

## **Indigenous Children and Youth in Detention, Custody Foster Care and Adoption: A Brief Report on the Indian Child Welfare Act in the United States**

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### **Overview**

This brief report provides an overview of the meaning and impact of the Indian Child Welfare Act (“ICWA”) in the United States. The Native American Rights Fund (NARF) published a detailed guide on the ICWA in 2007, which is available free of charge on our website, and in addition NARF represents in litigation tribes and parents seeking to uphold tribal court decrees or assert a tribe’s right to intervene in state court cases. Moreover, the author is a member of the Alaska Court Rules Committee on Child-In-Need-of-Aid (CINA) proceedings and a member of the Alaska Supreme Court Committee on Fairness, Access and Diversity. This paper is therefore based largely on experience in these various capacities, rather than on pure scholarship. My goal is to inform the group about the status of the ICWA and overall status of Indian children in state custody from the perspective of a practitioner.

### **The Indian Child Welfare Act**

The primary mechanism for tribal and indigenous involvement in the placement of their children is the ICWA. Passed in 1978 in an attempt to remedy the large number of American Indian and Alaska Native children who were being summarily removed from their homes, the ICWA had four general aims: (1) to affirm that tribes have exclusive jurisdiction over member children residing on reservations; (2) to affirm that tribes and states have concurrent jurisdiction over member children residing off-reservation (and provide that state cases should be transferred upon request of the tribes, unless good cause is shown); (3) to affirm that tribes have a right to intervene in state court proceedings of their own member children; and (4) to provide an order of placement preference for indigenous children, starting with relatives and the tribe. The legislative report underlying the law contained some staggering statistics, the most alarming of which is that indigenous children were six times more likely to be removed from their homes than non-indigenous children. Moreover, it was revealed that state social workers often removed children for cultural reasons; for example, they would declare a child abandoned if it had been left with an aunt or other relative even though this is customary in many indigenous societies where relatives help raise children.

### **The Government Accountability Report on the ICWA**

More than 30 years after its enactment, has the ICWA achieved its goal? In 2004, the Government Accountability Office (“GAO”) was ordered by Congress to research and provide a report on this

very question and the response was not encouraging: “25 years after it was enacted, we know very little about the effect of this law on moving American Indian Children in foster care to permanent homes in a timely and culturally appropriate manner.”<sup>1</sup> At the core of this problem is the fact that the ICWA identified no federal agency responsible for overseeing the implementation of the law. Nor is there any reporting requirement in the law. As a result, there is no comprehensive data available on how many indigenous children are in state custody at all, much less how and where they are placed. Only four states out of 50 even track whether the children in its system are indigenous. The GAO was only able to provide this basic statistic: according to the U.S. Department of Health and Human Services, indigenous children comprise 3 percent of all children in state custody even though indigenous people as a whole (adults and children) comprise only 1.5 of the entire U.S. population.<sup>2</sup>

The GAO report was based on a survey sent to all 50 states and the District of Columbia asking a host of questions about each state’s compliance with the ICWA. As an initial matter, most states did not know how well they had complied with the ICWA, and some did not mention the law at all in their responses. Only half of the states provided mandatory for their workers on the ICWA and what it required. Given the general lack of information and training, it is therefore not surprising that the GAO, like HHS, discovered that indigenous children were significantly overrepresented in the state foster system. In Alaska for example, which along with New Mexico and Oklahoma has the highest percentage of indigenous children, more than 60 percent of the children in foster care were indigenous. (Latest estimates suggest indigenous children comprise less than 10 percent of the population in Alaska.) The situation in South Dakota was even worse: 61 percent of all children in foster care were indigenous, even though their overall population was less than half of Alaska’s.

In addition to the data collection and oversight problems, the report also revealed some issues unforeseen at the time the ICWA was passed. The first is the impact of state laws. It was discovered for example, that one of the reasons there were so few indigenous foster families available was that state law requirements for certification often had stringent requirements that disparately impacted indigenous families. One such requirement was in California, which requires that foster children have their own bedrooms and share it with no more than 1 other child. Given the larger size and more communal living approach taken by many indigenous societies, many indigenous families failed this requirement and could not get licensed. Because of these kinds of requirements, many indigenous families are wary of even applying for a license to foster and feel that the process is intrusive and culturally insensitive. Thus one of the findings was that, despite the ICWA’s placement priorities, indigenous foster families could not be found due to restrictive state laws. The second unforeseen problem is the impact of federal law. The prime example is the American Safe Families Act of 1997 (“ASFA”), which provides that if a child has been in foster care for 15 of the previous 22 months parental right must be terminated; this of course runs totally contrary to the view of many tribes that a child’s relationship to the parent can never be severed.

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1 The complete report is available at [www.gao.gov/new.items/d05290.pdf](http://www.gao.gov/new.items/d05290.pdf)

2 The HHS does collect limited data on the ICWA but not in any detail; this is why there are some statistics available in addition to the four states detailed in the GAO report. It is because of this limited data collection that the GAO ultimately recommends that this agency adopt oversight for the ICWA.

