

Understanding the Indian Child Welfare Act (ICWA): Working with two Jurisdictions in Cases Involving Juveniles



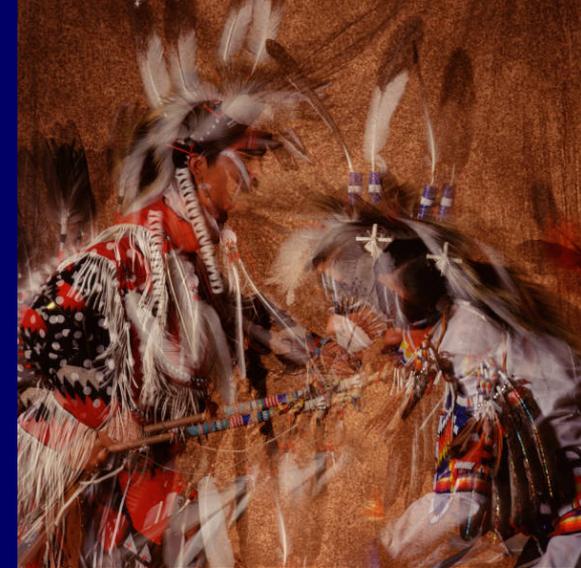
Anne K. McKeig
Judge- 4th Judicial District
Hennepin County, Minnesota
anne.mckeig@courts.state.mn.us
612-348-7983

FACES – Implementing the ICWA

Produced in part by American Indian Enhancement Project and Shenandoah Films.

History

- Passed in 1978 –
Congressional response to high number of Indian children removed from their families and tribes by nontribal agencies
- Federal law
- Purpose – to address the importance of tribal integrity, cultural & social standards of tribal community & extended family in Indian society



Statutory and Other Legal Authority



- Indian Child Welfare Act
- The Federal Adoption and Safe Families Act
- Minnesota Indian Family Preservation Act
- BIA guidelines
- Minnesota Tribal/State Agreement
- Minnesota Department of Human Services manual

“Indian Child” under ICWA



- Under 18
- Unmarried
- Member of tribe or eligible for membership; and
- Biological child of a member

