



ICWA OVERVIEW

PRESENTATION FOR THE KANSAS COURT IMPROVEMENT PROGRAM

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OVERVIEW AND INTRODUCTIONS

■ Week one:

- Background and Context
- Reason to Know and Notice
- Jurisdiction
- Intervention and Transfer

■ Week two:

- Adjudication and Out of Home Placements
- Guardianships, Termination of Parental Rights
- Placement Preferences
- Voluntary Proceedings
- ICWA Caselaw Overview, 2024-25

HISTORICAL CONTEXT



TREATIES



SOVEREIGNTY



PLENARY
POWER

BOARDING SCHOOLS

- Attendance in Indian boarding schools was mandatory from the late 19th century until the 1970s, which meant that children would be taken—with or without the consent of their parents—to schools where they would not be permitted to practice their own religion, speak their own language, or engage in any behavior that was “too Indian.”
- The boarding schools themselves had an appalling record of physical, emotional, and sexual abuse and the conditions in the schools often resulted in fatal outbreaks of communicable diseases.
- <https://www.bia.gov/service/federal-indian-boarding-school-initiative>



THE INDIAN CHILD WELFARE ACT OF 1978

- After years of testimony, Congress passes ICWA to address the overwhelming and systematic removal of Indian children from their families and tribes
- The law addresses
 - Jurisdiction
 - Procedural protections
 - Substantive protections
 - Placements
- In both CINC and voluntary proceedings

OTHER SOURCES OF LAW FOR NATIVE CHILDREN

- Indian Child Welfare Act, Federal Regulations
 - 25 C.F.R. pt. 23
- BIA's Guidelines for Implementing the Indian Child Welfare Act
- Designated Agents for ICWA Notice: <https://biamaps.geoplatform.gov/ICWA-Agents-Directory/>

ICWA 101

■ The life of a straightforward (ha!) ICWA/CINC case:

- Jurisdiction
- Petition/Removal
- Inquiry/Notice
- Adjudication: Active Efforts, Qualified Expert Witness, Clear and Convincing Evidence (Merits Hearing)
- Disposition
- Permanency
 - Reunification
 - Termination of Parental Rights, Active Efforts, Qualified Expert Witness, Beyond a Reasonable Doubt
 - Guardianships

APPLICATION OF ICWA

Proceeding

- A Proceeding that meets the definitions of 25 U.S.C. 1903
 - Out of Home Placements/CINC
 - Adoptions
 - Guardianships
- Delinquency proceedings depending on:
 - 1) the type of offense or crime,
 - 2) whether the placement was based upon an act that would be a crime if committed by an adult, and
 - 3) whether termination of parental rights is recommended, regardless of the type of offense committed by the juvenile.
 - If the Indian child is charged with a status offense, ICWA applies

Indian Child

- A child under the age of 18 who is
- A tribal member or
- Is eligible for membership in a federally recognized tribe and the biological child of a member



ICWA applies when any party has reason to know an Indian child is the subject of the involuntary proceeding. If the Department has not determined prior to the preliminary hearing, the Court must determine immediately at the preliminary hearing.



Court must expressly ask parties for any indication of Tribal membership or eligibility. 25 C.F.R. 23.107



Any foster care or termination proceeding must be suspended for 10-20 days to comply with ICWA's notice provisions



The party seeking foster care placement or termination of parental rights is responsible for sending notice

INQUIRY & NOTICE

INQUIRY & NOTICE

- “Simply put, the State provided some, but not all, of the information necessary for the relevant tribal authorities to make this determination through its notice and subsequent follow-up” Interest of D.M.H., 558 P.3d 1094 (Table) (Kansas Ct.App. 2024)
- DCF CFS Manual 0814: DCF worker must collect maiden names, among other information
 - Other pertinent details for notice:
 - Names, addresses, birth dates, and/or date of death for any family member who might be a member or eligible for membership.
 - Obtain information from family members specified by respondents. If respondents’ recollections are inadequate, refer to any records.
 - Federal regulations require more information regarding the family than the DCF Manual.

EMERGENCY PROCEEDINGS

Notice is required for each proceeding, except emergency proceedings/emergency protective custody/out of home placement.

States bypass ICWA implementation routinely with emergency removal procedures.

