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A NATIONAL CONVERSATION ON ICWA AND THE NEW REGULATIONS

## Why are Child Advocates and Child Welfare Organizations not Questioning the New Federal ICWA Regulations and the 2015 BIA ICWA Guidelines?

Over the past several years, the Bureau of Indian Affairs (BIA) and tribal leaders have mounted an unrelenting campaign to expand tribal rights in cases involving the Indian Child Welfare Act (ICWA). It is important to note, that these efforts have **not** included seeking congressional approval to amend the ICWA. The focus of their efforts is having the BIA push through their agenda with only limited public comment.

No one can question our nation's horrific history and the harmful policies in the 1950's and 1960's regarding Native American children. However, this dark history should not prevent us from having an objective and honest discussion of the 2015 BIA Guidelines, and the recently published ICWA federal regulations. Why are child welfare organizations and child advocacy groups not questioning how the 2015 BIA Guidelines and the newly released federal regulations ignore the rights of Indian children? Indeed, for the past several years, if not longer, there has been a deafening silence by child welfare groups, state agencies and child advocates regarding how the BIA Guidelines and proposed federal regulations will adversely impact foster children. →

by Philip (Jay) McCarthy, Jr.



by Judge Leonard Edwards (retired)



## Why Should Indian Children be Treated Differently?

Attacks on implementation of the Indian Child Welfare Act (ICWA) have recently been in the headlines. Several critics of the ICWA have stated that Indian Children should not be treated differently in child welfare and adoption proceedings.<sup>1</sup> Legal actions have been filed with the intention to declare the ICWA unconstitutional arguing that it discriminates based on race.<sup>2</sup> A federal court judge has recently found that a state court judge has illegally denied Indian parents of their due process rights after the state has removed their children.<sup>3</sup> A recent United States Supreme Court case held that the ICWA does not apply if the biological father does not have present custody of the child.<sup>4</sup> Years ago, in an attempt to circumvent the ICWA, state courts created the Existing →

1. See Cohen, Marie, "ICWA Puts Tribes' Interests Ahead of Children's" *The Chronicle of Social Change*, May 10, 2016;
2. *A.D. v Washburn*, a federal action filed on July 6, 2015, by the Goldwater Institute in Arizona; *National Council for Adoption v Jewel*, Virginia litigation; *Doe v Jensen*, Minnesota litigation; *Doe v Pruitt*, Oklahoma litigation; *C.E.S. v Nelson*, Michigan litigation. See ICWA Defense Project Memorandum, June 25, 2016; <https://turtletalk.files.wordpress.com/2015/08/2016-06-24-icwa-defense-project-memo-updated.pdf>. This argument ignores the fact that Indian tribes are sovereign nations and that the ICWA protects the citizens of their nation.
3. *Oglala Sioux Tribe v Luann Van Hunnik*, in Pennington County, South Dakota, No. CIV. 13-5020-JLV.
4. *Adoptive Couple v. Baby Girl*, 570 U.S. \_\_\_\_; 133 S. Ct. 2552; (2013).

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It is important to remember that it has been thirty-eight (38) years since the passage of the ICWA. Yet, our nation’s past failures seem to prevent an open and objective discussion of what needs to be done to improve the lives of Indian children in our nation’s foster care system. It is important to remember that **we are not** talking about children who reside or who are domicile on Indian Reservations, as these children fall under exclusive jurisdiction of tribal courts. The ICWA federal regulations and BIA Guidelines apply only to state court proceedings.

In February 25, 2015, the BIA issued (without allowing full public input), Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (BIA Guidelines). This document escalated the growing conflict between Indian tribes and the BIA with individuals who question certain aspects of the ICWA that adversely impact foster children and the rights of parents in voluntary ICWA adoption cases. The February 25, 2015 BIA Guidelines clearly disregard the rights of children, as exemplified by how the BIA states a determination of “good cause” to depart from the ICWA placement preferences is to be decided by state courts.” The ICWA placement preferences require state courts, for purposes of foster care, to place the child in reasonable proximity to his or her home, taking into account the child’s special needs. Preference must be given in descending order to: 1) a member of the child’s family; 2) a foster home licensed, approved, or specified by the Indian child’s tribe; 3) an Indian foster home licensed or approved by authorized non-Indian →