25 U.S.C. § 1903(4)

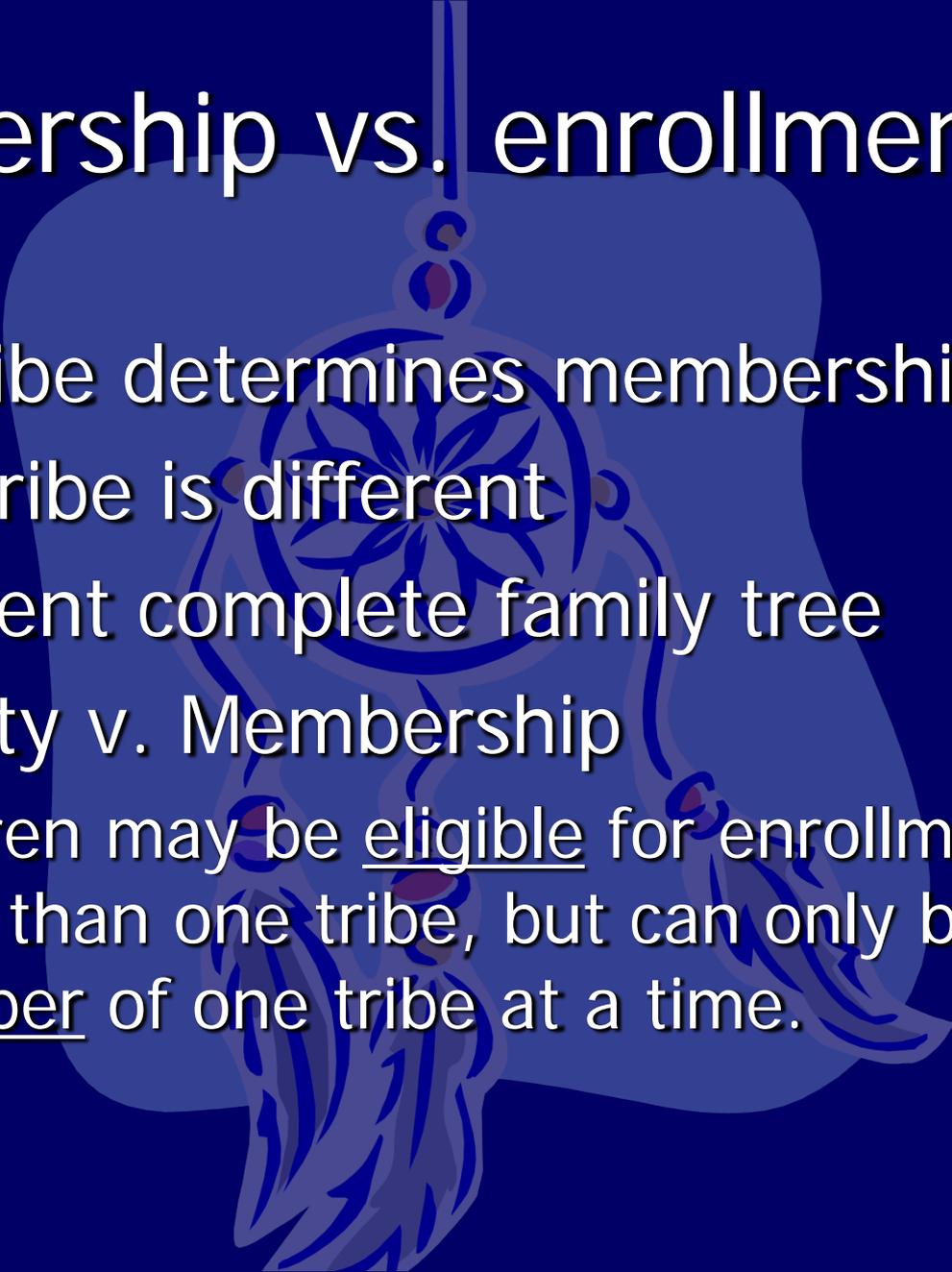
“Indian Child” as Defined in Minnesota

An unmarried person who is under age 18
and is:

- A member of an Indian tribe; or
- Eligible for membership in an Indian tribe.

Minnesota Indian Preservation Act – Minn.
Stat. § 260.755 Subd. 8. and § 260C.007 Subd. 21

Membership vs. enrollment



- Only tribe determines membership
- Every tribe is different
- Document complete family tree
- Eligibility v. Membership
 - Children may be eligible for enrollment in more than one tribe, but can only be a member of one tribe at a time.

“Indian Custodian” under ICWA

- Any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

25 U.S.C. § 1903(6)

See also In re Interest of Bird Head, 331 N.W.2d, 785 (1983), and State ex rel. Juvenile Dep't, Multnomah Cnty. v. England, 640 P.2d 608 (1982).

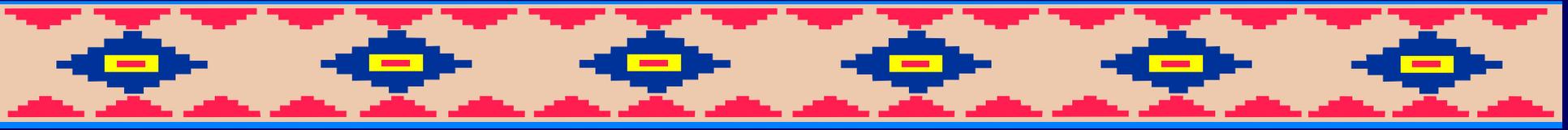
“Parent” under ICWA

- Any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.
- Does not include unwed fathers who have not acknowledged or established paternity.

