



To: Texas Judges Who Hear CPS Cases

From: The Honorable Robin Sage, Jurist in Residence, Office of Court Administration

Date: May 8, 2014

RE: Why It's Important to Consider the Indian Child Welfare Act

Last week I participated in the first Tribal/State Collaborative Round Table at the Alabama-Coushatta Indian Reservation in Livingston, Texas. Tribal judges, state court judges, attorneys and child welfare leaders gathered to discuss the Indian Child Welfare Act (ICWA). In 1978, the ICWA was passed by Congress in response to the alarmingly high number of Indian children being removed from their homes and placed with non-Indian families. Prior to ICWA, Indian children were often raised as white children and all cultural and tribal influences were removed. Congress passed the ICWA to establish minimum federal standards for the removal of Native American children from their families and to promote the stability and security of Indian tribes and families.¹ There are three federally recognized tribes in Texas: 1) the Alabama-Coushatta; 2) Kickapoo Traditional Tribe of Texas; and 3) Ysleta Del Sur Pueblo of Texas.

Today, the consequences of failing to follow ICWA include invalidation of state court proceedings after appeal either by the child or the parent, the possible disruption of a long-standing foster care placement, the voiding of an adoption order, and/or malpractice actions. A court's failure to comply with ICWA can entirely disrupt a child's placement and a family's life. Yet, despite the serious consequences of failing to apply ICWA, a recent study of Texas child protection hearings conducted by the Children's Commission revealed that ICWA was discussed in only 4% of the CPS cases observed. Data collected also reflected that in 60% of CPS cases observed, ICWA inquiries were not made in court or reflected in the court's file. Furthermore, recent survey results gathered from child welfare attorneys across Texas indicated that at least half are unfamiliar with ICWA and are interested in more CLE on ICWA.

Q: If my jurisdiction is not near a reservation of one of Texas' three federally recognized tribes, is it likely that ICWA would apply to a case before me?

A: Yes, the 2010 Census Briefs report that 78 percent of Native American people live outside of a reservation so courts cannot assume that it will not have Native American children involved in hearings. Further, Texas has the 4th largest Native American population in the U.S.

Q: When does ICWA apply?

A: ICWA applies when an Indian child is the **subject of a child custody proceeding**, including child custody proceedings brought by a governmental entity.

¹ 25 U.S.C. §§ 1901, 1902

An Indian child is any unmarried person who is under age 18, and is either: 1) a member of any Indian tribe; or 2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe

A child custody proceeding is one that involves:

- (i) **foster care placement** – any action removing an Indian child from his parent or Indian custodian for temporary placement in a foster home, institution, or in 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; or
- (ii) **termination of parental rights** – any action resulting in the termination of the parent-child relationship; or
- (iii) **pre-adoptive placement** – the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or
- (iv) **adoptive placement** – the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Q: How do I know if a child is a member of a tribe or eligible to be a member?

A: Each of the 562 federally recognized tribes, include those in Texas, determines its own tribal enrollment criteria in tribal constitutions, articles of incorporation, or ordinances, and each tribe maintains its own enrollment records and records about past members.

Q: What are the most important procedural provisions in ICWA?

A: The most important provisions for a court to know include:

- **Notice** -- ICWA requires written notice of all upcoming proceedings relating to foster care placement and termination of parental rights where an Indian child is being removed from home. Timely written notice to the child's tribe means the earliest possible notice upon discovery that the child might be an Indian child.
- **Active Efforts** -- ICWA requires a higher standard of proof in order to terminate parental rights. The plain language of ICWA states that to terminate the parental rights of a Native American parent, the burden of proof is beyond a reasonable doubt. There is an additional requirement that the court make a determination supported by evidence beyond a reasonable doubt—including testimony of a qualified expert—that active efforts have been made to prevent the breakup of the Indian family and, in spite of those efforts, the child cannot be returned to the parent without a substantial risk of serious physical or emotional harm.
- **Placement Preferences** -- ICWA outlines placement preferences with Indian families in any foster care or preadoptive placement, absent good cause.

Q: Where I can read more?

A: For more information, please see:

- Texas Child Protection Law Bench Book, [Indian Child Welfare Act](#)
- Indian Child Welfare Act, [25 U.S.C. §§1901-63](#) ; [25 C.F.R. Part 23](#)