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Indian Family Exception to the ICWA which remains the law in several states.<sup>5</sup> Editorial perspectives have also appeared arguing that all children should be governed by the best interests test in custody and adoption disputes, and that Indian tribes should not be given any special consideration.<sup>6</sup> Custody and adoption disputes between foster parents and either Indian parents (or Indian tribes) have attracted national attention in the media with articles that seem favor the non-Indian foster parents who have “bonded” to the Indian child.<sup>7</sup> The numbers of Indian children removed from parental control and placed with non-Native American families continues to far exceed the numbers of non-Native American children removed from parental care.<sup>8</sup> Additionally, a Supreme Court Justice has written that the ICWA is unconstitutional arguing that Congress has no power to legislate adoption laws.<sup>9</sup>

Despite these attacks, there are compelling reasons why the ICWA should be fully implemented. This article outlines some of the reasons for full implementation and argues that there are important reasons why Native American children should receive special treatment in the courts.

**Some History**

The ICWA reflects important cultural and historical facts that justify its existence. The United States Constitution created a federal-tribal trust →

5. The Exception was created to avoid compliance with ICWA. See for example, *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996). Most states have rejected this doctrine. See Administrative Office of the Courts, Judicial Council of California, *Bench Handbook: The Indian Child Welfare Act*, (Revised 2013), at pp. 6-7.

6. Cohen, *op.cit.*, footnote 1.

7. The Baby Veronica and Baby Alexandria cases are but two of these. Weber, C., “A California family appealed to the state’s highest court Tuesday in the fight for a 6-year-old foster child who was removed from their home after a court ruled that her 1/64th Native American bloodline requires her to live with relatives in Utah,” Associated Press, March 22, 2016.

8. <http://www.ncjfcj.org/sites/default/files/Disproportionality%20Rates%20for%20Children%20of%20Color%20in%20Foster%20Care%202013.pdf>; [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf); <http://fosteringtogether.org/wp-content/uploads/2013/02/ICWA-Current-Stats-for-WA-State-1.pdf>; [http://newscenter.sdsu.edu/education/csp/files/04541-FY\\_Disproportionality\\_Native\\_Amer.pdf](http://newscenter.sdsu.edu/education/csp/files/04541-FY_Disproportionality_Native_Amer.pdf)

9. Thomas, J., (concurring), *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013)

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authority; or 4) an institute for children approved by the Indian tribe or operated by an Indian organization which is suitable for the child’s needs. 25 U.S.C. §1915(b).

The 2015 BIA Guidelines, state, in pertinent part, “good cause” can be based upon: the request of **both** of the child’s parents. Yet, in many cases this is not possible and is not consistent with the ICWA definition of an Indian parent, which states it does not include a man who has not acknowledged or established paternity. 25 U.S.C. 1903(9). However, despite the clear statutory definition, the BIA and various tribes sought to prevent the request of a child’s mother as grounds for finding good cause to deviate from the placement preferences for purpose of her child’s foster care placement and/or for her voluntarily adoption plan.

THE MOST DISTURBING ASPECT OF THE 2015 BIA GUIDELINES IS FOUND AT F.4 ENTITLED: “HOW IS A DETERMINATION FOR “GOOD CAUSE” TO DEPART FROM THE PLACEMENT PREFERENCES MADE?”

Section F.4 (c)(3) states:

*“(c) A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:*

*(3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; **provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act. The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interest of an Indian child in light of the purposes of the Act”.** (Emphasis added). →*

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relationship,<sup>10</sup> one that was confirmed in early and recent Supreme Court decisions.<sup>11</sup> The trust relationship affirmed the federal government’s commitment to protect Indian children.<sup>12</sup>

That relationship changed significantly in the 19th and early 20th Centuries. Sadly, the United States federal government and state and local governments have treated Native Americans unfairly for more than 150 years, breaking treaties, seizing land, and violating the trust relationship established in the Constitution and numerous treaties.<sup>13</sup> State and federal policies weakened or destroyed Indian tribal and family structures in an effort to assimilate Indians into the dominant culture. These policies included the destruction of tribal governments, the removal of high numbers of Indian children from their families and tribes, the creation of compulsory boarding school education for Indian children, and criminal prosecution against those who practiced Indian religions.<sup>14</sup>