25 U.S.C. § 1903(9)

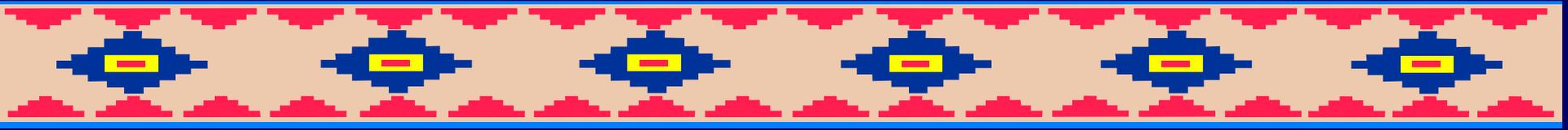
When does ICWA apply?

- Select Delinquency proceedings
 - Status Offenses – i.e. Truancy & Runaways
- Foster care placement
 - Temp placement where parent cannot have child returned upon demand but parental rights have not been terminated
 - Includes voluntary foster care placement



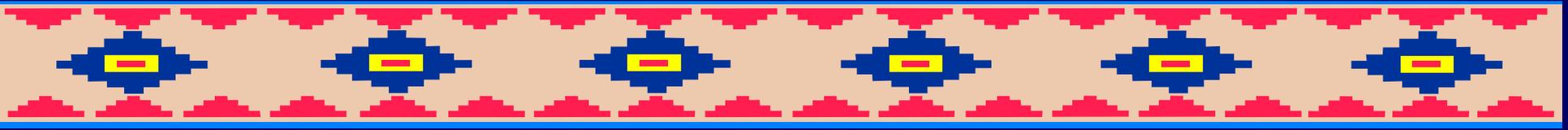
When does ICWA apply?

- Termination of parental rights
 - Legal relationship between parent and child is severed.
- Preadoptive placement
 - Temporary placement after TPR but prior to completion of adoption
- Adoptive placement
 - Permanent placement of child for adoption



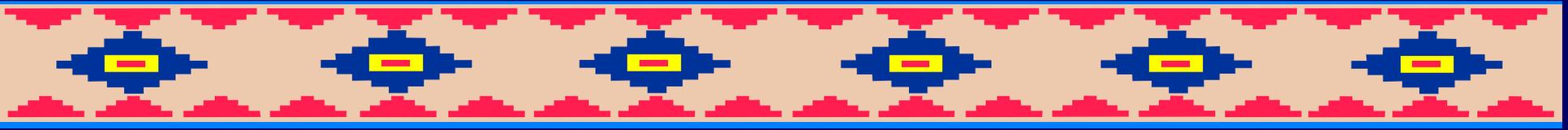
When does ICWA apply?

- Third Party Custody proceedings
 - A Family Court proceeding, brought by an individual other than the parent, seeking legal and physical custody of the minor child. *See* Minn. Stat. § 257C
 - Heritage of the custodial parent is not controlling when determining whether or not ICWA applies.



Proceedings NOT covered by ICWA

- All other Juvenile delinquency proceedings
 - Offenses which if committed by an adult would be a crime



When to make an ICWA finding

- An ICWA finding should be made at the first hearing in a juvenile protection matter, or the earliest possible point in the proceeding upon reasonable belief that the child is identifiable as an Indian child.
- If an ICWA finding isn't made at the first hearing, the court is required to attempt to determine the applicability of ICWA through review of the petition, other documents, and on the record inquiry. If the Court is unable to make a determination, it is required to direct the petitioner to make further inquiries.

Minn. R. Juv. Protect. P. 34.03, Subd. 1(i&j)

Re-Examining an ICWA finding

- The Tribes are given great deference in determining whether or not a child qualifies as an Indian child
- The Court must follow the Tribe's lead – if the Tribe submits that the child is eligible for enrollment, ICWA applies. If the Tribe denies that the child is eligible, ICWA does not apply

Re-Examining an ICWA finding

- In *S.N.R.*, the Tribe determined that the minor child was eligible for enrollment during the adoption phase of the case. The adoptive parent's petition for adoption was dismissed.

