The Indian Child Welfare Act

Part I of II

By Anne McKeig

The Indian Child Welfare Act (ICWA) was passed in 1978. Its passage was a congressional response to the high number of Indian children who were removed from their families and tribes by non-tribal public and private agencies, and placed in non-Indian foster homes or made available for non-Indian adoption. The placements in non-Indian homes resulted in a separation of Indian children from their culture, which led to serious adjustment problems as they grew up in a non-native culture that did not acknowledge their Indian heritage.

The cornerstone of ICWA is its recognition of the importance of tribal integrity: the cultural and social standards of the tribal community, and the concept of extended family in Indian society. Recognition of these principles resulted in the ICWA jurisdictional and procedural requirements that must be followed in any state court proceeding where the result may be the removal of an Indian child from his or her home and the parent or Indian custodian cannot have the child returned upon demand. In most cases, these will be child protection proceedings.

Please note that the Indian Child Welfare Act must be read in conjunction with other applicable state or federal laws. Generally, ICWA procedures must always be followed unless other state or federal law provides a higher standard of protection for the Indian child, parent, or Indian custodian.

Working within the guidelines of the Indian Child Welfare Act can be very challenging for practitioners who have limited contact with the law because it is fairly complex in its application. Each case must be examined upon its unique fact pattern, as there may be exceptions based on interpretation of statutory language. Practitioners should also become familiar with the Bureau of Indian Affairs Guidelines for state courts, which provide some guidance for consistency in applying the Indian Child Welfare Act.

Proceedings Covered by ICWA

There are four basic types of proceedings that fall under the provisions of ICWA. These proceedings are identified as child custody proceedings, which under ICWA is defined as any action removing the child from the care of the parent where the parent cannot have the child returned upon demand. For practitioners in the child protection arena, these proceedings include: foster care placements, termination of parental rights, pre-adoptive placements and adoption placements. ICWA does not apply to delinquency cases, but does apply to status cases such as truancy and runaways. A status case is defined as a case in which the behavior is subject to court action because the perpetrator is a juvenile.

Identification of an Indian Child

Child protection practitioners must be able to identify not only what category of cases falls under the Indian Child Welfare Act, but also verify that the family meets the identification requirements. In order for ICWA to apply, the child must be under 18, unmarried, eligible for membership in a federally recognized tribe, or the biological parent must be an enrolled member of the tribe.

As a general rule, it is much easier to proceed with a case as though it falls under the provisions of ICWA than to exclude a case too early based upon a legal technicality. It is harder to play catch up and have to re-file your petition due to an error in the application of ICWA. A common error that may occur in the early stages of an ICWA case is determining membership eligibility of an Indian child.

Membership is very different from enrollment and ICWA only requires that a child be eligible for membership. Each tribe is unique and the response of the tribe regarding membership is final and cannot be challenged in state court proceedings. Practitioners may find it helpful to send a membership eligibility form to the tribe along with a self-addressed stamped envelope for easy return. A form can easily be created for this purpose in your office. The information on the form should include the child’s names and dates of birth, along with parents’ names and dates of birth and their known tribal affiliations. The more information on the form, the easier it is for the tribe to identify the family. For example, you may want to include any grandparents’ names and dates of birth along with their tribal affiliation in order to assure the Tribe in determining membership.

If the tribe is unknown, practitioners must send an inquiry to the local Bureau of Indian Affairs office. Practitioners are encouraged to file a copy of that inquiry in the Court file as proof of compliance with ICWA.

Notice

Once the parents have identified a tribe, best practice would dictate that the social service agency notify the tribe(s) of their involvement very early on, even at the point of investigation. This notification of services can be done by a simple letter or via the initial phone call to the tribe requesting information regarding membership eligibility.
If the case proceeds past investigation and a petition is filed, a more formal notification is required under the Indian Child Welfare Act. Formal notice must be sent not only to the Tribe, but also to the parent or to the Indian custodian of any proceeding initiated in juvenile court that may remove an Indian child from the care of the parent or Indian custodian. Formal notice must be sent by registered mail and must be received at least 10 days prior to the initial hearing. The notice must contain several pieces of information, including, but not limited to, the name of the child, child’s tribal affiliation, name of petitioner, statement of right of counsel, etc. It is not required to send formal notice prior to any emergency proceeding addressing the initial custody of the child. Formal notice must be sent however, prior to an admit/deny hearing on the petition. It is wise for practitioners to send notice a full 30 days prior to an admit/deny hearing on a petition because any party can request an additional 20 days to respond after receiving notice of the admit/deny hearing.

Active Efforts
A significant component of the ICWA is the requirement that a child placement agency demonstrate that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proved unsuccessful.” Active efforts are not defined in the ICWA; but it clearly means a higher level of service than the reasonable efforts required for all child protection proceedings.

At all hearings, practitioners must be prepared to argue what active efforts the social service agency is providing to the family. Active efforts must take into account the prevailing “social and cultural conditions and way of life of the Indian child’s tribe.” Practitioners must be able to demonstrate to the court the agency’s attempts to engage the family in services; and that may include the need to file a petition so that services are ordered by the court. It is also important to note that a social service agency cannot be relieved of active efforts even when a permanency petition has been filed. Active efforts must continue until the conclusion of a case.

Standard of Review
Petitioners must prove Indian children are Children in Need of Protection or Services (CHIPS) by clear and convincing evidence, but if a Termination of Parental Rights Petition has been filed, the standard of proof changes to beyond a reasonable doubt. When proving active efforts in a termination of parental rights case, practitioners must also be prepared to meet the beyond a reasonable doubt standard.

Membership eligibility, notice, active efforts, and standard of review are a few of the important aspects of an Indian Child Welfare Act case, but even more important is the discussion of expert testimony which will be discussed in the second part of this article.

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5. Id.
14. Id.
15. Id.
16. Id.
17. Id. BIA Guidelines §B.5.
18. BIA Guidelines §B.5(b) at 67588 and §B.7.