would help determine the child's tribal status. If the proceeding is voluntary--e.g., the mother is voluntarily seeking to terminate her rights so she can place the child for adoption--notice may not be necessary; need will be dictated by the court decisions of that particular jurisdiction.

In situations where notice is required, notice must be completed at least ten days before the state proceedings may advance and it must apprise the tribe of: its unconditional right to intervene in the state court proceeding, its right to examine all relevant documents, and its right to request that the start of the proceeding be delayed. Notice also must inform the tribe of its right, and the right of the child's parent(s) or Indian custodian, to request a transfer of the proceedings to the tribal court. The law requires that state courts grant such requests except when one of the following occurs: one of the parents objects to the transfer, the tribal court declines the transfer, or the state court finds good cause not to transfer.

Much of the case law interpreting the ICWA has arisen from situations in which one of the parties to a state court child custody proceeding claims "good cause" for not transferring the case to a tribal court. Although "good cause" is not defined under the law, its meaning is made somewhat clear in the guidelines for state courts enacted by the Department of the Interior (44 Fed. Reg. No. 228, p. 67584 (Nov. 26, 1979)). The guidelines state that a party opposing a transfer to tribal court has the burden of showing good cause by clear and convincing evidence.

Examples of good cause grounds to deny a transfer request include: the absence of a tribal court for the tribe in which the Indian child is a member, an objection by the Indian child to a transfer (if he or she is older than age 12), a history of minimal contact between the child and the Indian tribe and reservation, a situation in which the request for transfer is not timely and the proceedings are at an advanced stage, and evidence that a transfer would impose hardship on the parties and witnesses because of the distance to the tribal court (forum non conveniens ground).

In addition, some state courts have adopted a "contrary to the best interest of the child" standard when deliberating a transfer request--even though such a standard is not included in the law or guidelines--and have invoked it as grounds to deny a transfer when the Indian child has already "bonded" to his or her foster caretaker (s). (Be aware that some other state courts have condemned the use of this standard to deny a transfer.)

More Procedures

Whatever the reason, if transfer to a tribal court is denied and the case remains in state court, various other procedural protections of the ICWA will apply. For example, a party attempting to achieve the involuntary foster-care placement of an Indian child must establish, by showing clear and convincing evidence, that: (1) an active effort has been made to provide remedial and rehabilitative services to the child's family and that it was unsuccessful, and (2) continued custody by the parent(s) or Indian custodian likely will result in serious emotional or physical damage to the child.

The latter showing must be supported by the testimony of one or more "qualified" expert witnesses, persons who have substantial knowledge of traditional Indian child-rearing practices or substantial experience working with Indian children. In states with small Indian populations, finding such a person may be problematic, but the alternative--allowing the child's future to ride on the opinion of experts who may be ignorant and, therefore, biased against Indian parents--is more problematic.

When the petitioning party's objective is the termination of parental rights to an Indian child, the party has the burden of demonstrating beyond a reasonable doubt that serious emotional or physical harm will befall the child if parental rights are not terminated, and that active efforts to provide remedial and rehabilitative services have been unsuccessful. Again, the findings must be supported by the testimony of a qualified expert witness, one who is versed in the ways of traditional Indian child-rearing practices.

Voluntary Placements and Adoptions

In recognition that a substantial number of Indian children have been removed from their homes under the guise of "voluntary placements," the ICWA regulates the voluntary placement of Indian children and the voluntary termination of parental rights for adoptions. Its stringent requirements on parties who seek voluntary placements represent an attempt to abolish a longtime pattern by many public and private agencies of abusing the rights of Indian parents.

The act mandates that the valid placement of an Indian child in foster care, or the valid termination of parental rights, requires the consent of the Indian parent in writing before a judge of competent jurisdiction (either a state court judge, if the child is domiciled off the reservation, or a tribal court judge) who certifies that he or she has explained to the parent the consequences of his or her actions in a language the parent understands, or has had the consent translated into a language the parent understands.

A consent to the termination of parental rights cannot be executed until after the child is ten days old. If the consent is not obtained pursuant to the provisions of the ICWA, the termination will not be legal. The party obtaining custody will be barred from invoking a state court's jurisdiction to further place the child and the child will be ordered returned to the parent, unless returning the child would subject him or her to immediate danger.

An Indian parent or custodian can revoke his or her consent at any time during the foster care placement and before the decree of termination or adoption has been entered. After doing so, he or she will be entitled to the automatic return of custody of the child. In the case of an adoption, however, if the court has already entered an order accepting the voluntary termination of parental rights, the parent cannot revoke his or her consent. In cases where an Indian child has been in the home of an Indian custodian, not only must there be a termination of the parental rights, but also a termination of the custodial rights before the adoption will be legal.

Placement Provisions

A second, and equally important, goal of Congress in enacting the ICWA was to ensure the placement of Indian children in homes that would reflect the unique values of Indian culture. This was achieved by the placement provisions of the ICWA, which govern both voluntary and involuntary placements of Indian children and define placement preferences that public and private agencies must follow. (Note that Indian tribes are permitted under the ICWA to change the order of the act's placement preferences, so you must investigate with each tribe you encounter the order of its particular preference scheme.)

According to the ICWA, when an Indian child is placed in foster care, the placement agency or party must place the child--in the absence of good cause to deviate--with: (1) a member of the Indian child's extended family (including non-Indian members of the family), (2) a foster home licensed or approved by the child's tribe, (3) an Indian foster home licensed or approved by a non-Indian agency or authority, or (4) an institution for children that has the approval of an Indian tribe.

To determine which placement option best meets the intent of the ICWA, the placement agency must consider the need to approximate the child's family setting as closely as possible, to keep the child as near as possible to his or her family's home, and to place the child in the least restrictive environment.

When an Indian child is placed for adoption, the ICWA requires that, in the absence of good cause to deviate, the child should be placed with: (1) a member of his or her extended family, (2) other members of his or her tribe, or (3) other Indian families. In this situation, too, it is necessary to determine whether the tribe involved has altered the standard preference scheme.

In either a foster care or adoption placement, if the party advocating a deviation from the placement preferences

demonstrates good cause to deviate, the state court can sanction a placement that does not conform to the standard placement criteria.

The Department of the Interior's guidelines for state courts lists the following as examples of good grounds to deviate: (1) a request to deviate that comes from the biological parents or the child (provided he or she is of "sufficient" age), (2) extraordinary physical or emotional needs of the child (as established by qualified expert testimony), and (3) the determination--after a diligent search for a family that meets the placement preferences--that a "suitable" family is not available.

Is It Working?
The standard by which any law should be judged is whether it has achieved its stated legislative objective. The ICWA was enacted to prevent the continued removal by state agencies, courts, and private agencies of large numbers of Indian children from their families and--equally important--their culture.

At the very minimum, the existence of the act has brought attention to the unique needs of Indian children and provided state agencies and judges with a valuable, cross-cultural educational tool. Although the removal of Indian children from their homes continues to occur at an alarming rate, the ICWA mandates a process that, if adhered to over time, will eventually ensure the survival of Indian tribes and cultures well into the future.

Magazine Links

- This Issue's Table of Contents
- Past Issues
- Current Editorial Board
- Subscriptions
- Reprint Permissions
- Author Guidelines
- Advertising Opportunitites

This page was printed from: http://www.abanet.org/genpractice/magazine/1995/fall/indianchildwelfareact.html

© 2007. American Bar Association. All Rights Reserved. ABA Privacy Statement