Basics of the Federal Indian Child Welfare Act and Interface with Colorado's Children's Code

Jill Elizabeth Tompkins (Penobscot)
Clinical Professor and Director, American Indian Law Clinic
University of Colorado Law School

June 16, 2010

(*) = Copy provided in materials


A. Alarmingly high percentage of Indian children being removed
   1. Not for abuse or neglect, ignorance about tribal child rearing practices
   2. Also child stealing, fraud and well-intentioned (sometimes religious motivations) removals

B. Inconsistent state court decisions on the role of tribes and tribal jurisdiction in off-reservation child custody matters

C. Senate Committee starts holding oversight hearings in 1973 after receiving reports (study by Association on American Indian Affairs)
   1. Reports were true, majority placed in non-Indian homes
   2. Practice of Indian boarding schools going back to 1888
   3. Testimony that Indian child suffer serious emotional damage when placed in homes that don’t meet their cultural needs (Francesca in Finding Ophelia, *Split Feather Syndrome*)

D. Congress passes ICWA in 1978
   1. Never been amended.
II. Congressional Policy and Purposes of ICWA

A. Set forth clearly in 25 U.S.C. §1902: “[T]o 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 homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.”

B. Key Purposes

1. In furtherance of role as trustee to tribes, prevent break up of Indian families by establishing minimum standards (burdens of proof) for state courts to apply

2. Prevent separation of Indian children from tribes and Indian culture (placement preferences, adoption information)

3. Clarify tribal jurisdiction and give tribes more say in the lives of their member children
   a. Led to development of tribal social services departments
   b. Spurred tribal court development


A. ICWA controls child custody proceedings involving Indian children

1. “Foster care placement” = “any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand but where parental rights have not been terminated.”

2. Termination of parental rights

3. Preadoptive placement = temporary placement of Indian child after termination of parental rights but in lieu of or prior to adoption

4. Adoptive placement

   a. Act if committed by an adult would be a crime (juvenile crime/delinquency)
      (1.) C.R.S. § 19-1-126 adds “certain juvenile delinquency proceedings”
      (2.) No reported cases yet
b. Divorce proceedings

(1.) Several courts have ruled any custody action between parents (e.g., Colorado’s allocation of parental rights and responsibilities) are excluded.

c. Private custody actions brought by third parties are not excluded

(1.) In re N.B., --- P.3d ----, 2007 WL 2493906 (Colo.App.) (ICWA governs private stepparent adoption)

(2.) In re J.C.T., 176 P.3d 726 (Colo. 2007) (ICWA applies to private guardianship)

(3.) In the Interest of Child: S.M.J.C., Upon Petition of Oglala Sioux Tribe (ONTRAC), (District Court applying ICWA to non-parent petition for allocation of parental rights. Appeal of denial of motion to dismiss pending before Court of Appeals)

d. Lack of a close relationship between Indian family and tribe or culture is not relevant

(1.) “Existing Indian Family Exception” has been rejected in Colorado. In re N.B.

(2.) Exception ignored plain language of ICWA and the tribe’s separate interest in its children

B. Who is an Indian child? [25 U.S.C. § 1903(3),(4)]

1. Any unmarried person under the age of 18 who is a member of an Indian tribe (federally recognized) or is an Alaska Native

2. Also includes a child who is eligible for tribal membership if one of the biological parents is a member (or, if the parent is eligible and gains membership during pendency of the case)

3. Colorado imposes a duty to make “continuing inquiries” to determine whether a child is Indian [C.R.S.§ 19-1-126(a)]

a. Colorado’s “American Indian/Alaska Native Indian Child Welfare Act Assessment Form”

b. Drafting of petition in dependency and neglect

c. Judge’s inquiry of parents/guardians at first appearance. C.R.S. § 19-1-126(c)(2)

4. Duty of court to decide if ICWA applies. In the Interest of C.C.G., 942 P.2d 1380 (Colo. App. 1997) (Ponca Tribe, intervenor); People ex rel. L.O.L., 197 P.3d 291 (Colo. App. 2008)(trial court erred in applying higher standard for termination where it could not conclude the child was an Indian child)
C. **Jurisdiction** [25 U.S.C. §1911]

1. Tribal court has exclusive jurisdiction over children living on reservation, domiciled on reservation or a ward of the tribal court -- regardless of residence
   
   
b. Pending case before Colorado Court of Appeals, *In re: S.M.J.C.*, in which Indian parents signed over powers of attorney to non-Indian custodian and then abandoned for three years

