Asserting Tribal Rights in ICWA Cases

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Review – ICWA Application

- ICWA applies to state court custody proceedings that involve a child who is a member or eligible for membership in a federally recognized tribe and who is the biological child of a member.

ICWA Applies

- Foster Care Placement
- Termination of Parental Rights
- Pre-adoptive Placements
- Adoptive Placements (Private AND State/County Initiated)

ICWA Does Not Apply

- Custody Disputes between Parents (Divorce or Other)
- Delinquency Proceedings if the Act Would be a Crime if Committed by an Adult
- Voluntary Educational and Religious Placements when Parents can Regain Custody upon Demand

ICWA Proceedings

ICWA recognizes the absolute authority of a tribe to determine its own membership

- Tribe has exclusive jurisdiction over Indian children domiciled on the reservation and Indian children who are wards of the tribal court.
- Tribe has the right to transfer jurisdiction to the tribal court.
- The Tribe, Indian Child's Parents, Indian Custodians are entitled to Notice in any involuntary proceeding – registered mail return receipt requested.
- Indigent Indian Parents and Custodians are entitled to the appointment of counsel in these proceedings.

- Tribe has the right to intervene at any stage of the ICWA proceedings and the right to request transfer.
- Tribes have the right to discover placement location of tribal members and challenge actions taken by state courts and entities in violation of ICWA.
- Tribe has the right to alter foster care placement preferences.

Challenges

- No termination of parental rights may be ordered in such proceeding in the absence of a determination . . . that the **continued custody of the child** by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1912(f)

Adoptive Couple v. Baby Girl (June 25, 2013)

The phrase "continued custody" thus refers to custody that a parent already has (or at least had at some point in the past). As a result, §1912(f) does not apply where the Indian parent *never* had custody of the Indian child.

Nonbinding guidelines issued by the Bureau of Indian Affairs (BIA) demonstrate that the BIA envisioned that §1912(f)'s standard would apply only to termination of a *custodial* parent's rights. Under this reading, Biological Father should not have been able to invoke §1912(f) in this case because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings.

- In any adoptive placement of an Indian child . . . a preference shall be given . . . 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.

§ 1915(a)

- **Section 1915(a)'s adoption-placement preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. No party other than Adoptive Couple sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court. Biological Father is not covered by §1915(a) because he did not seek to adopt Baby Girl; instead, he argued that his parental rights should not be terminated in the first place. And custody was never sought by Baby Girl's paternal grandparents, other members of the Cherokee Nation, or other Indian families.**

Fall Out

Native Village of Tununak v. Alaska (Sept. 12, 2014)

The critical piece, however, is Elise's failure to formally assert her intent to adopt Dawn as OCS moved toward terminating Jenn's parental rights. . . . And when the Smiths filed a formal petition to adopt Dawn on November 3, 2011, Elise did not file a competing adoption petition or any other formal request that might serve as a proxy for such a petition.

In *Baby Girl*, Biological Father displayed a much higher level of involvement, but the Supreme Court nonetheless found his efforts insufficient. . . Notwithstanding this active participation by Biological Father at every level of the state and federal litigation, the Supreme Court still found that "he did not seek to *adopt* Baby Girl; instead, he argued that his parental rights should not be terminated in the first place." In other words, because Biological Father did not "formally [seek] to adopt" Baby Girl, the Supreme Court held that he could not be an ICWA preferred placement — he was not an "alternative party" that triggered § 1915(a)'s adoptive preferences.

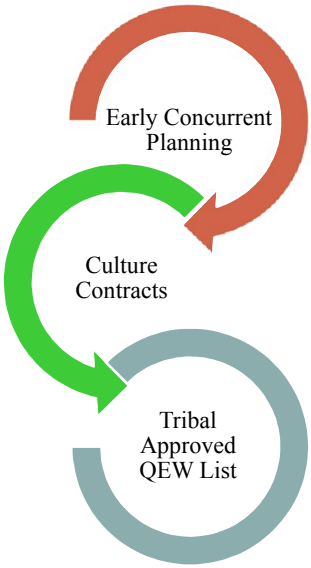
Additional Cases Citing Adoptive Couple

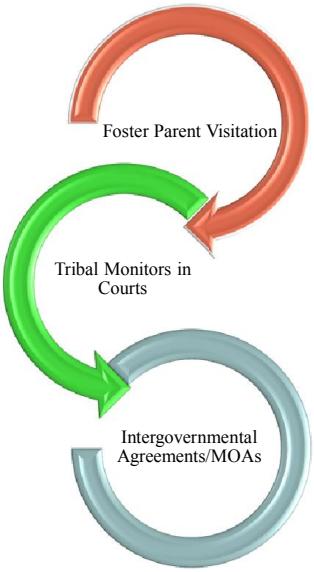
As of October 2014, 15 involuntary proceedings have cited to Adoptive Couple:

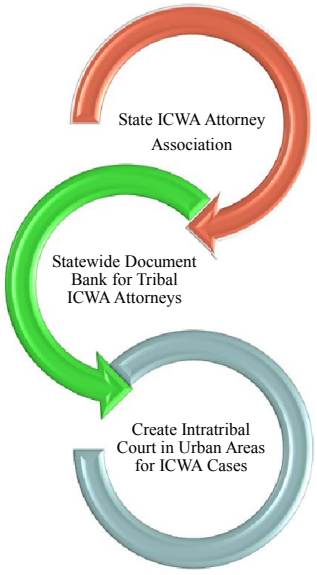
- 5 - California
- 2 - Montana
- 1 - Alaska
- 1 - Nebraska
- 1 - North Carolina
- 1 - North Dakota
- 1 - Minnesota
- 1 – Michigan
- 1 - Oklahoma
- 1 – Virginia

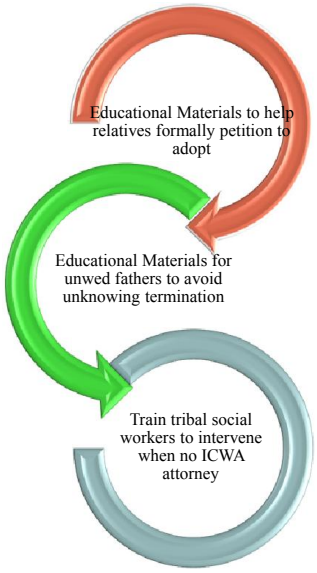
*Thanks to Kate Fort and Turtle Talk for the data

What Can We Do?


Early Concurrent Planning
Culture Contracts
Tribal Approved QEW List


Foster Parent Visitation
Tribal Monitors in Courts
Intergovernmental Agreements/MOAs


State ICWA Attorney Association
Statewide Document Bank for Tribal ICWA Attorneys
Create Intratribal Court in Urban Areas for ICWA Cases


Educational Materials to help relatives formally petition to adopt
Educational Materials for unwed fathers to avoid unknowing termination
Train tribal social workers to intervene when no ICWA attorney

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