



# THE INDIAN CHILD WELFARE ACT<sup>1</sup> A PRIMER

by Hon. Maurice Portley

**T**he Indian Child Welfare Act<sup>2</sup> was enacted to “protect the best interests of Indian children and to promote the sta-



bility and security of Indian tribes and families.<sup>3</sup> It was congressional acknowledgment that “an alarmingly high percentage of Indian families are broken up by the removal...of their children” and placed in non-Indian homes without considering the child’s unique role as part of the social and cultural fabric of an Indian family and community.<sup>4</sup> Congress also wanted to ensure that Indian children who were removed from their families could be returned to their tribes and extended families despite the belief that “it would cause evil to remove a partly Indian child...raised as an Anglo from [an] Anglo home and place her in an Indian foster home.”<sup>5</sup> Accordingly, the Indian Child Welfare Act provides “minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture...”<sup>6</sup>

The Act revolutionized the “best interests of the child” concept for Indian children. Instead of merely looking at the Indian child’s stability in a placement and bond with a psychological parent,<sup>7</sup> the federal standard requires an examination of “the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society”<sup>8</sup>—a standard found to be constitutional.<sup>9</sup>

### When Does the Indian Child Welfare Act Apply?

There are two prerequisites to determining whether the Child Welfare Act applies. First, the Act only applies to a “child custody proceeding.”<sup>10</sup> If applicable, the second important question is whether the child is an Indian child.<sup>11</sup>

#### **Child Custody Proceeding**

The Indian Child Welfare Act defines “child custody proceedings” as any proceeding involving foster care placements,<sup>12</sup> termination of parental rights,<sup>13</sup> preadoptive<sup>14</sup>

and adoptive placements.<sup>15</sup> It specifically excludes custody disputes in divorce proceedings,<sup>16</sup> placement of delinquent Indian children,<sup>17</sup> or voluntary placements where the Indian parent can reclaim the child upon demand.<sup>18</sup>

The Act does not apply to an applicable child custody proceeding if the Indian father has not established paternity. In *Juvenile Action No. A-25525*,<sup>19</sup> the putative father, a Pima Indian, failed to acknowledge paternity or even attempt to establish it until years after his parental rights were terminated and the adoption was pending. The court, unconvinced that the Act applied, even though the tribe intervened, refused to set aside the adoption because “Congress evidenced its intent not to extend the [Act] to a child whose mother is non-Indian and whose father has failed to come forward and lay legal claim to the child.”<sup>20</sup>

#### **An Indian Child**

The Act defines an “Indian child” as “[a]ny unmarried person who is under age 18 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.”<sup>21</sup>

Although the definition is straightforward, its applicability may be difficult since there may be a question whether the parent is an Indian, whether the parent is enrolled or entitled to be enrolled in the tribe, or even whether the tribe is federally recognized. The most direct method to determine whether a child is enrolled, or entitled to be enrolled as a member of a federally recognized Indian tribe,<sup>22</sup> is to notify the tribe and allow it to resolve the child’s status.<sup>23</sup> The tribe’s resolution of the child’s status is conclusive.<sup>24</sup>

In *Juvenile Action No. JS-7359*,<sup>25</sup> the mother, believing she was a member of Rhode Island’s Narraganset tribe, appealed the trial court’s termination of her parental rights. She argued that the termination must be set aside because the trial court failed to enforce the Act. The appellate court rejected her argument because it found that her status in the tribe depended on the status of her former

husband. Since he was never enrolled in the Narraganset tribe, she nor the children were entitled to be enrolled in the tribe, or receive the protections of the Act.

If the tribe cannot factually resolve the question, the Department of the Interior should be consulted and its decision is conclusive.<sup>26</sup> If, however, the tribe and federal government cannot conclusively resolve the issue, the trial court may have to review tribal documents to settle the issue.<sup>27</sup>

### If the Child Welfare Act Applies, Then What?

**Tribal participation.** Once the Act applies, the tribe can assert its exclusive jurisdiction and have the child custody proceeding transferred to tribal court,<sup>28</sup> absent timely objection by either parent.<sup>29</sup> Alternatively, if the tribe allows the state court to maintain jurisdiction, it can intervene and fully participate in the state proceedings<sup>30</sup> or challenge a completed proceeding.<sup>31</sup>

**Child Placement.** The Act defines the preferences for where an Indian child should be placed.<sup>32</sup> If an Indian child is placed in *foster care or a preadoptive placement*, preference first should be given to the members of the Indian child's extended family, a foster home approved by the tribe, an Indian foster home licensed by a non-Indian licensing authority or an institution for children approved by the tribe or operated by an Indian organization which has a program to meet the child's needs.<sup>33</sup> Otherwise, the placement should be "the least restrictive" family setting where the child's special needs, if any, can be met, including reasonable proximity to the child's home.<sup>34</sup>

The placement preference can be obviated if a parent or Indian custodian voluntarily places a child in foster care.<sup>35</sup> The consent can, however, be withdrawn at any time, and the child has to be returned to the parent or Indian custodian.<sup>36</sup>