- Application of ICWA at initial CINC hearings
 - 25 U.S.C. 1922 “imminent physical damage or harm” standard
 - Petition for emergency removal or continued emergency placement governed by 25 C.F.R. 23.113(d)
- Emergency proceedings should be shifted to a defined “child custody proceeding” within 30 days

FULL FAITH AND CREDIT OF TRIBAL COURT ORDERS

- 25 USC 1911(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes:
- The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.



INTERVENTION

TRIBES HAVE A RIGHT TO INTERVENE IN ICWA CASES IN STATE COURT. 25 U.S.C. 1911 (C)



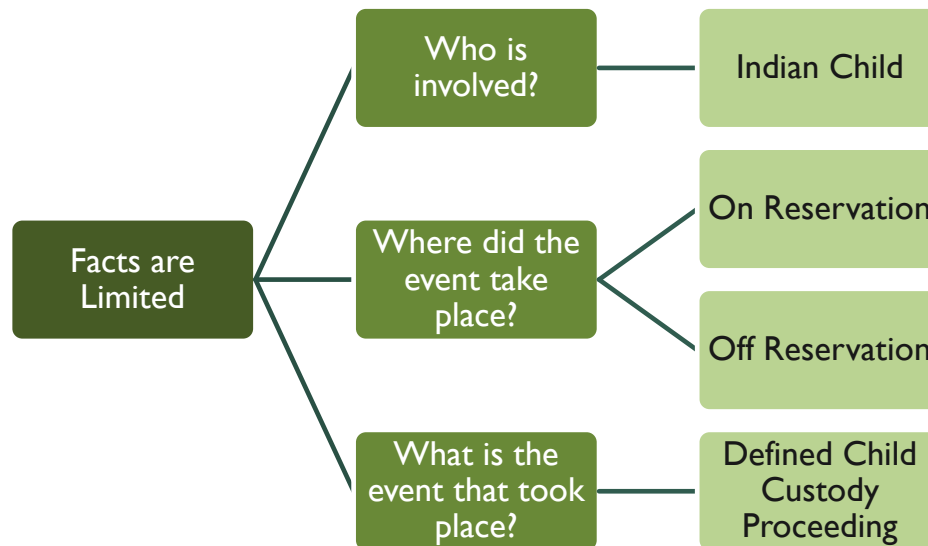
ICWA JURISDICTION

Based in Case Law

- Wisconsin Potowatomies
- Fisher v. District Court

But Defined in the Law

- 25 U.S.C. 1911



ON RESERVATION ICWA JURISDICTION

25 U.S.C. 1911 (a)

- A tribe has exclusive jurisdiction over an Indian child domiciled on its reservation.

Exceptions

- Public Law 280
 - Concurrent state and tribal law
- Oklahoma Supreme Court
 - In re S.J.W.
- Emergency Proceedings
 - 25 U.S.C. 1922

OFF RESERVATION ICWA JURISDICTION

25 U.S.C. 1911(b)

- Tribes and states have concurrent jurisdiction over Indian children who reside off the reservation
- Tribes have continued exclusive jurisdiction over “wards of the Tribal Court”
- Tribes or parents or Indian Custodians can request a transfer from state court to tribal court

Exceptions to Transfer

- If a parent objects
- If the tribal court declines
- If the state court finds “good cause”

Kansas Case Law

- In re J.L.A., 153 P.3d 570 (Table)(Kansas Ct.App. 2007

“Even if we were to reverse the judgment of the district court, the [former foster parents] have offered no authority suggesting our court has the authority or the ability to wrest jurisdiction . . . from the tribal court”

WHAT IS GOOD CAUSE TO DENY TRANSFER?

Federal Regulations 25 C.F.R.
23.118

Congressional Intent and Case
Law

(c) In determining whether good cause exists, the court must not consider:

- (1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
- (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- (3) Whether transfer could affect the placement of the child;
- (4) The Indian child's cultural connections with the Tribe or its reservation; or
- (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

Inconvenient
forum

Best interests
of the child

WEEK TWO TRAINING

- Week two:
 - Adjudication and Out of Home Placements
 - Guardianships, Termination of Parental Rights
 - Placement Preferences
 - Voluntary Proceedings
 - ICWA Caselaw Overview, 2024-25