Perhaps the most egregious recent example involved state and federal governmental actions towards Native American children. Governmental policies have resulted in the removal of Native American children from their families and tribes in high numbers.<sup>15</sup> Beginning in 1959, The Indian Adoption Project aspired to systematically place the entire Indian child population with non-Indian families across lines of nation, culture, and race.<sup>16</sup> The Adoption Resource Exchange of North America (ARENA), founded in 1966, was the immediate successor to the Indian Adoption Project. ARENA was the first national adoption resource exchange devoted to finding homes for hard-to-place children. It continued the practice of placing Native American →

10. Fletcher, M., & Singel, W., “Indian Children and the Federal-Tribal Trust Relationship,” Available at SSRN: <http://ssrn.com/abstract=2772139>

11. *Worcester v Georgia*, 31 U.S. 515 (55-556, 560-61 (1832)); *Morton v Mancari*, 417 U.S. 535 (1974).

12. This protection was repeatedly spelled out in treaties throughout the early days of the nation. See Fletcher, M. & Singel, W., *Op.Cit.*, footnote 10 at pp. 6-37.

13. For a historical summary of the ways in which the federal, state and local governments treated Indian Children during the latter half of the 19th Century and the 20th Century, see Fletcher, M. & Singel, W. *Id.* at pp. 38-60. See also *The Destruction of American Indian Families*, Association on American Indian Affairs, Inc., New York, N.Y., 1977.

14. *Id.*

15. “Final regulations to strengthen implementation of the Indian Child Welfare Act issued,” *Char-Koosta News*, June 16, 2016; [http://www.charkoosta.com/2016/2016\\_06\\_16/Regs\\_strengthen\\_ICWA.html](http://www.charkoosta.com/2016/2016_06_16/Regs_strengthen_ICWA.html)

16. Testimony of the National Indian Child Welfare Association Regarding Proposed Amendments to the Indian Child Welfare Act: S. 569 and H.R. 1082, June 18, 1997.

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Despite its glaring disregard for the rights and needs of foster children, there was little, if any, criticism rendered by national child welfare organizations, and the child advocacy community regarding this section. The ICWA, as well as, state laws, mandates court decisions based upon the best interests of the child. 25 U.S.C. §1902. Section F.4(c)(3) violates the child’s constitutional rights by prohibiting state courts from conducting a best interest analysis. The U.S. Supreme Court has held that where a determination of custody is based upon the best interests of the child, this is indisputable a substantial government interest for purposes of the Equal Protection Clause. *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed. 2d 421 (1984).

What is disingenuous and troubling is the fact that the 2015 BIA Guidelines failed to state that they were non-binding. Indeed, reading of the 2015 BIA Guidelines would leave the reader to believe they are federal regulations and binding upon state courts. The 2015 BIA Guidelines are contrary to the original 1979 BIA Guidelines, which had consistently stated the Department did not have the authority to promulgate binding regulations upon state courts.<sup>1</sup>

Shortly after the release of the February 2015 Guidelines, the BIA published on March 20, 2015, proposed federal regulations pertaining to the ICWA. It is important to note, that proposed federal regulation, §23.131, pertaining to what constitutes “good cause” to not follow the ICWA placement preferences, deleted the language contained in the 2015 BIA Guidelines which prohibited the state courts from conducting an independent best interest evaluation. However, as stated in the Guidelines, the proposed regulation §23.131(c)(3), continued to state:

*(c) A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:*

*(3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or →*

1. Cases holding the 2015 and the 1979 BIA Guidelines are non-binding. *Gila River Indian Community v. Department of Child Safety*, 363 P.3d 148, (Ariz. App. 2015); *National Counsel for Adoption v. Jewell*, 2015 U.S. Dist. LEXIS 175213, W.L. 9854389; *C.L. v. P.C.S.*, 17 P.3d, 769 Alaska (2001); *In Re Baby Girl A*, Ariz. 282 Cal. Rptr. 105 (Cal. App. 1991).

