The Indian Child Welfare Act

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Association on American Indian Affairs – Findings of 1969 & 1974 Studies

- By the 1960s, there was recognition that Indian families were being broken apart at an alarming rate due to state social service departments removing children and placing them in non-Indian homes.
- 25-35% of all Indian children were separated from their families, placed in foster homes, adoptive homes or institutions.
- In Wisconsin, the risk of an Indian child being separated from his or her family was **1600 times** higher than for non-Indian child.
- More than 17% of school aged Indian children from reservations were living in institutional facilities.
- 85% of all Indian children in foster homes were in non-Indian homes.
- Only 1% were removed because of abuse. The rest: “neglect” or “social deprivation.”

- Blanchard, Evelyn L. and Unger, Steven, “Destruction of American Indian Families," **Social Casework 58(1977)**

“Indian” Designation

The designation of “Indian” by the federal government refers to a **political** status, rather than a **racial** status.

- It recognizes that an Indian person is a member of a sovereign political entity -- of a tribe.
- An Indian person is, in effect, a person with dual citizenship.
- Child’s political status is independent of their parent’s

Tribal Sovereignty

- The U.S. government and Tribes have a government-to-government relationship that is unique in the world system of governments.

- This Relationship was created by:

  – The United States Constitution – Article I, Section 8:

    To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; and

  – 1823-1832 U. S. Supreme Court "Marshall Trilogy"

    - *Johnson v. McIntosh, 21 U.S. 543 (1823)*
    - *Cherokee Nation v. Georgia, 30 U.S. 1 (1831)*
    - *Worcester v. Georgia, 31 U.S. 515 (1832)*

Marshall Trilogy

- Created constitutional concepts of Federal/ Indian relationship defining tribes as "Domestic dependent nations" within the United States.
- Discovery Doctrine
- State Law inoperative within boundaries of reservation

Overview of the Wisconsin Indian Child Welfare Act

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Wis. Stat. § 48.028

* Other sections as well

WICWA applies when:

The child is an Indian child,

- a member of an Indian tribe, or
- eligible for membership and the biological child of a member of an Indian tribe

[Wis. Stat. § 48.02(8g)]

and

The child is subject of an Indian child custody proceeding or action governed by WICWA

[Wis. Stat. § 48.028(3a)]

Important to keep in mind:

- A child may still be a member or eligible for membership in a tribe, even if adopted by a non-Indian person.
- An adult may be a member of a tribe, even if adopted by a non-Indian as a child, and his or her child could also be a member or eligible for membership.

WICWA Requirements Summary

- Notice to tribe required for OHC placement
- Tribe may intervene and/or may transfer case to tribal court
- Agency required to provide culturally sensitive active efforts to prevent child's removal and return child home
- Requires placement consistent with tribal preference, primarily with extended family or tribal approved foster home
- Special testimony and findings required
  - Qualified Expert Witness
  - Serious Damage to Child must be proven Beyond a Reasonable Doubt
- Special rules for voluntary placements and TPR's
- Invalidation is Remedy

Indian Tribe

Any Indian tribe, band, or other organized group or community of Indians that is recognized by the federal government, including any Alaska native village as defined in 43 U.S.C. 1602(c).

[Wis. Stat. § 48.02(8r)

There are currently 11 federally-recognized tribes in WI and 567 in the U.S. (May 4, 2016 Federal Register Notices)

WI Federally Recognized Tribes

- Bad River Band of Lake Superior Chippewa
- Forest County Potawatomi Community
- Ho-Chunk Nation
- Lac Courte Oreilles Band of Lake Superior Chippewa
- Lac du Flambeau Band of Lake Superior Chippewa
- Menominee Indian Tribe of WI
- Oneida Tribe of Indians of WI
- Red Cliff Band of Lake Superior Chippewa
- Sokaogon Chippewa (Mole Lake)
- St. Croix Chippewa Indians of WI
- Stockbridge-Munsee Band of Mohicans

-WICWA applies to ALL federally recognized tribes – not just Wisconsin federally recognized tribes.