2. State court does have jurisdiction over emergency removal and placements [25 U.S.C. § 1922]

3. Transfer to tribal court mandatory if petition made by Indian parent or the tribe (absent objection of parent or declination by tribal court) absent "good cause." Burden on opposing party to prove good cause. [25 U.S.C. §1911(b)]
   
a. Colorado codified a few of the BIA guidelines defining “good cause”
      
      (1.) Tribe does not have a tribal court
      
      (2.) Proceeding was at an advanced stage and petitioning party failed to petition promptly after receiving notice
      
      (3.) Court of Appeals rejected a “best interests of the child” test for transfer. *In the Interest of J.L.P*, 870 P.2d 1252, 1258-9 (Colo.App. 1994).

b. Other BIA guidelines for “good cause” to deny transfer
   
   (1.) Indian child over the age of 12 objects
   
   (2.) Necessary evidence could not be presented in tribal court without undue hardship on parties or witnesses
   
   (3.) Parents of child over age of 5 have had little or no contact with tribe or members (but see N.B.)

4. State courts must give “full faith and credit” to tribal court decisions [25 U.S.C. § 1911(d)]

IV. **ICWA Provides Protection Through Notice, Rights of Intervention and Heightened Standards**


1. Notify of proceedings and right to intervene

2. To child’s parent (not including putative fathers), Indian custodian and tribe

**B. Notice of Voluntary Proceedings**

1. ICWA only requires for involuntary proceedings but best practice also to provide notice in voluntary proceedings

2. Will help to avoid possible jurisdictional issues if reservation residence or domicile at issue

3. Voluntary proceeding may turn involuntary

**C. To Whom, When and How Notice Given**

1. In addition to parents and custodians, must notify tribe child is a member of, or eligible for membership in.

   a. If eligible for more than one, must notify all “potentially concerned tribes” *B.H and In the Interest of J.O.*, 170 P.2d 840 (Colo.App 2007)

   b. Tribe with more significant contacts is the child’s tribe (though actual membership or enrollment may be definitive)


   d. If don’t know identity or location of parent, Indian custodian, or tribe must notify Secretary of Interior (who then has 15 days to notify party)

2. Written notice must be sent by registered mail, return receipt requested, at the commencement of a child custody proceeding (foster care and again at termination) *In the Interest of S.R.M.*, 153 2d. 438 (Colo.App. 2006).

3. Enhanced Colorado notice requirements intended to further define how tribe is notified in order to improve effectiveness [C.R.S. 19-1-126(b), (c)]

   a. Sent to the federally designated agent (CFR), or if none designated, then to highest official, to the highest tribal judge and to the tribal social service department

   b. Return receipts must be filed with the court

4. Contents of notice. 25 C.F.R. §23.11(d)(e), BIA Guideline, B.5 Notice Requirements (p. 67588). Leading case in Colorado is *In the Interest of N.D.C.*, 210 P.3d 494, 498 (see extensive list of required components.)

   a. Copy of petition

   b. Notice of the right to intervene
5. No foster care or termination hearing can be held before 10 days after notice received. (Another 20 days to prepare must be granted upon request.)

D. Burdens of Proof and Impact of Defective Notice

1. Party seeking foster care placement or termination of parental rights to an Indian child has a continuing duty to inquire about a child's Indian ancestry and status. C.R.S. § 1-19-126(a)

2. Party (usually a parent or tribe) has the ultimate burden to produce the necessary evidence for the court to determine that a child is in Indian child and that ICWA applies. People in the Interest of A.G.-G. 899 P.2d 319 (Colo.App.1995).

3. Once there is "reason to believe" an Indian child is involved in a child custody case, burden is on the party seeking the foster care placement or termination of parental rights to provide notice. B.H. v. People ex rel. X.H.

3. Failure to provide parents and tribe with sufficient detail in the notice can provide grounds for reversal of the foster care placement or termination. In re N.D.C.

4. The court can find errors in the notice sent to the tribe and parents to be harmless. If, after receiving all known information, a tribe responds that a child is not an Indian child, any errors in the notice are deemed to be harmless. In the Interest of A.R.Y.-M., -- P.3d --, 2010 WL 963086 (Colo.App.2010)

a. Question to ask is: whether the missing information from the notice would have changed the membership determination?

b. Best practice is to gather and provide ALL the information requested by the assessment form, attach a copy along with petition and notice of the tribe's rights and possible consequences of the proceedings.

D. Other protections for parental and tribal interests

1. Right of intervention [25 U.S.C. §1911 (c)]

a. Foster care placement or termination of parental rights (most courts allow tribes to intervene in adoption as well)

b. At “any point in the proceeding”

c. Tribe must explicitly waive right to intervene and to notice of proceedings; can't be inferred from silence or inaction. People ex rel. T.M.W., 208 P.3d 272 (Colo. App. 2009).