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children with non-Indian adoptive parents for a number of years into the early 1970s. The goal was assimilation. As one Native American stated:

*The endgame, the official federal policy, was that the tribes wouldn’t exist.<sup>17</sup>*

Church leaders also encouraged the adoption of Indian children. One author estimates that there were thousands of Navajo children adopted by members of the Latter Day Saints, while the Catholic Church and other Christian denominations removed Indian children from their homes to place them in residential institutions; from there they were to be adopted out.<sup>18</sup> Adoption was seen as the best method to assimilate Indian children into mainstream America.

**The Indian Child Welfare Act**

While many social policy leaders, such as the Child Welfare League of America (CWLA), supported and praised these projects, Indian leaders attacked them as destructive to the Indian culture. Researchers demonstrated that federal and state policies were destroying American Indian Families.<sup>19</sup> Ultimately, some leading politicians joined them in an effort to change the law. During Congressional hearings in the 1970’s Senator Abourezk testified that “placement of Indian children in non-Indian settings resulted in their Indian culture, the Indian traditions, and in general, their entire way of life... being smothered.” Senator Abourezk concluded that this loss “strikes at the heart of Indian communities and has been called cultural genocide.”<sup>20</sup>

These observations were a driving force behind the Congressional passage of the Indian Child Welfare Act (ICWA) in 1978.<sup>21</sup> The ICWA confirmed the need for greater protections for Indian children and the preservation of Indian culture. The United States Congress found

*...an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal →*

17. Woodard, Stephanie, “Native Americans Expose the Adoption Era and Repair Its Devastation” *Indian Country*, 12/6/11.

18. *Id.* at p. 2.

19. *The Destruction of American Indian Families*, Association on American Indian Affairs, Inc., New York, N.Y., 1977.

20. “Indian Child Welfare Program”, Hearings before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, United States Senate, 95th Cong., 2d Sess. (April 8-9, 1974) at 3.

21. 25 U.S.C. §§ 1901 et seq.



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*emotional needs of the child does not include ordinary bonding or attachment that may have as a result of a placement or the fact that the child has for an extended amount of time, been in another placement that does not comply with ICWA.*

The author is unaware of any state, or national child welfare organization, other than the State of Washington and the American Academy of Adoption Attorneys who challenged this section and other aspects of the proposed regulations.

Fortunately, many individuals voiced concerns about the proposed federal regulations and how the proposed rules would harm children and violate the rights of foster children and parents.

Indeed, the final regulations issued on June 14, 2016, (which become effective December 12, 2016), have rejected the most egregious aspects of the 2015 BIA Guidelines, F.4. Section 23.132 of the regulations, regarding “good cause” to deviate from the ICWA placement preference, does not require the testimony of an expert witness for purposes of determining good cause. Furthermore, the regulations reject the position advocated by many tribes that bonding and attachment cannot be considered. The final regulation, §23.132(c)(3), also recognizes that good cause may be based upon “the presence of a sibling attachment that can be maintained only through particular placement.” This is an important development for Indian children. Over the course of many years, some Indian tribes have tried to separate siblings from one another.

The federal regulations also now state that the request of one parent, or both parents, will constitute good cause to deviate from the ICWA placement preference. §23.132(c)(1). Most importantly, as to bonding and attachment, the final regulations, at §23.132(e) states:

*“A placement may not depart from the placement preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.” (Emphasis added). →*

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*public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.<sup>22</sup>*

The ICWA imposed upon state child welfare practices substantive and procedural requirements which state courts must follow. Most notably, the ICWA answered the question, “What is in an Indian child’s best interest?” The ICWA answered that state courts must now give primary consideration to the placement of Indian children with their extended families and tribal communities.<sup>23</sup> Additionally, the ICWA requires state courts to recognize tribal authority and jurisdiction over tribal children. The law has made it more difficult for the state governments to remove Indian children from their homes and more difficult to adopt Indian children outside of their tribes.<sup>24</sup> Further, the ICWA identified the best interests of Indian children as being served by protecting “the rights of the...child as an Indian.”<sup>25</sup> The United States Supreme Court confirmed the ICWA’s placement priority, calling it “the most important substantive requirement imposed on state courts.”<sup>26</sup>

Years later, some child welfare leaders came to accept the ICWA. In 2001. The Director of the CWLA, Shay Bilchik, apologized for the CWLA’s role in the Indian Adoption Project and ARENA stating, “No matter how well intentioned and how squarely in the mainstream this was at the time, it was wrong; it was hurtful; and it reflected a kind of bias that surfaces feelings of shame, as we look back with the 20/20 vision of hindsight.”<sup>27</sup> →

22. *Id.* § 1901.