Tribal Membership

- Membership and eligibility for membership are determined by the tribe (Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)

- A determination by a tribe is not advisory; it is definitive
- Membership criteria differ from tribe to tribe.
- Membership is not the same as enrollment.
- Some Tribes have membership classifications for purposes of ICWA
  - Leech Lake Band of Ojibwe in MN
  - May not meet blood quantum for enrollment, but Tribe acknowledges membership for purposes of ICWA protections.
  - Cherokee Nation- ICWA Membership classification from 10th Circuit (SCOTUS denied cert on 5/21/12)

Proceedings and Actions Governed by WICWA

Child Welfare proceedings or actions that result or may result in the removal of an Indian child from his or her parent or Indian custodian.

-Indian child/juvenile custody proceedings (dependency actions)

-Voluntary placements

Indian Child/Juvenile Custody Proceeding

Includes:

- CHIPs Proceedings
- JIPS Proceeding based on a petition that the youth is:
- uncontrollable
- school drop out
- habitually truant from school
- habitually truant from home
- Guardianships
- Termination of Parental Rights Proceeding

In which any of the following may occur:

- out of home placement
- adoptive placement
- preadoptive placement
- termination of parental rights
- [Wis. Stat. § 48.028(2)(d)]

Definition of “Out-of-Home Care Placement”

- Removal of an Indian child from his or her parent or Indian custodian for temporary placement in a:
  - foster home or treatment foster home
  - group home
  - residential care center
  - shelter care
  - home of a relative other than a parent
  - home of a guardian
- From which the parent or Indian custodian cannot have the child returned upon demand

Definition of Parent

For purposes of WICWA, a “parent” is:

- A biological parent
- An Indian person who has adopted an Indian child, including adoption under tribal law or custom
- An Indian husband who has consented to artificial insemination of his wife

[Wis. Stat. § 48.02(13)]

Notice of First Hearing

The party seeking out-of-home placement or TPR, or initiating proceedings must send Notice

- The notice of the 1st hearing in an involuntary Indian child/juvenile custody proceeding must be sent by **registered mail, return receipt requested.**
- The return receipt must be filed with the court.

Notice must be sent to:

Indian child's parent

Indian custodian

Tribe in which the indian child is a member, or

Tribe or tribes in which the Indian child may be eligible for membership, or

If child's tribe is unknown, to the Bureau of Indian Affairs

[Wis. Stat. § 48.028(4)(a)]

NEW: BIA Regulations

Interestingly, the BIA Regulations have relaxed the requirements for service of the initial notice. The BIA Regulations now only require certified mail, return receipt requested.

§ 23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention.

* States are permitted to grant higher protections though. Arguably, registered is stricter/higher protection, and thus must be followed within Wisconsin.

Formal Notice- Subsequent Hearings

Notice must be sent in writing by:

- mail
- personal service
- fax
- NOT email

[Wis. Stat. § 48.028(4)(a)]

Tribal Intervention and Jurisdiction

- There has been confusion in WI w/ some counties who have mistakenly understood (W)ICWA to only apply if the Tribe intervenes.
- WICWA places mandate on the agency initiating the child custody proceeding. That agency is required to meet those mandates, regardless of the Tribe's involvement.

Tribal Sovereignty and WICWA

- The tribe must be notified of all Indian child/juvenile custody proceedings.
- The tribe has the right to formally intervene at any point during the proceeding and become a party to the case. [Wis. Stat. § 48.028(3)(e)]
- Failure to allow the tribe(s) to Intervene is grounds for invalidation. [Wis. Stat. § 48.028(6)]

Cases that Remain in Circuit Court

- Must be handled in accordance to WICWA
    * Even if the Tribe does not intervene!
- The Tribe can continue to intervene at any state of the proceeding

Findings for a Termination of Parental Rights

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WICWA & ICWA Regulations

Findings Required for TPR

The court must make certain findings / follow certain procedures before ordering a TPR:

– Active Efforts

– Standard of Evidence/Burden of Proof

– Causal Relationship

– Qualified Expert Witness

Active Efforts

Active Efforts

– Before ordering a TPR, the court must conclude that:

  • Active efforts have been made to prevent the breakup of the Indian family; and

  • Those efforts have been unsuccessful

– Active efforts must be documented in detail in the record.

