Protecting Native American Children
By Joel R. Brandes

The Indian Child Welfare Act of 1978 (ICWA), [1] was the product of rising concern in the mid–1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.[2] The Act "seeks to protect 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." [3] It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." [4]

The Indian Child Welfare Act applies to all "child custody proceedings involving an "Indian child".[5] The ICWA defines "child custody proceeding" as including foster care placements, termination of parental rights proceedings, preadoptive placements and adoptive placements.[6] An "Indian child" is defined as "any unmarried person who is under age eighteen 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".[7]

In Mississippi Band of Choctaw Indians v. Holyfield, [8] the U.S. Supreme Court found that the children involved were Indian children as defined by Indian Child Welfare Act §1903(4) although they had never lived in an Indian home or on an Indian reservation. It held that even though the children were born off of the reservation, they were domiciled on the reservation within the meaning of the ICWA's exclusive tribal jurisdiction because the domicile of an Indian child is that of the mother if the child is born out of marriage, and federal law preempts state law as to the definition of domicile.

The ICWA vests Indian tribal courts with exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of the tribe. [9] It also creates concurrent, but presumptively tribal jurisdiction,

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[1] 92 Stat. 3069, 25 U.S.C. §§ 1901–1963.
[2] 25 U.S.C. § 1901.
[3] House Report, at 23, U.S. Code Cong. & Admin.News 1978, at 7546.
[4] *Id.,* at 24.
[5] 25 U.S.C. §§ 1903, 1911
[6] 25 U.S.C. § 1903, subd. 1 [i]-[iv]
[7] 25 U.S.C. § 1903 subd. 4.
[8] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989)
[9] 25 U.S.C. § 1911 (a)

in the case of an Indian child not domiciled on the reservation.[10] In this latter case, state courts "shall" transfer any proceeding for foster care placement or termination of parental rights to the tribal court unless "good cause" to the contrary is shown, either parent objects to the transfer or the tribe declines jurisdiction. [11]

The ICWA authorizes an Indian child's tribe to intervene at any point in state court proceedings for "foster care placement" or "termination of parental rights." [12] The ICWA defines termination of parental rights as "any action resulting in the termination of the parent-child relationship". [13]

The Act provides substantive standards for placement of Indian children in different types of child custody proceedings.[14] 25 USC § 1915 subd. a, pertaining to adoptive placement proceedings, states: "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." These preferences have been described by the Supreme Court as "[t]he most important substantive requirement imposed on state courts". [15]

Social Services Law § 39 is the New York Indian Child Welfare Act. It and the New York regulations,[16] mirror the definition of “child custody proceedings” under the Indian Child Welfare Act and the federal regulations.[17] Social Services Law § 39 and 18 NYCRR 431.18 expand the federal definition of Indian tribe to include recognition of “[a]ny Indian tribe designated as such by the state of New York,” [18] and to include federally recognized tribes and tribes recognized by the State of New York or by any other state.

The Family Court Act provides that jurisdiction of the Family Court over Indian child custody proceedings is subject to the ICWA.[19] Tribal courts of Indian tribes designated as such by the state of New York have jurisdiction over child custody proceedings involving Indian children to the same extent as federally designated Indian tribes upon the approval of the state office of children and family services.[20]

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[10] 25 U.S.C. § 1911 (b)
[11] Id.
[12] 25 U.S.C. § 1911 (c)
[13] Matter of Baby Boy C., 27 A.D.3d 34, 805 N.Y.S.2d 313 (1st Dept., 2005)
[14] 25 USC § 1915
[15] Id
[16] 18 NYCRR 431.18.
[17] 81 FR 31877
[18] Social Services Law § 39
[19] Family Court Act §115(d).
[20] Id.

In Matter of Dupree M. v. Samantha Q. [21] the Appellate Divison held, among other things, that a neglect proceeding triggers the ICWA and the presumptive tribal jurisdiction over the proceedings. There, the respondent mother and her husband were the parents of the child, who was born in January 2017. The father was a member of the Unkechaug Indian Nation and the Shinnecock Tribe. The Department of Social Services filed a petition against the mother alleging that she derivatively neglected the child. When the parties appeared before the Family Court on the petition, the mother's attorney requested that the proceeding be transferred to the Unkechaug tribal council, and a representative of the Unkechaug, made the same request. Opposition to the application was interposed by the attorney for the child. Family Court granted the application and, inter alia, transferred jurisdiction over the proceeding to the Unkechaug. The attorney for the child appealed. The Appellate Division affirmed. It observed that although the ICWA applies only to federally recognized tribes [22] and the Unkechaug did not appear to be federally recognized, Social Services Law § 39 and 18 NYCRR 431.18 expand the federal definition to include recognition of "[a]ny Indian tribe designated as such by the state of New York" , and to include federally recognized tribes and tribes recognized by the State of New York or by any other state. [23] The Unkechaug was recognized by the State of New York,[24] and the ICWA was applicable to the Unkechaug.