If the Indian child is being placed in an *adoptive placement*, preference

should be first given to placing the child with a member of his extended family, then other members of the tribe or other Indian families, before considering other "less restrictive" options.<sup>37</sup>

**Voluntary Consent to Adopt.** If an Indian parent wants to consent to termination of his or her parental rights to allow another adult to adopt the Indian child, the consent must be in writing, made before a judge of competent jurisdiction and accompanied by that judge's certificate that the terms and consequences of the consent were fully explained and fully understood by the parent or custodian.<sup>38</sup> The consent may be withdrawn at any time prior to the final termination or adoption and the child must be returned to the parent or Indian custodian.<sup>39</sup>

**Burden of Proof.** The standard burden in dependency and termination actions increases for Indian children.<sup>40</sup> In dependency proceedings, instead of the preponderance of the evidence standard, the Court must find that the children are dependent by the clear and convincing evidence standard, using expert evidence, and 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."<sup>41</sup> Similarly, the burden of proof for termination action rises from the clear and convincing standard<sup>42</sup> to beyond a reasonable doubt, using expert evidence, where 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.<sup>43</sup>

## Conclusion

This primer highlights issues that arise in a child custody proceeding involving Indian children. The Indian Child Welfare Act significantly impacts those proceedings, and replaces the state's best interest analysis with minimum federal standards to ensure that cultural bias and misunderstanding does not adversely impact an Indian child's relationship

with his Indian family and her tribe. Hopefully, an understanding of the Act's history, motivation, concerns and procedures will provide an appreciation that the Indian child is part of a larger community, and that the larger community, if it's to exist, needs its children. In return, the community will love, protect and build a life for her—can we ask anymore of anyone? 🙏

*Judge Maurice Portley is the presiding judge of the Maricopa County Juvenile Court.*

#### ENDNOTES:

1. 25 U.S.C. § 1901 et seq.
2. *Id.* See generally, B.J. Jones, *The Indian Child Welfare Act Handbook* (1995); see also, Comment, "The Existing Indian Family Exception: Is It Appropriate to Use a Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?," 26 Cap. U.L. Rev. 847 (1997); Comment, "The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act," 34 San Diego L. Rev. 381 (1997); Metteer, "Pigs in Heaven: A Parable of Native American Adoption Under the Indian Child Welfare Act," 28 Ariz. L. J. 589 (1996).
3. "[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement

- of such children in foster or adoptive home which will reflect the unique values of Indian culture..." 25 U.S.C. § 1902, H.R. Rep. No 1386, 95th Cong., 2d Sess. 8, 9, reprinted in U.S. Code Cong. & Admin. News 7530, 7531 (1978); *In re Juvenile Action A-25525*, 136 Ariz. 528, 667 P. 2d 228 (App. 1983).
4. The Congressional hearings in the mid-1970s revealed a pattern of wholesale public and private removal of Indian children from their homes which undermined their families and was threatening the survival of tribal and Indian culture. Indian Child Welfare Program, Hearing Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess. 3 (1974). See also, H.R. Report No. 1386, *supra*, note 3 (Indian children were placed in foster care or for adoption three times the rate for non-Indian children); Senate Report No. 597, 95th Cong., 1st Sess. (1977); Senate Hearings before the Select Committee on Indian Affairs, 95th Cong., 1st Sess. On S 1214 to Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes to Prevent the Breakup of Indian Families and for Other Purposes (Aug. 1974); see also, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989).
  5. *In re Juvenile Action No. J-10175*, 153 Ariz. 346, 348, 736 P.2d 829, 831 (App. 1987).
  6. *Mississippi Band of Choctaw Indians v. Holyfield*, *supra* note, 490 U.S. at 37, 109 S. Ct. at 1602, 104 L. Ed. 2d at 36 (1989).
  7. See, e.g., J. Goldstein, et al., *Beyond the Best Interests of the Child* (1979).
  8. H.R. Report No. 1386, *supra*, note 3, at 23.
  9. See, e.g., *In re Appeal of Pima County Juvenile Action S-903*, 130 Ariz. 202, 635 P. 2d (App. 1981), cert. den. 455 U.S. 1007 (1982).
  10. 25 U.S.C. § 1903(1); *In re Juvenile Action No. A-25525*, *supra*, note 3. The Act does not define "custody."
  11. 25 U.S.C. § 1903(4); *In re Juvenile Action No. A-25525*, *supra*, note 3; *In re Juvenile Action No. JS 7359*, *supra*, note 11. A tribe must be recognized by the federal government. 25 U.S.C. § 1903(8).
  12. 25 U.S.C. § 1903(1)(I). The Act also covers voluntary placements, 25 U.S.C. § 1913, and sets the standard to keep an Indian child in foster placement, 25 U.S.C. §