– What are active efforts?

  • Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his/her family

WICWA Active Efforts- Wis. Stat. § 48.028(4)(g)

(g) *Active efforts standard.*

1. The court may not order an Indian child to be removed from the home of the Indian child's parent or Indian custodian and placed in an out-of-home care placement unless the evidence of active efforts under par. (d) 2. or (e) 2. shows that there has been an **ongoing, vigorous, and concerted level of case work** and that the active efforts were made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers. The consideration by the court or jury of whether active efforts were made under par. (d) 2. or (e) 2. shall include whether all

Were all of these Active Efforts Provided?

Were appropriate tribal representatives requested to evaluate the family and assist in developing a case plan that uses resources of the tribe and Indian community?

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Has a comprehensive assessment of the family been completed?

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Have tribal representatives been identified, notified, and invited to participate in the proceeding?

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Have extended family members been consulted for support, cultural connections, and placement?

Were arrangements made to provide family interaction in the most natural and unsupervised setting?

Were all available family preservation strategies offered or employed, while also involving the tribe?

Were community resources offered and the family actively assisted in accessing those resources?

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Was monitoring of client progress and participation in services provided?

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If services were unavailable, were alternative ways of addressing the family's needs considered?

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If any activity was not conducted, has documentation been provided to the court with an explanation? Because documentation has to be provided per statute.

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Why have the activities and efforts been unsuccessful in reunifying the Indian family?

Burden of Proof

Standard of Evidence

Burden of Proof in a TPR-WICWA, § 48.028(4)(e)

(e) *Involuntary termination of parental rights; serious damage and active efforts.* The court may not order an involuntary termination of parental rights to an Indian child unless all of the following occur:

1. The court or jury finds beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

2. The court or jury finds by clear and convincing evidence that active efforts, as described in par. (g) 1., have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.

Burden of Proof in a TPR - CFR § 23.121

- (1) Evidence beyond a reasonable doubt,
- (2) Including the testimony of qualified expert witness(es),
- (3) That the child's *continued custody* by the child's parent or Indian custodian is likely to result in "serious emotional or physical damage" to the child.

Causal Relationship

Causal Relationship Must be Proven- CFR § 23.121

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

Qualified Expert Witness (QEW) Testimony

QEWin a TPR-WICWA, § 48.028(4)(f)

(f) *Qualified expert witness; order of preference.*

1. Any party to a proceeding involving the out-of-home placement of, or involuntary termination of parental rights to, an Indian child may call a qualified expert witness. Subject to subd. 2., a qualified expert witness shall be chosen in the following order of preference:

a. A member of the Indian child's tribe described in sub. (2) (g) 1.

b. A member of another tribe described in sub. (2) (g) 2.

c. A professional person described in sub. (2) (g) 3.

d. A layperson described in sub. (2) (g) 4.

2. A qualified expert witness from a lower order of preference may be chosen only if the party calling the qualified expert witness shows that it has made a diligent effort to secure the attendance of a qualified expert witness from a higher order of preference. A qualified expert witness from a lower order of preference may not be chosen solely because a qualified expert witness from a higher order of preference is able to participate in the Indian child custody proceeding only by telephone or live audiovisual means as prescribed in s. 807.13 (2). The fact that a qualified expert witness called by one party is from a lower order of preference under subd. 1 than a qualified expert witness called by another party may not be the sole consideration in weighing the testimony and opinions of the qualified expert witnesses. In weighing the testimony of all witnesses, the court shall consider as paramount the best interests of the Indian child as provided in s. 48.01 (2). The court shall determine the qualifications of a qualified expert witness as provided in ch. 907.

QEW-CFR § 23.122

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

WISCONSIN
Court of Appeals

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In re Avery G.