23. *Id.* § 1915.

24. 25 U.S.C. §§ 1912(d) & (f).

25. 25 U.S.C. § 1902. Congressional declaration of policy. The Congress hereby declares that it is the policy of this Nation to protect 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.

26. *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30 (1989) at p.36.

27. Quoted in “Understanding The Indian Child Welfare Act,” The ICWA LAW CENTER, <http://www.icwlc.org/education-hub/understanding-the-ICWA/>

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Thus, state courts may consider bonding and attachment as grounds in support of a finding of good cause to deviate from the placement preference, if the placement was not made in violation of ICWA.

A “good cause” determination, as to the ICWA placement preferences, still allows the state courts to consider the child’s best interest, including, issues pertaining to bonding and attachment.

However, §23.118 of the federal regulations, regarding “good cause” to deny a request to transfer a case from state court to tribal court raises serious constitutional concerns, and demonstrates a disregard for the needs of the Indian child. Cases involving a request to transfer a cases from state court to tribal court involve cases where the child is **not** a resident on an Indian Reservation and the state court has jurisdiction. 25 U.S.C. 1911(b).

The federal regulation, §23.118(c)(3), states, that in determining whether good cause exist to deny transfer of a case from state court from tribal court, the state court cannot consider “whether the transfer could affect the placement of the child.” This demonstrates indifference as to the needs of the child. As one who has practiced in this field for over thirty-six (36) years, I know such requests to transfer a case from state court to tribal court often occur after the filing of a petition to terminate the parental rights of the child’s parents. As mentioned above, child advocates need to challenge this federal regulation, as it overrides thirty-eight (38) years of state law and, as stated above, violates a foster child’s constitutional rights. See *Palmore v. Sidoti, Supra*.

In closing, Indian tribes, the BIA, child advocates, state social service agencies, child welfare organizations and others need to have an honest discussion regarding the needs of foster children and how to address a child’s needs as early as possible in these cases. The ICWA was enacted to protect Indian children and was not intended to lessen their rights and to make them more vulnerable than other foster children. ■

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Looking Ahead

The ICWA’s passage and the apology from child welfare leaders still seem insufficient in light of the attacks on the ICWA.<sup>28</sup> The high numbers of Indian children removed from home and placed with non-Indian families or in congregate care remains high, and implementation of the ICWA is spotty.<sup>29</sup> More needs to be done to make the ICWA an effective legal protection for Indian children and the preservation of their culture.

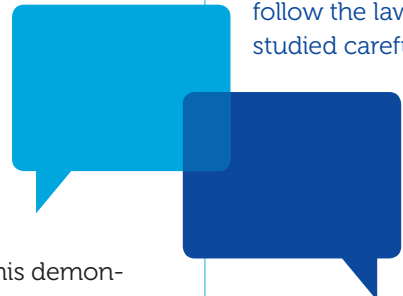
State court compliance with the ICWA has been difficult to achieve. Some state courts still resist following the ICWA. Even when trial courts attempt to follow the law, compliance is challenging. The law is complex and must be studied carefully to understand it correctly. Trial judges may see only one case involving the ICWA in a year. Judicial trainings on the ICWA can be effective, but these trainings have to compete with all of the other subject matter judges must keep pace with including criminal, civil, probate, and juvenile law. As a result most judicial training conferences around the country do not include sessions on the ICWA. Appellate case law reveals that substantial numbers of trial court decisions involving the ICWA are reversed. For example, the California appellate courts reversed hundreds of cases involving the ICWA just on the issue of notice to the tribes.<sup>30</sup>

More importantly, we must all resist the temptation to assimilate Native American people in our mistaken belief that the best interests of these children is to be placed with non-Native American families. We must accept that Native Americans have a different culture, one that is neither better nor worse than ours. We need to respect that culture and the Native American way of living. Respect comes with the acknowledgment that other cultures have different ways of living and that those ways comprise their identity as →