- 1912(e).
13. 25 U.S.C. § 1903(1)(ii), 1912(f), 1913(a) and (c).
14. 25 U.S.C. § 1903(1)(iv).
15. 25 U.S.C. § 1903(1), 1911(c) ; see also *Mississippi Band of Choctaw Indians v. Holyfield*, *supra*, note 4; *In re Juvenile Action No. A-25525*, *supra*, note 3.
16. 25 U.S.C. § 1903(1); *State v. Zaman*, 190 Ariz. 208, 946 P. 2d 459 (1997).
17. 25 U.S.C. § 1903(1); see also, Dep't of Interior Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings B-3, 44 Fed. Reg. 67,584 (1979) (hereinafter cited as Guidelines) ("the Act does apply to status offenses, such as truancy and incorrigibility").
18. Guidelines, *supra* note 17, at B-3(c).
19. 136 Ariz. 528, 667 P. 2d 228 (App. 1983).
20. 136 Ariz. at 533-34, 667 P. 2d at 232 (App. 1983).
21. 25 U.S.C. § 1912. The Court has to make inquiry if the court is informed that the child is an Indian child, that a parent is an Indian, that any information about the child's Indian heritage is discovered, that the area the child lives in is an Indian community or other information that may come to the court's attention. Guidelines, *supra* note 17, at B-1(a) and (c).
22. Guidelines, *supra* note 17, at B-1. The tribe must be contacted by registered mail, return receipt requested, and provided with a notice of pending proceedings and their right of intervention. 25 U.S.C. § 1912.
23. Guidelines, *supra* note 17, at B-1(b)(I).
24. *Supra*, note 8.
25. 159 Ariz. 232, 766 P. 2d 105 (App. 188).
26. Guidelines, *supra* note 17, at B-1(b)(ii).
27. E.g., *Matter of Baby Boy Doe*, 849 P. 2d 925 (Idaho 1993). Other jurisdictions have held that if the parents fail to produce evidence that the Act applies, it is not error to ignore the Act's mandates. See, *Matter of Shawboose*, 438 N.W. 2d 272 (Mich. App. 1989); *People in Interest of A.E.*, 749 P. 2d 450 (Colo. App 1987).
28. 25 U.S.C. § 1911 (a) and (b); *In re Appeal of Pima County Juvenile Action S-903*, *supra*, note 9 (transfer to tribal court should have been granted); *Goclanney v. Desrochers*, 135 Ariz. 240, 660 P. 2d 491 (App. 1982) (moving the child involuntarily to Texas did not grant that state jurisdiction; habeas corpus petition granted to the tribe).
29. 25 U.S.C. § 1911(b); *In re Juvenile Action No. JD-6982*, 186

- Ariz. 354, 922 P. 2d 319 (App. 1996) (a non-Indian parent of an Indian child can object to the transfer).
30. 25 U.S.C. § 1911(c). A tribe has 10 days after receiving notice to intervene, and can get an automatic 20 day extension. 25 U.S.C. § 1912(a).
  31. 25 U.S.C. § 1914. A tribe cannot intervene on appeal unless it intervened at the trial. *See also, Stephenson v. Nastro*, 192 Ariz. 475, 967 P. 2d 616 (App. 1998).
  32. 25 U.S.C. § 1915.
  33. 25 U.S.C. § 1915(b) and (c); *In re Juvenile Action No. J-10175*, 153 Ariz. 346, 736 P. 2d 829 (App. 1987) (if the Act applies, the preferences must be followed in the absence of good cause to the contrary); *In re JA No. A-25525*, *supra*, note 19.
  34. 25 U.S.C. § 1915(b).
  35. 25 U.S.C. § 1913(a).
  36. 25 U.S.C. § 1913(b). The consent can also be collaterally attacked if it was obtained through fraud or duress. 25 U.S.C. § 1913(d).
  37. 25 U.S.C. § 1915(a)
  38. 25 U.S.C. § 1913(a).
  39. 25 U.S.C. § 1913(c). The termination or adoption can be collaterally attacked if the consent was the result of fraud or duress. 25 U.S.C. § 1913(d).
  40. 25 U.S.C. § 1921.
  41. 25 U.S.C. § 1912(e); *In re Juvenile Action No. J-10175*, *supra*, note 5. A "qualified expert" can be a tribal member with knowledge about family organization and child rearing, a lay expert with experience in Indian child and family services and a knowledge of the social and cultural standard of the child's tribe or a professional person with substantial education and experience in his or her specialty. Guidelines, *supra*, note 17, § D.4(b). *See also*, 25 U.S.C. § 1912, 1913; *Rachell S. v. Ariz. Dep't of Economic Security*, 191 Ariz. 518, 958 P. 2d 459 (App. 1998) (special knowledge of Indian life is not necessary where a professional person has substantial education and experience and testifies on matters not implicating cultural bias); *Maricopa County Juvenile Action No. JS-8287*, 171 Ariz. 104, 828 P.2d 1245 (App. 1991).
  42. A.R.S. § 8-537(B).
  43. 25 U.S.C. § 1912(f).