In re the interest of Avery G. (Jackson County, WI)

https://www.wicourts.gov/ca/opinion/DisplayDocument.html?content=html&seqNo=85106

In re Avery G.
No. 2011AP2783.
Court of Appeals of Wisconsin, July 17, 2012

* Synopsis: (from the opinion) "Robert H. appeals from the order terminating his parental rights to his son, Avery G., and the order denying his motion for postdisposition relief. Robert contends he is entitled to a new trial on three grounds: (1) the requirement of the Wisconsin Indian Child Welfare Act (WICWA) with respect to testimony by qualified expert witnesses was not satisfied during the fact-finding hearing; (2) he was denied effective assistance of counsel; and (3) we should exercise our discretionary power of reversal because the real controversy has not been fully tried and it is probable that justice has miscarried. We conclude that the requisite testimony of an expert witness qualified under WICWA was presented at the disposition hearing and the error in not presenting it at the fact-finding hearing was harmless based on the specific circumstances in this case and given the arguments made by Robert. We also conclude that Robert did not receive ineffective assistance of counsel and there are not grounds for the exercise of our discretionary power of reversal. Accordingly, we affirm the order terminating Robert's parental rights to Avery and the order denying his postdisposition motion for a new trial."

* Holding: QEW should have been heard by Jury. Harmless Error. Upheld the TPR.

INVALIDATION

Remedy for Violations of the WICWA- Invalidation

Failure to comply with the ICWA:

§1911: Exclusive jurisdiction, transfer of jurisdiction, intervention, full faith and credit

§1912: Notice, time, counsel, active efforts, evidentiary standard, QEW, damage to child

§1913: Voluntary consent and withdrawal

SHALL result in the invalidation of the out-of-home placement or termination of parental rights.

[Wis. Stat. § 48.028(6)]

Implications of Noncompliance

Implications for Noncompliance

- Invalidation of proceedings
- Possible return of custody to Indian parent before ready
- Nullification of adoption orders
- Instability of placements of children
- Delay in permanence for a child
- Malpractice actions
- State could be required to pay back Federal IV-E foster care payments
- Tribe/Family/Child is damaged for life
- Tribe experiences loss of child- history

Potential Legal Pitfalls

Notice is not being sent to the Tribes

- Counties report difficulty in identifying the correct Tribe
- Counties are not asking the correct questions to identify if the child is an Indian Child and who are the potential tribes are
- Notice needs to be sent to all eligible tribes at day one
- Late notice prevents the Tribe from participating in case at beginning
- Frequently, if Tribe does not respond quickly to Notice, the County moves forward as if non-ICWA case

Tribes do not respond quickly to Notice, even when sent in a timely and appropriate manner

Pitfalls = More Adversarial

- A history exists between the state, county, and tribal agencies that has not always been positive and this further complicates communication.
- Counties believe WICWA is an obligation placed on Tribes and expect the Tribe to provide AE and QEW
- Communication between the county and tribe does not occur early on in the proceeding, or it is not maintained throughout the case. Then, if the county wants to proceed on a permanency option that is not supported by the tribe, the proceedings become exceedingly adversarial.

Parent's Attorney Misunderstands ICWA; Arkansas COA Goes Along With It

King v. Arkansas Dept. of Human Services (Ark. Ct. App.)

Posted on September 1, 2016 by Matthew L.M. Fletcher

https://turtletalk.wordpress.com/2016/09/01/parents-attorney-misunderstands-icwa-arkansas-coa-goes-along-with-it/

Here is the opinion in Maybe it's a little thing, maybe not, but the court allowed an attorney to withdraw from representation, in part, on this representation:

"The remaining adverse ruling was the denial of Hailey's motion for a continuance, which was based on her assertion D.K. is an Indian child within the meaning of the Indian Child Welfare Act, entitling the Kiowa Tribe to notice of the proceedings. As explained in counsel's brief, an Indian child is defined as "any unmarried person who is under age eighteen [8] 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[.]" (Emphasis added.) 25 U.S.C. section 1903(4). Counsel further explains D.K.'s paternal grandmother, who was an enrolled member of the Kiowa tribe, testified that D.K.'s father, her son, was not eligible for membership in the Kiowa tribe because she was the last generation to satisfy the tribal requirement of at least one-quarter blood. Thus, her son could not be a member of the tribe. She further explained that her son was not enrolled in the Cherokee tribe either, even though he was allowed to receive medical treatment through the Cherokee Nation because she is a registered Indian and is his mother. As noted by counsel, "even if the father were eligible to be enrolled as a Cherokee, that fact is not relevant because the statute requires that he actually be enrolled in order for D.K. to be considered an Indian child." We agree. D.K. is not an Indian child under the Act; consequently, it did not apply. Therefore, the trial court did not err in denying the motion for continuance because notice to an Indian tribe was not required."