2. Appointment of counsel for indigent parents or Indian custodian [25 U.S.C. § 1912(b)]

3. Parties have right to examine all reports and documents submitted to the court [25 U.S.C. § 1912(c)]
E. Heightened standards applicable in ICWA proceedings

1. If federal or state law provides a higher standard of protection of rights, those rights apply, e.g., Colorado law mandates GAL in all D & N proceedings so that applies. [25 U.S.C. § 1921]

2. “Active” (as opposed to merely “reasonable”) efforts to provide remedial services and rehabilitative programs to prevent family’s breakup required [25 U.S.C. § 1912(d)]
   a. Example: reasonable efforts may be to give parent a list of substance abuse treatment providers to do evaluation and treatment; active efforts would include calling to make appointment for parent, providing bus pass to get there, etc.
   b. Must be proof that active efforts were tried and were unsuccessful (state need not persist with “futile efforts” after trying and failing remedial efforts however. In the Interest of K.D., 155 P.3d 634 (Colo.App. 2007))
   c. Adoption & Safe Families Act, implemented in Colorado via H.B. 98-1307, does not override or excuse “active efforts” requirement of ICWA. See In the Interest of J.S.B., 691 N.W.2d 611 (SD 2005).

3. No foster care or termination of parental rights may be ordered without qualified expert witness testimony that continued custody is “likely to result in serious emotional or physical damage to the child.” [25 U.S.C. § 1912(e),(f)]
   a. Qualified expert witness—not defined by ICWA but guidance given by BIA guidelines, D.4 Qualified Expert Witness, 44 Fed. Reg. 67593
      (1.) Member of child’s tribe recognized as knowledgeable in tribal customs regarding family organization and childrearing practices
      (2.) Lay expert having substantial experience in Indian child and family service delivery and extensive knowledge of the tribe’s prevailing social and cultural standards and childrearing practices
      (3.) A professional person having substantial education and experience in area of his or her specialty
      (4.) Caveat: Colorado’s courts’ view is that if removal or termination is based on “culturally neutral considerations,” expert need not have special knowledge of Indian life. In the Interest of A.N.W., 976 P.2d 365, 368 (Colo.App. 1999).

4. Proof in foster care proceeding must be by “clear and convincing evidence” (instead of preponderance of evidence) [25 U.S.C. § 1912(e)]

5. Proof in termination case must be “beyond a reasonable doubt” (criminal standard instead of clear and convincing evidence standard) [25 U.S.C. § 1912(f)]
F. Special judicial safeguards in voluntary proceedings for placement or relinquishment

1. Consent of parent or Indian custodian must be in writing

2. Must be signed in front of a judge

3. Judge must certify that terms and consequences of consent were explained in detail and fully understood by parent or Indian custodian
   a. “Confessing” a motion to terminate treated differently
   b. Most County/City Attorneys still do an offer of proof with expert testimony

4. Judge must certify whether explained in English or interpreted into a language that parent or Indian custodian understood

5. No consent is valid if given prior to or within 10 days of Indian child’s birth

6. Due to requirement of applying higher standard of protection, in Colorado, relinquishing Indian parent must undergo counseling prior

7. Consent to voluntary foster care placement can be withdrawn at any time and child must be returned to parent or Indian custodian

8. Consent to termination or adoptive placement can be withdrawn prior to the final decree of termination or adoption
   a. If allege circumstances of fraud or duress, parent can petition to withdraw consent to adoption
   b. No adoption older than two years may be invalidated
   c. Note: if an adoption of an Indian child subsequently fails, then all the provisions of ICWA apply to the new proceeding. Arguably parents whose rights were terminated would be entitled to notice, right to intervene, etc. [25 U.S.C. §1916(b)].

V. ICWA Keeps Indian Families and Tribes Together


1. General provisions
   a. Placed in least restrictive setting that approximates a family and within reasonable proximity to child’s home
   b. Standards to be applied in meeting preferences are the Indian community’s social and cultural ones
   c. Tribe may establish different order of preference
d. Where appropriate, child or parent’s preference to be considered (consenting parent may be anonymous)

e. Record of placements to be maintained showing efforts to comply and must be available to tribe or Secretary upon request.