SUBSTANTIVE PROTECTIONS IN OUT OF HOME PLACEMENTS AND TERMINATION OF PARENTAL RIGHTS

- No foster care placement may be ordered without a determination, supported by evidence **that is clear and convincing**, including the testimony of **qualified expert witnesses**, that 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**. 25 U.S.C. 1912(f), 712B.15
- No termination of parental rights may be ordered without a determination, supported by evidence **beyond a reasonable doubt**, including the testimony of **qualified expert witnesses**, that 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**. 25 U.S.C. 1912(f), 712B.15
- **Active efforts** have been made to provide remedial services and rehabilitative programs designed to **prevent the breakup of the Indian family** and these efforts have proved unsuccessful. 25 U.S.C. 1912(d), 712B.15

GUARDIANSHIPS—HOW DO THEY FIT IN

- Definition of foster care proceeding, 25 U.S.C. 1903(1)
 - Any action removing an Indian child from their parent
 - For a temporary placement in a foster home or institution or **home of a guardian** or conservator
 - Where the parent cannot have the child returned upon demand
 - But parental rights are not terminated
- 25 U.S.C. 1903 (1)(i), 1912 (involuntary), 1913 (voluntary)
 - 25 C.F.R. 23.103; 124-128

ACTIVE EFFORTS

- An action to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the child with the Indian family.
- Requires more than a referral to a service without actively engaging the Indian child and family.
- Defined in 25 C.F.R. 23.1 (“affirmative, active, thorough, and timely efforts”) with additional important examples
- In Interest of L.M.B., 54 Kan.App.2d 285 (2017)
 - Close look at active efforts under the 2015 guidelines
 - Cases are very fact dependent
 - An understanding of chemical dependency and brain science should inform active efforts cases

QUALIFIED EXPERT WITNESS

- A Qualified Expert Witness (QEW) must testify to support the findings to place a child out of home or to terminate parental rights
 - “The expert need not opine on the ultimate issue of whether the State met its burden of proof. But the expert’s opinion must support the ultimate finding of the district court ...” 290 Kan. 142, 156.
- In re M.F., 290 Kan. 142 (2010)
 - Where the state used brand new state social workers as the QEWs
- QEW in federal regulations at 25 C.F.R. 23.122
 - Specifically state the social worker regularly assigned to the child cannot be the QEW, following the M.F. decision.

PLACEMENT PREFERENCES

■ Adoptions

1. A member of the child's extended family.
2. Other members of the Indian child's tribe.
3. Other Indian families.

■ Foster care/Out of Home Placement and pre-adoptive placement

1. A member of the Indian child's extended family;
2. A foster home licensed, approved, or specified by the Indian child's tribe;
3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority;
4. An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

PLACEMENT PREFERENCES-GOOD CAUSE EXCEPTION

- The Regulations place the burden of establishing good cause not to follow the order of preference on the party requesting the deviation.
- “ICWA’s overall design, including its ‘good cause’ threshold in 25 U.S.C. 1915, ensures that all interests—those of the natural parents, the tribe, the child, and the prospective adoptive parents — are appropriately considered and safeguarded.” *In re A.J.S.*, 288 Kan. 429 (2009)
- Good cause not to follow the order of preferences must be made on the record and should be based on one or more of the following, 25 C.F.R. 23.132:
 - Request of the parents if they have reviewed the placement options
 - Request of the child/sufficient age
 - Extraordinary physical, mental, or emotional needs of the child/specialized treatment services not available in the community
 - Unavailability of a placement after a diligent search

VOLUNTARY PROCEEDINGS

Voluntary Foster Care

- 25 U.S.C. 1913
- Requires court involvement

Relinquishment

- 25 U.S.C. 1913
 - Provides protections for birth parents
- In re T.S.W., 294 Kan. 423 (2012)
 - This is an example of an adoption case as an ethics case
 - Adoption agency tried an end run around the Tribe and the law and lost

2024 HIGHLIGHTED CASES

Elkins v. Ark. Dep't of Hum.
Srvs. 2024 Ark.App. 204

- Placement preferences

In re V.J.R., 2024 OK 66

- Equal Protection

In re A.P., 2024 ND 43

- QEW

In re Ricardo T., 999 N.W.
2d 562 (Neb. 2024)

- Transfer to Tribal Court

CASES ON CURRENTLY APPEAL TO STATE SUPREME COURTS

In re L.K.
9 N.W.3d 174
(Minn. Ct.App.
2024)

In re C.J.J.I.
(Wn. Ct.App.
2024)



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