Unfortunate, because the first step for parents' counsel (and the child's attorney most especially) should be to figure out whether an unenrolled parent is eligible for membership, get that parent enrolled, and get the tribe involved. Perhaps parent's counsel is overworked and didn't have the time or resources to make the effort, but did take the effort to file a notice of appeal. Deeply unfortunate, and likely endemic to the state system. The court of appeals could have done good work here and remanded to require counsel to perform diligently.

SCOTUS

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Holyfield
Baby Veronica

Mississippi Band of Choctaw Indians v. Holyfield

Facts: Unmarried parents- residents who are domiciled on Choctaw Reservation in Mississippi- give birth to twins off the reservation and immediately place the children up for adoption with non-Indian couple.

Issue: Did the Tribe have exclusive jurisdiction over the matter?

- Were the children domiciled on the reservation? Even though they were physically never even on it?

Held: The twins were "domiciled" on the Tribe's reservation within the meaning of the ICWA's exclusive jurisdiction provision, state court was without jurisdiction to enter adoption decree.

Holyfield, Rules

25 U.S.C. § 1911(a): An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

Holyfield, Cont...

Analysis: Domicile looks to the person's physical presence, along with the intent to remain. Children are unable to determine their domicile, so they retain the domicile of their parents. Domicile is not defined in the ICWA (Of note: the definition of domicile has arisen during the Rule-Making process, so a definition may appear in the Regulations).

SCOTUS found that "domicile" is a federal matter for the purposes of ICWA. This is a departure from normal understanding of domicile- namely that it is typically set forth by the individual states. However, because ICWA is a federal law meant for application across the country, SCOTUS determined domicile should be consistent across the country too for the purposes of determining domicile in an ICWA proceeding- uniform, nationwide application.

Born in Wedlock: parents' domicile

Born out of Wedlock: mother's domicile

No parents: child takes domicile of person who stands in loco parentis (guardian/custodian)

Holyfield, Congressional Intent- Statutory Interpretation

Importantly, SCOTUS put significant weight on congressional history and the intent of the law as a whole when determining what the definition of "domicile" should be. Much focus therefore was directed towards the fact that Tribes have an interest in their tribal children on par with a parent or Indian custodian. Their interest is obviously different, but significant.

"[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting INdian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3); Holyfield, 490 U.S. at 35.

Adoptive Couple v. Baby Girl (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."

Facts: Non-Indian family filed petition to adopt child. Bio dad, Cherokee member, opposed adoption and Cherokee Nation intervened. South Carolina Supreme Court held child should be with father. Non-Indian adoptive parents appealed.

Held: Supreme Court's decision was a 5-4 decision, which narrowed the application of 25 U.S.C. §§ 1912(d) and (f) in certain situations and 25 U.S.C. § 1915(a) when there are no competing adoption petitions filed. Child adopted by non-Indian couple.

Issues: See following slides

Baby Veronica, A Lesson in Framing the Issues...

Non-Indian Couple (Petitioners)

1) Whether a non-custodial parent can invoke the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63, to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

1) Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

Biological Indian Father (Respondent)

1) Whether an Indian child's biological father who has expressly acknowledged that he is the child's father and has established that he is the father through DNA testing is the child's "parent" within the meaning of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963.

1) Whether ICWA governs state proceedings to determine the custody of a minor who all parties concede to be an "Indian child" within the meaning of the Act.

Framing the Issues as the Tribe...

Cherokee Nation

Whether the determination that Adoptive Couple is not entitled to custody of this Indian child under § 1915(a) provides a separate ground to affirm the judgment of the South Carolina Supreme Court, and whether the constitutional avoidance doctrine permits unambiguous terms in the Act to be construed contrary to their plain meaning, when the Act falls comfortably within Congress's broad authority under the Constitution to protect Indian Tribes and does not violate any due process or equal protection rights of Adoptive Couple, Mother, or Baby Girl.