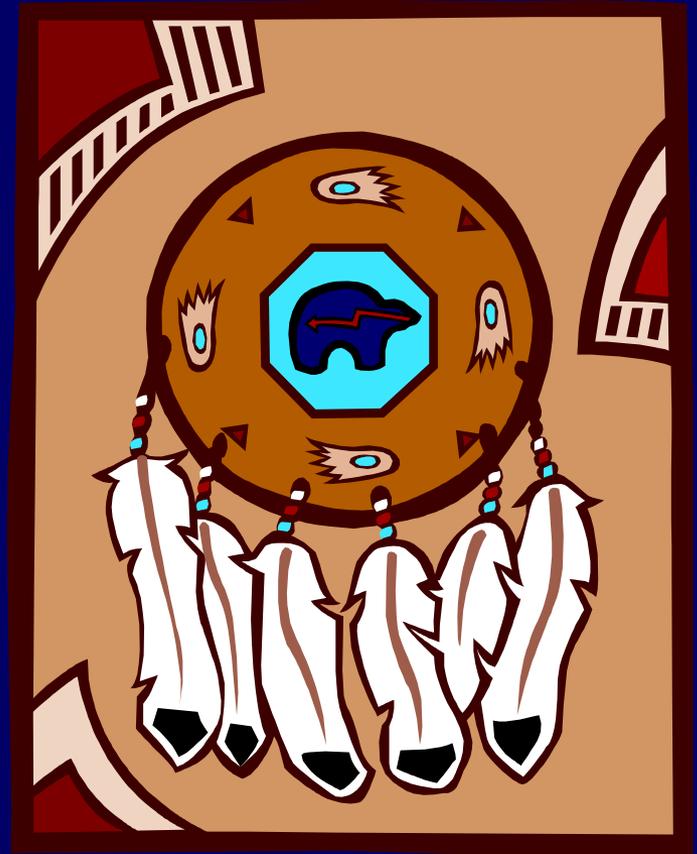
In re Welfare of S.N.R., 617 N.W.2d 77, Minn. Ct. App. (2000).

- In *A.L.W.*, the Court held that a tribal determination of eligibility for enrollment is conclusive evidence that a child is an "Indian Child" under ICWA.

In re Dependency of A.L.W., 32 P.3d 297, Wash. Ct. App. (2001).

Requirements of ICWA

- Identification of Indian child
- Notice to the Tribe
- Right of Intervention
- Active Efforts
- Expert testimony
- Placement Preferences
- Standard of Proof
- Transfers to Tribal Court
- Post-permanency issues



ICWA Notice

- Formal notice – tribe has discrete interest
- Petitioner is responsible for sending notice
- Registered mail
- Timeline
- Who receives notice
 - Parent
 - Indian Custodian
 - Tribe



Intervention

- Tribes may intervene as a matter of right.
- When can the Tribe intervene? At any stage of the proceeding up until the final order from a proceeding is filed.



Active efforts

- Active vs. reasonable
- Remedial and rehabilitative services
- Prevailing social standards
- Efforts are ongoing
- Tribal communication



Expert testimony

- Member of child's tribe
- Lay expert witness
- Professional person with substantial knowledge



Expert testimony

- Magic language
 - “Return of the child to the care of the parents would place the child at risk of serious emotional or physical harm”
 - Needed within 90 days of the placement. *See* BIA Guidelines B.7(d).



Placement Preferences for foster placement:

- Member of child's family
- Foster home approved by tribe
- Indian foster home approved by non-Indian licensing authority
- An institution approve by tribe



Adoptive Couple v. Baby Girl

- A South Carolina couple sought to adopt an Indian child whose father was an enrolled member of the Cherokee Nation and whose mother was predominately Hispanic.
- Biological father opposed the adoption and the Cherokee Nation intervened.