The Court observed that the current federal regulations define the term "child-custody proceeding" as "any action, other than an emergency proceeding, that may culminate in" foster-care placement, termination of parental rights, preadoptive placement, and adoptive placement.[25] It found that even though the action did not result in a foster-care placement, it may have culminated in such a placement and, therefore, should be considered a 'child-custody proceeding' under the statute.[26] It noted that Social Services Law § 39(6) provides that "[i]n any state court child custody proceeding involving the foster care placement of, or termination of parental rights to an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe..." The New York regulations mirror the definition of "child custody proceedings" under the ICWA and the federal regulations. Any action that "may culminate" in, inter alia, a "foster care placement" or "termination of parental rights" triggers the ICWA and the presumptive tribal jurisdiction over the proceedings.[27] Here, DSS filed a petition alleging neglect which may culminate in foster care or termination of parental rights. The Court held that under the circumstances presented, there was no reason to disturb the Family Court's transfer order.

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[21] 171 A.D.3d 752, 97 N.Y.S.3d 680 (2d Dept.,2019)
[22] *see* 25 USC § 1903 subd. [8]
[23] *see* 18 NYCRR 431.18
[24] *see* Indian Law § 151
[25] 25 CFR 23.2[11][1]
[26] 81 Fed Reg 38778–01 at 38799
[27] 18 NYCRR 431.18 [a][4]

The party asserting the applicability of the Indian Child Welfare Act bears the burden of providing sufficient information to put the court on notice that the child may be an "Indian child" within the meaning of the Indian Child Welfare Act.[28]

Either parent or the Indian custodian or the Indian child's tribe may bring a proceeding in any court of competent jurisdiction to invalidate any action taken in a foster care or termination proceeding involving an Indian child taken from the custody of a parent or Indian custodian, upon a showing that the action violated any provision of sections 1911, 1912, and 1913 of the ICWA.[29]

In Matter of Connor [30] the child was born in 2010 to the mother and the nonparty birth father, a member of the Choctaw Indian tribe. The mother and the birth father were never married. Thereafter, the mother married Jacob D. (respondent). Jacob D., with the mother's consent, filed a petition for adoption of the child. The birth father voluntarily relinquished his parental rights to the child during the adoption proceeding. The Family Court issued an order of adoption, approving the adoption of the then three-year-old child by the respondent. Subsequently, Jacob D. commenced an action for a divorce against the mother. In April 2018, while the divorce action was pending, the mother moved in the Family Court, in effect, pursuant to Domestic Relations Law § 114(3) to vacate the order of adoption in favor of Jacob D. on the ground that the child was an Indian child and the adoption proceeding was not held in compliance with sections 1911, 1912, and 1913 of the Indian Child Welfare Act, or, in the alternative, on the ground that the adoption was effectuated through fraud, misrepresentation, and other misconduct. Family Court, inter alia, denied the mother's motion. The Appellate Division affirmed. It agreed with the Family Court's determination that the mother lacked standing to allege a violation of sections 1911, 1912, or 1913 of the ICWA. It pointed out that the ICWA provides that "[a]ny Indian Child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title." Although the adoption proceeding involved the voluntary termination of the birth father's parental rights to the child, the plain language of both 25 USC § 1914 and 25 CFR 23.137(a) was clear that only the child, the parent or Indian custodian from whose custody the child has been removed, and the Indian child's tribe had standing to allege a violation of sections 1911, 1912, or 1913 of the ICWA. Since the mother did not fall into any of those categories, she lacked standing to allege a violation of sections 1911, 1912, or 1913 of the ICWA. It held that the language of section 1914 itself limits standing to challenge state-law terminations of parental right to parents from whose custody the child was removed.

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[28] 25 U.S.C. §1911 subd. (b).

[29] 25 U.S.C. §1914.

[30] --- N.Y.S.3d ----, 2019 WL 3436659 (2d Dept., 2019)

Conclusion

In Brackeen v. Bernhardt,[31] decided on August 9, 2019, the U.S. Court of Appeals for the Fifth Circuit held that the ICWA was constitutional. A few days later the ABA Journal reported that its House of Delegates approved a resolution declaring the ICWA constitutional. The article noted that in recent years the ICWA has been attacked by politically conservative legal organizations as unconstitutional. [32] We applaud the Fifth Circuit for upholding this federal law that is vital to safeguarding the welfare of Indian children.

[31] See the opinion at https://www.narf.org/nill/documents/20190809brackeen-icwa-opinion.pdf

[32] See http://www.abajournal.com/news/article/the-indian-child-welfare-resolution-115C