The report also described tribes' and some states' views that courts did not interpret the ICWA the way it was intended. The most common example of this is that courts often refuse to transfer cases to tribal courts even though this is specifically provided for in the law. Equally disturbing is the so-called "existing Indian family" exception; this is not a real exception but a pure invention of courts reluctant to place indigenous children with tribal people. This "exception" provides that the court does not have to apply the provisions of the ICWA if it determines that there the child's ties to the tribe and community are not substantial enough; in other words, a court decides what indigenous culture is and whether the child is closely enough tied to it so that he or she can even be considered indigenous. This has been heavily criticized, but it still exists.

The GAO report concluded by recommending that the appropriate division within the Department of Health and Human Services take responsibility for at least data collection (if not oversight) of compliance with ICWA. That agency submitted comments rejecting this suggestion; they did not want to collect data on the ICWA nor assume responsibility for oversight. This rejection speaks volumes about the true nature of the problems implementing the ICWA in the U.S.; this is not a financial problem or a practical problem – it is a political problem.

### **Alaska: a Case Study**

As noted above, Alaska and South Dakota have the highest percentage of indigenous children in state custody. Therefore, they are worst case scenarios, not a representative view of how the Act is implemented nationwide. The following case took place in Alaska:

N.S. was born in 2000 to parents who were members of two different Athabascan tribes. Her mother had difficulties with substance abuse and was later convicted of second degree murder. Her father was not interested in raising her, nor was anyone in his family. The tribe took emergency custody of N.S. when they discovered her unattended in her home. The tribe became her guardian and began a long and careful process of searching for a good home for her. They began with her relatives, striking out anyone who drank or who had criminal histories, and interviewed prospective parents both within the tribe and in upriver tribes. The tribe eventually located relatives of hers in an adjacent village who very much wanted to adopt her. The would-be adoptive parents were both teachers and had six other children of their own. The tribal court declared them her guardians, and eventually the family petitioned to adopt her formally. The tribal court, having now monitored this family for more than a year, was convinced they were good parents and terminated her birth parents' parental rights and declared her new family to be her parents for all legal purposes. The tribe completed the hearing and the attendant paperwork and sent it to the State of Alaska, Bureau of Vital Statistics along with a request to issue a new birth certificate to N.S. with her new last name and her new parents' names. The State refused.

The State responded to the tribe's request with a one-page letter that it did not "recognize" adoption orders issued by tribal courts, and asked instead that the tribe have the family petition under state law or in state court. N.S. and her family sued for violation of the ICWA provision stating that tribes have concurrent jurisdiction to adjudicate cases that arise off-reservation. Although the State had raised this same argument (lack of jurisdiction) almost 20 years before and lost, it now proceeded to fight the exact same case it had lost previously. In the meantime, N.S. had no birth

certificate and none of the documents that a person needs to establish a legal identity. She lived in legal limbo, unable to travel, and unable receive public benefits or assistance – had she tried to move schools or receive medical care at any time during this limbo, she would have been stuck because the two people whom she recognized as her parents were nothing more than strangers in the eyes of the law.

The State of Alaska lost the case of course. It was wrong, and this issue has long been decided: tribal courts have authority to adjudicate children's cases for their member children. The State's argument was that tribal courts did not have any jurisdiction except when it was transferred to them from a state court. Not only is this a nonsensical prospect because courts transfer cases and not jurisdiction, but also because as noted in the GAO report, courts often refuse to transfer cases to tribal courts; thus the State's argument was tantamount to saying tribes have no jurisdiction at all. The reason offered by the State was that it was protecting non-members from tribal court overreaching.

Today, that same case is still ongoing. After the State lost, it appealed to the Ninth Circuit, who summarily affirmed the district court's opinion. This month, the State appealed to the United States Supreme Court, arguing again that tribes have only transfer authority from state courts. Now, however, they have added as justifications the assertions that: (1) many indigenous people intermarry with non-indigenous people creating greater likelihood that non-indigenous people may have to appear in front of tribal courts; and (2) tribal courts do not provide due process to litigants. Neither has any merit when one considers the facts of this case: all participants were indigenous, all participants consented to tribal court jurisdiction, no party raised any doubts as to due process provided by the court, and 10 years later N.S. is happy and healthy in her home. One wonders why the State of Alaska, or indeed any state, would want to interfere with something that has worked so well? The answer, again, is political.

## **Conclusion**

There are several possible approaches to the problems raised here. The first is education. State court judges and state social workers need to meet tribal judges, learn about tribal courts and gain greater understanding about their role in tribal societies. Lack of information seems to have caused reluctance to trust them. The second is political pressure on states and their agencies. Neither Alaska nor any other state should be raising the kinds of arguments being raised here, and much of this can be avoided through increased agreements on tribal-state cooperation. The third option is information gathering. It is shocking that thirty years after the ICWA was enacted, we still have no comprehensive data on whether or not it is working as intended. Until that time, we have no way of knowing how many indigenous children are in state custody and accordingly no way of measuring the problem nor devising any comprehensive solutions.