

## Child Welfare Laws and Native Americans

In 1978, Congress passed the Indian Child Welfare Act (ICWA). ICWA made the adoption of Native American children by non-native people extremely difficult by erecting significant barriers to their adoption by anyone without tribal affiliation.<sup>1</sup>

The ICWA declares its intention to:

"[p]rotect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs."<sup>2</sup>

The federal Indian Child Welfare Act<sup>3</sup> (ICWA) provides protections for recognized Native American tribes for children who have been placed in state care or who are in danger of removal or who are placed for adoption.<sup>4</sup> The ICWA gives exclusive jurisdiction to tribes for child welfare cases on a reservation and mandates preferences for tribal intervention in child welfare cases outside the reservation.

As part of the ICWA's focus on keeping children with their tribes, New York State's Office of Children and Family Services operates a specific department called Native American Services.<sup>5</sup> This department responds to both on and off reservation needs of the Indian Nations in New York and provides assistance to local social services agencies and authorized childcare agencies. The department is a good place to begin if you have questions about the law and Native American children.

Under state regulations,<sup>6</sup> family courts must follow a special "Foster Care Placement Preference" and attempt to place children with their extended tribal family, or in the alternative with a foster home approved by the tribe or a Native American certified foster home.

In adoptions, there is a similar legal mandate that ensures that children remain with Native American families. Indeed, the adopting families have a legal obligation to make "active efforts" to keep children with their tribes.<sup>7</sup>

If you are adopting a child who is a member or eligible for membership with a federally recognized Indian Tribe, this adoption might be contrary to federal statute<sup>8</sup> and probably

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Source "The Adoption History Project", available at <http://www.uoregon.edu/~adoption/topics/ICWA.html>

<sup>2</sup> 25 U.S.C. § 1902.

<sup>3</sup> ICWA, 25 U.S.C. §§ 1910. et seq

<sup>4</sup> For a summary of ICWA, see [http://jec.unm.edu/resources/benchbooks/child\\_law/ch\\_39.htm](http://jec.unm.edu/resources/benchbooks/child_law/ch_39.htm)

<sup>5</sup> <http://www.ocfs.state.ny.us/main/nas/default.asp>.

<sup>6</sup> 18 NYCRR § 481.18.

<sup>7</sup> 25 U.S.C.A. § 1912(d).

<sup>8</sup> 25 U.S.C. § 1901 et seq.

can be invalidated by either the natural parents, Indian custodian<sup>9</sup> or the child's tribe.<sup>10</sup> In foster care placements and termination of parental rights hearings, the proceedings can be transferred to tribal court upon petition of either parent or the child's tribe, absent good cause to the contrary, or objection by either parent<sup>11</sup>. The child's tribe has a right to intervene, in any event.<sup>12</sup>

**Adopting a child who is a member or eligible for membership with a federally recognized Indian tribe may be contrary to federal statute<sup>13</sup> and could be invalidated by the natural parents, Indian custodian<sup>14</sup> or the child's tribe.<sup>15</sup>**

Among the ICWA protections, section 1914 provides a process for the parent/Indian custodian and the child's tribe to petition the court to invalidate any foster care placement or Termination of Parental Rights (TPR) order in violation of sections 1911, 1912 and 1913.<sup>16</sup>

In all adoptive placements of an Indian child under state law, the placement preferences of section 1915 apply, absent good cause to the contrary.<sup>17</sup> Consistent with the Act's stated purposes of preventing the removal of Indian children from Indian families and preserving Indian culture, these preferences are:

- 1) member of the child's "extended" family;<sup>18</sup>
- 2) other members of the child's tribe; or
- 3) other Indian families.<sup>19</sup>

However, if a child is born off the reservation to parents who do not have significant ties to the reservation, some states have invoked a judicial doctrine, called the "Existing Indian Family" (EIF) to carve out an exception to the rule that Native American children are subject to tribal authorities in adoption proceedings.

Currently, New York does not follow the EIF exception. A recent decision, *In re Baby Boy C*,<sup>20</sup> indicates that the tribe's decision-making regarding adoptions can trump the

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<sup>9</sup> 25 U.S.C. § 1903(6).

<sup>10</sup> 25 U.S.C. § 1914.

<sup>11</sup> 25 U.S.C. § 1911(b). This section also provides that such a transfer is "subject to declination by the tribal court."

<sup>12</sup> 25 U.S.C. § 1911(c).

<sup>13</sup> 25 U.S.C. § 1901 et seq.

<sup>14</sup> 25 U.S.C. § 1903(6).

<sup>15</sup> 25 U.S.C. § 1914.

<sup>16</sup> 25 U.S.C. §§ 1912(e) and (f) (1992). See also Matter of D.S., 577 N.E.2d 572 (Ind.1991) (failing to follow ICWA burden of proof in state court proceeding reversible error); Matter of N.S., 474 N.W.2d 96 (S.D.1991).

<sup>17</sup> 25 U.S.C. § 1915(a).

<sup>18</sup> Because state court judges probably are unfamiliar with the concept of "extended" family, the practitioner in an ICWA proceeding should know it and be prepared to explain it to the court. Basically, the extended family is a reflection of traditional Indian child-rearing practices whereby responsibilities were divided among many members of the community. See generally Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 35 at n. 4 (1989); Basic Skills in Indian Child Welfare (Northwest Indian Child Welfare Institute, 1984).

<sup>19</sup> 25 U.S.C. § 1915(a).

tribal parent's decision. But while *In re Baby Boy C* does not follow the "Existing Indian Family" (EIF) exception, the appellate court also declared that there may be a "good cause" exemption from following the ICWA when there are certain extraordinary circumstances.

*In re Baby Boy C* was reversed on appeal but the issues remain undecided.<sup>21</sup> So the law in New York regarding adoption of Native American children may change.<sup>22</sup>

**Persons who are involved in child welfare placements or adoptions involving Native American children would do well to make sure that courts are aware of the Native American heritage of children in order to ensure that federal and state laws are properly invoked and outcomes are based on good law.**

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<sup>20</sup> *In re Baby Boy C*, 27 A.D.3d 34 (1st Dep't, 2005).

<sup>21</sup> *In re Baby Boy C. v. Tohono Nation*, 2005 WL 3295635 (N.Y.A.D. 1 Dept.)

<sup>22</sup> A Colorado Court of Appeals case (*In the Matter of the Petition of N.B.*, 2007 WL 2493906) may eventually result in the rejection of the EIF by the U. S. Supreme Court. The unreported case, in which the Assiniboine Tribe and Sioux Tribe have intervened, involves the attempted adoption of an Indian child by a step-mother and the termination of the Indian birth mother's parental rights.