2. Foster care or preadoptive placement [25 U.S.C. §1915(b)]

   a. Member of Indian child’s extended family (not restricted to other Indians however)

      (1.) Tribe’s law or custom defines “extended family member” (be aware tribes may not use same definitions, e.g. biological great-aunt = tribal grandmother)

      (2.) If no law or custom, includes adult grandparent, aunt, uncle, sister, brother, sister-in-law, brother-in-law, niece, nephew, first or second cousin or stepparent

   b. Foster home approved by tribe

   c. Licensed Indian foster homes

   d. Indian-approved institutions


   a. Extended family members

   b. Tribal members

   c. Other Indian Families

4. “Good cause” to deviate from placement preferences

   a. Burden is on party seeking deviation. BIA Guideline F.3 Good Cause to Modify Preferences lists possible circumstances:

      (1.) Request of biological parent or child over 12

      (2.) Child’s extraordinary physical or emotional needs as established by testimony of qualified expert witness

      (3.) Unavailability of suitable families after diligent search

   b. Colorado found good cause in In the Interest of A.N.W., 976 P.2d 365, 369 (Colo.App. 1999) due to child’s bond with foster parent who had been placed with since birth and abandoned by mother; court may consider, “The certainty of emotional or psychological damage to the child if removed from the primary caregiver.”

1. Court must provide Secretary with copy of final adoption order and information regarding child’s name, tribal affiliation, names and addresses of biological parents, names and addresses of adoptive parents and agency having information regarding adoptive placement [25 C.F.R. § 1951]

2. An adopted Indian child who reaches 18 may petition court for information on Indian affiliation and information necessary to protect tribal rights [25 C.F.R. § 1917]

3. Adopted Indian child 18 or over, adoptive or foster parents of an Indian child or the Indian child’s tribe may request Secretary to disclose information necessary for enrollment

4. ICWA rights trump Colorado’s confidential intermediary process, but ICWA still protects anonymity of biological parents by allowing for Secretarial certification to Indian child’s tribe of enrollment information

VI. ICWA Provides Strong Enforcement


1. Upon petition of Indian child, parent or Indian custodian, and/or Indian tribe to invalidate state court action

2. For violations of Sections 1911, 1912, 113: jurisdiction, transfer, notice, burdens of proof, active efforts, placement preferences and consent provisions.

3. To a court of “competent jurisdiction” (usually issuing court, but Doe v. Mann, 285 F.Supp.2d 1229 (N.D.Cal 2003) a federal district court heard invalidation petition)

B. Agreements between States and Indian tribes [25 U.S.C. § 1919]

1. Authorization for agreements regarding care and custody of Indian children, jurisdiction, transfers and concurrent jurisdiction

2. Must give other party 180 days written notice of revocation

3. State of Colorado and Southern Ute Tribe agreement

   a. Recites main provisions of ICWA and agrees to follow

   b. Helpful additional agreement in the following areas:

      (1.) Tribe agrees to keep child custody matters confidential

      (2.) Department will provide telephonic notice of proceedings "as soon as reasonably possible"

      (3.) Tribe’s membership determinations are conclusive and irrebuttable
(4.) More detailed notice to include identification of child's special needs, social history, placement history, information about collateral contacts with other human service agencies and urban Indian centers and a statement of the date telephonic notice given to the Tribe's social services department

(5.) No termination of parental rights until expiration of thirty days notice to Tribe

(6.) Presumption that the tribal court will accept transfer of case (County pays costs of returning child to reservation and foster care until return accomplished)

(7.) Department must provided in a detailed written summary the reasons to recommend deviation from placement preferences

(8.) Acknowledges Tribe's right to license both on and off reservation foster homes. Department and Tribe to jointly develop Indian child foster home licensing standards

(9.) Department to assist Tribe when child needs to be placed out-of-state

VII. in the Spirit of ICWA

A. Cultural Connectedness Agreements

1. Reality of dealing with urban Indian population with very few local Indian foster and adoptive homes

2. Agreements between child's tribe and non-Indian foster or adoptive parents to work cooperatively to keep child connected to tribe and culture (language, ceremonies etc.)

3. Can include extended Indian family members as are critical link to tribe and heritage

B. Future Initiatives to Improve ICWA Compliance

1. Colorado Judicial Branch Court Improvement Training Wheel

   a. Community and Culture

   b. Roles and Responsibilities

   c. Practice and Procedure (by Judge J. Robert Lowenbach large section devoted to ICWA)

2. Minnesota as a model?

   a. Minnesota Department of Human Services involves tribes in Indian child welfare service decisions, makes grants available to tribes to provide services and provides training and technical assistance.

   b. Minnesota Indian Child Welfare Advisory Council develops and implements child welfare policies
c. Intergovernmental (county, tribe and private agency representative) Compliance Review Team reviews for non-compliance and recommends corrective action