Adoptive Couple v. Baby Girl

- The Family Court denied petition and requires prospective adoptive couple to transfer child to biological father.
- Prospective adoptive couple appealed.
- The South Carolina Supreme Court affirmed holding:
 - The biological father was a “parent” under ICWA, father did not consent to relinquishment of his parental rights under ICWA, best interest served for child to return to biological father from adoptive parents.

Adoptive Couple v. Baby Girl

- The United State Supreme Court reversed and remanded.
- The 2013 Supreme Court decision held that the procedures required by ICWA do not apply to a non-custodial parent who never had custody of the child
- Active efforts do not apply where Indian parent abandoned the child prior to birth
- Further held that the preferred placement of the child to another Indian family did not apply.

Adoptive Couple v. Baby Girl

- On Remand, the South Carolina Supreme Court held, on July 17, 2013, the following:
 - ICWA's placement preferences did not apply, and
 - Father's consent to adoption was not required.

Standard of proof

- TPR and “Active Efforts”: Beyond a reasonable doubt
- CHIPS and TLC: Clear and convincing



Transfers to Tribal Court

- Court must transfer absent a finding of Good Cause to deny the transfer
- Only parents have veto power to stop a transfer

Permanency options:

- Reunification
- Transfer of legal and physical custody
- Termination of parental rights
- Customary adoption
- Long term foster care

Permanency options:

- Best practice would be to have the tribe's support for the permanency disposition, however, the tribe's support is not legally necessary.
- However, expert testimony is always required.

Adoption and ICWA

- The Court must file a copy of the final adoption order or decree of every Indian Child with the Secretary of the Interior.

25 U.S.C. § 1951(A)

25 U.S.C. § 1903(11)

Transfers of Legal Custody

- All motion related to TLCs filed on or after August 1, 2012 must be filed and heard in Juvenile Court.
- Each district must determine how to handle motions related to earlier TLCs, for example: In Hennepin County, all motions related to TLCs completed before August 1, 2012 must be filed and heard in Family Court

Minn. Stat. § 260C.521, *See also* June 18, 2014
Joint Standing Order– Hennepin County
Family/Juvenile Divisions

Juvenile Status Offenses

- Offenses that are only considered offenses because of the status of the offender
 - i.e. Truancy, under-age drinking, runaways
- All of the same ICWA requirements apply

Courts and Tribes: Working Together

- Establish relationships
- Meet regularly/quarterly reviews
- Common understanding of roles
- Written policies
- Practice tips

Common goals

County

- Protection of child
- Adhere to state and federal laws
- Keep family together
- Protect child's culture

Tribe

- Protection of child
- Preserve culture
- Follow tribal customs
- Accountable to the family and community

Working policies

- Who has what responsibility?
- Written policy of common practice and understanding
- Consistent communication
- Mutual respect

Team effort

- County attorney
- Defense attorney
- Guardian ad litem
- Tribal representative
- Judge
- Social worker

Multidisciplinary Teams

- Department of social workers
 - ICWA identified worker(s)
 - Training
 - Open communication
- Guardian ad Litem
 - Native guardians
 - Training
 - Team approach

Multidisciplinary Teams (2)

- County Attorneys/Public Defenders
 - ICWA identified attorneys
 - Training
 - Commitment to ICWA compliance
- Court
 - ICWA identified Judge
 - Training
 - Commitment to ICWA compliance

Public Law 280

- A transfer of federal law enforcement authority within certain tribal nations to state governments (including Minnesota)
 - Transfer significantly changed the division of legal authority among tribal, federal & state governments
- Federal law establishing “a method whereby States may assume jurisdiction over reservation Indians.”
 - *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 177 (1973).

Bibliography

- Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et. Seq.)
- Bureau of Indian Affairs Regulations: Bureau of Indian Affairs, U.S. Dept. of the Interior, Guidelines for State Courts, 44 Fed. Reg. 67584-67595 (1979)
- 18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. § 1321-1326