Amici Curiae- Wisconsin Tribes

Whether 25 U.S.C. § 1915(a), which provides that in "any adoptive placement" of an "Indian child," preference "shall be given" to members of the child's extended family or other Indian families, can be rewritten to apply only to placements of children who were previously in the custody of their Indian biological parent.

Baby Veronica, Rules

1912(d) Remedial services and rehabilitative programs; preventive measures

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 that these efforts have proved unsuccessful.

1912(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of a qualified expert witness, 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.

1915(a) Adoptive placements; preferences

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 Indian child's tribe; or

3) other Indian families.

Baby Veronica, Cont...

Analysis:

Majority focused heavily on the language "continued custody" in the statutory provision. It interpreted that language as meaning that a parent must have had either physical or legal custody of the child at some point in order to possess the protections of this section- essentially it doesn't apply "when the Indian parent never had custody of the Indian child." They looked at ICWA as stemming solely from the unwarranted removal of Indian children, and separated the facts of this case from that in doing so. However, the end result remains the same- more Indian children adopted/removed. It it is semantics at that point- adopted out vs. removed- the result is the children aren't with their tribes (spirit of the law).

Active Efforts to prevent the break-up of an Indian Family are not required when the parent "abandoned" the Indian child prior to birth and child had never been in the legal or physical custody of parent. The Court did not defined "abandonment" and acknowledges that the definition varies from state to state. Thus, potential litigation issues.

Placement preferences for adoptive placement of Indian children does not prevent a non-Indian family from adopting Indian child when no other eligible candidates have filed for adoption. See Alaska's 4/15/15 Emergency Regulations to assist in dealing with this holding.

Baby Veronica Take Away

ICWA is still alive and well.

This case addresses a very limited fact pattern- and even then- the SCOTUS did not include all facts from the S.C. trial and appellate levels.

Federal ICWA Litigation Update

1) Doe v. Jesson (Dist. of MN)(6/3/15) (MIFPA)- involves arguments on equal protection and tribal determinations of members.

* July 2, 2015- The Court denied the P's request for injunction. P's could not prove irreparable harm.
* Tribe & State filed motions to dismiss the suit. The Court held hearing on motions on 11/3/15. Issued order on 2/25/16 dismissing tribal defendants, but left open the constitutional questions for further briefing.
* The court did not, however, grant dismissal to the state defendants, and the case will proceed to the summary judgment phase on the constitutionality issues with briefing due this fall.

2) Doe v. Pruitt (N.D. Okla.)(8/19/15 Complaint)-involves voluntary adoption, OK state ICWA, Cherokee of OK. Arguments on right to privacy, due process, and equal protection claims.

* Oklahoma and Cherokee Nation filed motions to dismiss. Motion Hearing was 1/12/16.

3) National Council for Adoption v. Jewell (E.D. Virginia)(5/27/15)(Guidelines)- arguments that guidelines violated APA, due process, EP, 10th Amend, ICWA exceeded Congress's authority under Indian Commerce Clause.

* The case remains ongoing as Plaintiffs have appealed the trial judge's decision to the Fourth Circuit Court of Appeals. Plaintiffs' opening brief is due July 1, with supporting amicus briefs due July 8. DOJ's brief was due August 5, with supporting amicus briefs due August 12.

4) A.D. v. Washburn (Dist. of AZ) (7/6/15)(Goldwater) - involves arguments on equal protection and tribal rights to determine citizenry.

* September 29, 2016- The Court permitted intervention by Gila River and Navajo Tribes.
* In the meantime, both the federal government and the Goldwater Institute have filed separate pleadings to initiate discovery, or evidence gathering, in the case.

New ICWA Developments

- New BIA Guidelines were issued 2/25/15- non-binding rules
- New BIA Regulations were issued 6/14/16, with an effective date 6 months from publication

  * There are two webinars left on the new Regulations. November 15 or November 17 from 1-3 p.m. central time (register http://www.indianaffairs.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm)