

ICWA: Historical Background

Beginning in the mid-1800s, public and private agencies, with the federal government's consent, routinely removed Indian children from their homes.

A congressional investigation in the 1970s revealed:

- 1. 25-35% of all Indian children in the US were being taken from their families by state welfare agencies.
- 2. In some states, Indian children were 7 to 8 times more likely to be removed than white children.
- 3. The vast majority of these Indian children were placed in non-Indian homes.

Historical Background (cont.)

- Congress found that state judges and social workers were often biased against Indians and ignorant of tribal values and customs. State officials "have often failed to recognize the . . . cultural and social standards prevailing in Indian communities and families." --25 U.S.C. § 1901
- 5. These removals were disastrous not only for many Indian children and their families, but also for their tribes. Tribes were being stripped of their youth.

ICWA's Purpose

Congress passed ICWA to create "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." --25 U.S.C. § 1902

ICWA contains protections for both Indian families and Indian tribes. "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians."

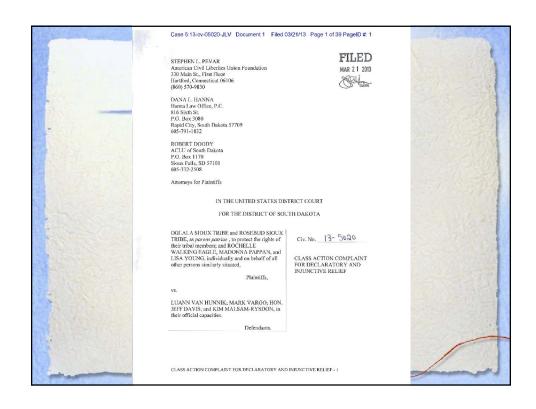
--Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989)

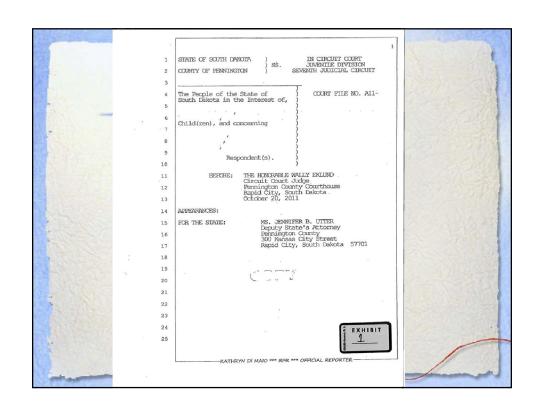
South Dakota Facts: 2010

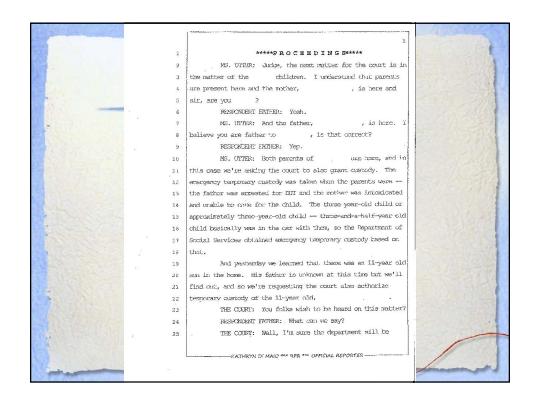
- 1. State's population: 814,000.
- 2. 8.9% of the population is American Indian or Alaska Native.
- 3. But 52.5% of the children in foster care are American Indian or Alaska Native, only 30% are white.
- 4. Thus, an Indian child is 11 times more likely to be placed in foster care than a non-Indian child.

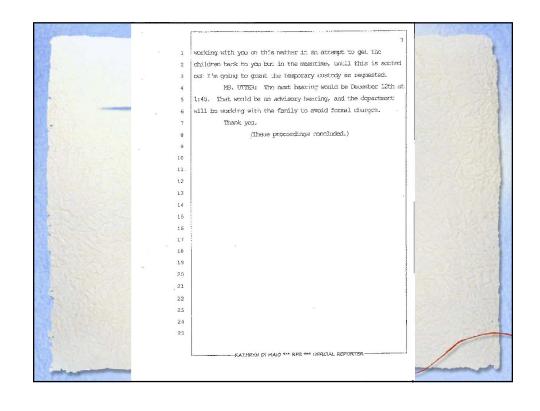
Four Stages of a Foster Care Case

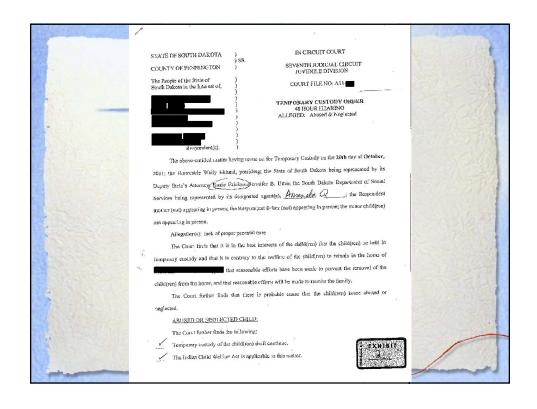
- 1. Emergency removal of the child from the home, either by Social Services or by the police.
- 2. Initial ("48-hour") hearing.
- 3. Trial.
- 4. Placement of the child outside the home.

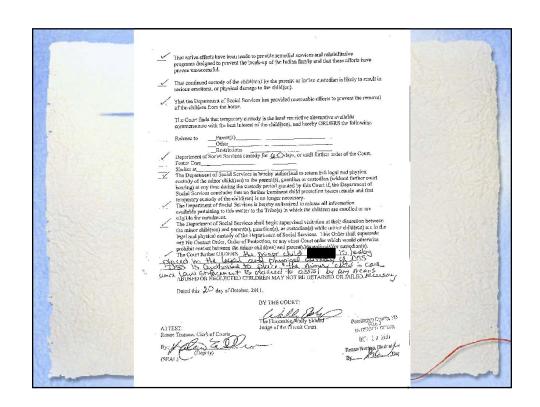












- ✓ "That active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proven unsuccessful."
- ✓ "That continued custody of the child(ren) by the parents or Indian custodians is likely to result in serious emotional or physical damage to the child(ren)."
- ✓ "That the Department of Social Services has provided reasonable efforts to prevent the removal of the children from the home."

Facts: Violations of Due Process

- 1. Although the State has filed a Petition accusing the parents of abuse and neglect, the parents were not given a copy of this Petition prior to or during the 48-hour hearing.
- 2. Attached to the Petition is an Affidavit from a case worker. Parents were not given a copy of the Affidavit prior to or during the hearing.
- 3. Parents were not told that they could challenge the Petition and were prohibited from offering evidence.

Due Process Allegations (cont.)

- 4. Parents were not permitted to confront and crossexamine the case worker who signed the Affidavit.
- 5. Indigent parents were not offered appointed counsel.
- 6. The court based its decision on the Petition and Affidavit filed prior to the hearing by the state, and no evidence was submitted during the hearing.
- 7. Since January 2010, parents lost 100% of these hearings. The next hearing was 60 days later.

Facts: Violations of Section 1922 of ICWA

Section 1922 of ICWA addresses the situation where an Indian child outside the reservation needs immediate, emergency protection from harm.

Section 1922 allows the state to remove an Indian child from the home in an emergency based on *state* standards for removal. However, at the very first hearing, federal protections kick in.

Violations of Section 1922 of ICWA (cont.)

At the first hearing, the state judge "shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child." Sec. 1922 (emphasis added). This is a tougher standard than "best interests of the child."

Thus, if the state cannot prove at the hearing that the child faces imminent physical damage or harm, the parents have a right to take their child home.

Seven Precedent-Setting Rulings

1. Do the two tribes have standing to sue *parens* patriae (that is, on behalf of their members)?

"The court finds this action is inextricably bound up with the Tribes' ability to maintain their integrity and 'promote the stability and security of the Indian tribes and families.' 25 U.S.C. § 1902. The motions to dismiss for lack of standing are denied."

Precedent-Setting Rulings (cont.)

2. Do the three parents have a right to sue on behalf of a class of all Indian parents in the county?

The Court granted our motion for class certification, agreeing that "each member of the class would be entitled to the same injunctive or declaratory relief," therefore making it appropriate to certify this case as a class action.

Precedent-Setting Rulings (cont.)

3. Does Sec. 1922 "defer" ICWA's standards until later in the process, as the Defendants claimed, or require the State to meet a higher standard of proof *at* the 48-hour hearing, as we claimed?

The Court ruled in our favor and held that:

- (a) Section 1922 requires the state court to determine at the 48-hour hearing that *continued* removal is necessary to prevent "imminent physical damage or harm."
- (b) Section 1922 also requires the state court to order Social Services to immediately return the child to the home as soon as the emergency has ended.

Precedent-Setting Rulings (cont.)

4. Are Indian parents entitled to receive meaningful notice at the initial hearing, including copies of the Petition and ICWA Affidavit?

The Court held that Indian parents have a right to notice of the charges against them, including copies of the Petition and the Affidavit: "Keeping Indian parents in the dark as to the allegations against them while removing a child from the home for 60 to 90 days certainly raises a due process issue."

Precedent-Setting Rulings (cont.)

5. Does it violate the rights of Indian parents to be forced to wait 60 days or longer for a hearing when they can challenge the Petition?

The Court held that if parents are required to wait 60 days or longer before they can challenge the Petition, this would violate the Due Process Clause.

Precedent-Setting Rulings (cont.)

6. Must the state produce records of other 48-hour hearings, even though those records are privileged under state law?

"Individual and state privacy interests must yield to the federal interest in discovering whether public officials and public institutions are violating federal civil rights." The Court ordered state officials to produce the records of every third 48-hour hearing held since Jan. 1, 2010, as we requested.

Precedent-Setting Rulings (cont.)

7. Would it violate the Due Process Clause if Indian parents are being coerced into waiving their federal rights?

"A failure to provide parents with the advisement of their fundamental rights or coercing a parent into waiving those rights would certainly amount to a constitutional violation."

Our Motions for Summary Judgment: Section 1922

- We are asking the Court to hold as a matter of law that, in violation of ICWA's Section 1922, the defendants have consistently:
 - (a) Failed to determine at the 48-hour hearing that continued custody is necessary "to prevent imminent physical damage or harm to the child."
 - (b) Failed to order Social Services to immediately return the child to the home as soon as the emergency has ended.

Our Motions for Summary Judgment: Due Process

- 2. We are asking the Court to hold as a matter of law that, in violation of the Due Process Clause, the defendants have consistently:
 - (a) Failed to provide adequate notice of the charges.
 - (b) Failed to permit parents to present evidence in their defense;
 - (c) Failed to permit parents to confront and cross-examine the state's witnesses:

Motions for Summary Judgment

- (d) Failed to appoint counsel to represent the parents in the 48-hour hearing; and
- (e) Failed to base the court's custody decision on evidence introduced during the hearing.

We are asking the Court to enter an order immediately halting all further violations.

Dept. of Justice Amicus Brief

The US Department of Justice on August 14, 2014, filed a "friend of the court" (amicus) brief agreeing with and supporting every position contained in our motions for summary judgment except for the right to counsel, which DOJ doesn't discuss.