

Indian Child Welfare Act of 1978 (ICWA)

25 U.S.C. §§1901-1963

Purpose of the Act

- ▶ The ICWA was enacted to address concerns in the mid-1970's over the number of Indian children that were removed from their families and tribes through adoption or foster care placement.
- ▶ More often than not, the children were placed in non-Indian homes.
- ▶ The act is intended to protect the best interest of Indian children, and to promote the stability and security of Indian children and their families, by establishing minimum Federal standards.

What procedure must be followed under the ICWA?

ICWA Procedure

- ▶ A party seeking to involuntarily terminate parental rights under the ICWA must demonstrate that “active efforts have been made to prevent the break up of the Indian family, and those efforts have proved unsuccessful.”
- ▶ A state court may not involuntarily terminate parental rights UNLESS there is evidence that establishes *beyond a reasonable doubt* that the continued custody by the Indian parent is likely to result in serious emotional or physical damage, or physical damage to the child.
- ▶ In adoption placements, preference is given to a member of the child’s extended family, other members of the Indian child’s tribe, or other Indian families.

When does ICWA apply?

- ▶ The ICWA applies when a child is an “Indian Child.”
- ▶ Indian child - an unmarried minor who is eligible for membership in an Indian tribe, or is the biological child of a tribe member.
- ▶ The ICWA is a statute about political status and tribal affiliation, not race.
 - ▶ See, for example *S.S. v. Colorado River Indian Tribes*, 388 P.3d 569 (Ct. App. 2017), cert. denied.
 - ▶ The Arizona Supreme Court acknowledged that “the additional requirements the ICWA imposes on severance of a parent’s rights to an Indian child are based not on race, but on Indians’ political status and tribal sovereignty, and that those requirements are rationally related to the federal government’s desire to protect the integrity of Indian families and tribes.”

Federal Preemption: if there is a conflict the ICWA Controls

- ▶ *In the Interest of J.J.C. and A.M.C.*, 302 S.W. 3d 896 (Tex. App. - Waco 2009, no pet.).
 - ▶ The court of appeals determined that the ICWA can be raised for the first time on appeal.
 - ▶ The Trial Court, and the Department of Family Protective Services had a duty to send notice under the ICWA "where the court knows, or has reason to know, an Indian child is involved."
 - ▶ Take away - the ICWA controls - the burden rests on the Courts to verify ICWA status.
- ▶ *In Interest of C.C.*, 2017 WL 2822518 (Tex. App. -Tyler 2017, no pet.)
 - ▶ A statement by the father that he had "Indian blood" was enough to put the trial court on notice that ICWA could apply.

In the Interest of J.J.T., 2017 WL 6506405

- ▶ Jake, a 2-month old member of the Navajo nation was removed from the custody of his parents after suffering significant “non-accidental trauma.”
- ▶ Department of Family and Protective Services notified the Navajo nation. The Navajo nation did not intervene as a party in the action.
- ▶ Navajo Nation sought to intervene at trial.
- ▶ Parental rights were terminated, but Jake remained in the custody of DFPS.
- ▶ Reversed - it was error to not let the Navajo Nation intervene at trial - the ICWA allows intervention at any time.

Adoptive Couple v. Baby Girl

570 U.S. 637 (2013)

- ▶ Facts - Mom and Dad are engaged, but never married.
- ▶ Dad tells mom he will terminate parental rights...via text message.
- ▶ Mom decides to give baby up for adoption.
- ▶ Dad is served with notice of termination when the adoptive parents initiate proceedings to adopt in South Carolina.
- ▶ Dad contests the adoption and wins. The South Carolina Supreme Court finds that ICWA applies - he gets custody of the daughter (now nearly 2 years old).
- ▶ Adoptive parents appeal - and the U.S. Supreme Court reverses - sending her back to the adoptive parents (she is now 3.5).

Adoptive Couple v. Baby Girl

570 U.S. 637 (2013)

- ▶ What was the rationale?
- ▶ The U.S. Supreme Court majority (5:4) took the position that the ICWA did not apply to the dad in this case because he had never had custody of his daughter.
- ▶ Dissent - sees a big problem - the holding in this case essentially gives no ICWA protection to unwed fathers.
- ▶ Result → the 2016 Regulations

Case to Watch: Texas v. Zinke

Case 4:17-cv-00868-O, Northn District of Texas

- ▶ Three families, and the states of Texas and Louisiana, challenge the applicability of the ICWA.
- ▶ Brackeens
 - ▶ Non-Indian parents sought to adopt A.L.M., supported by his biological mother and grandparents.
 - ▶ When the initial petition was filed, it was denied by the Trial Court because of the ICWA. An Indian family was found to adopt the child. The Brackeen challenged the decision.
 - ▶ However, the selected Indian family decided not to adopt. The Brackeens are now in the process of re-attempting to adopt A.L.M.

Texas v. Zinke

▶ Librettis

- ▶ The Librettis have cared for Baby O (now 20 months) since her birth, supported by her birth mother.
- ▶ Baby O is a member of the Ysleta del sur Pueblo tribe, which seeks to remove her from the Librettis in Nevada, to a reservation near El Paso.

▶ Cliffords

- ▶ The Cliffords wish to adopt the 6 year old girl they have fostered since 2016.
 - ▶ Her grandmother (who is not fit to adopt) is a member of the White Earth Band of Ojibwe Indians.
- ▶ This case has been brought by these parents to challenge "the final rule" → the 2016 Regulations.