28. The pending case, *Oglala Sioux Tribe v Luann Van Hunnik*, in Pennington County, South Dakota [op.cit](http://op.cit), footnote 3, is but one example. In that case the federal court held that the state court violated federal law, state law, and numerous standard civil proceedings by holding hearings which cursorily deprived Indian parents of their rights and removed thousands of Indian children from their homes in order to place them in white foster homes. [http://rapidcityjournal.com/news/local/local-native-child-case-may-be-bound-for-supreme-court/article\\_55940298-a5f8-580a-aa94-7f3e3502923e.html](http://rapidcityjournal.com/news/local/local-native-child-case-may-be-bound-for-supreme-court/article_55940298-a5f8-580a-aa94-7f3e3502923e.html)

29. See, for example, *Oglala Sioux Tribe v Luann Van Hunnik, Id.* and the disproportionate data cited in footnote 8.

30. Bench Handbook *The Indian Child Welfare Act*, California Administrative Office of the Courts, 2013, pp 14-18.



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a people. This means we must not assume that we can “save them” from a life style that is different, but not necessarily better nor worse than our own. The Indian baby may seem like a “blank slate” that any family can rear, but this belief is simply inaccurate. Biological research confirms that much of the newborn’s characteristics and behavior are heritable.<sup>31</sup> The “blank slate” belief is not only incorrect, but it is short-sighted and does not acknowledge a person’s need to identify with his or her people and culture. Many human beings want to know with whom they share their DNA and will search for those persons throughout their life. As one adopted Indian adult stated:

*We were brought up without our culture, which took a terrible toll on our lives. I grew up angry and miserable.*<sup>32</sup>

One Cherokee Indian described Native adoptees as suffering from what she called Split Feather Syndrome – the damage caused by loss of tribal identity and growing up “different” in an inhospitable world.<sup>33</sup> She continued to describe the stories of adoptees lives:

*Even in loving families, Native adoptees live without a sense of who they are. Love doesn’t provide identity.*<sup>34</sup>

Starting with a foundation of respect, specific steps should be taken. First, judicial educators must introduce and train judges in the new federal ICWA regulations published on June 14, 2016.<sup>35</sup> These comprehensive regulations received over 2,100 comments from child welfare and other experts from around the country prior to their issuance, an extraordinarily high response. The comments resulted in modification of some of the Guidelines issued by the Bureau of Indian Affairs in 2015.<sup>36</sup> They clarify ambiguities in the ICWA and confirm the original intent of Congress. For example, the regulations state that the Existing Indian Family Exception doctrine, a judicial attempt to

circumvent the ICWA, is not the law.<sup>37</sup> Second, judges should appoint counsel to represent tribal interests in cases involving the ICWA. Counsel will be able to ensure that the tribal interests will be effectively presented in court proceedings and that the ICWA is followed.<sup>38</sup> Third, each state must continue to expend significant time and energy to implement the ICWA. State efforts should include reaching out to work with tribal courts, including ICWA trainings at judicial education institutes, and collaborating with tribal leaders on legal issues that involve both state and tribal courts. Examples of these efforts include the State Court-Tribal Court Forums in California, South Dakota, Wisconsin, Arizona and other states.<sup>39</sup>

Fourth, continuing education leaders working with the bar should require that attorneys receive training in the ICWA. They can do this by ensuring that workshops on the ICWA are a part of legal symposiums and including issues regarding the ICWA on state bar examinations. Fifth, Indian leaders and others should meet with media representatives and carefully explain the history of the ICWA and why it should be followed in court proceedings. This exchange will give media representatives the context they should include in any article regarding cases involving the ICWA.

It makes sense to start with the legal system.

JUSTICE IS FUNDAMENTAL TO OUR IDEALS AND OUR WAY OF LIFE IN THE UNITED STATES. STATE AND TRIBAL COURTS SHOULD WORK COOPERATIVELY TO PROVIDE THE BEST POSSIBLE JUSTICE FOR PERSONS WHO APPEAR IN ONE OR BOTH COURT SYSTEMS.

State courts must respect the valid orders that tribal courts issue just as tribal courts should respect valid state court orders. Judicial leadership will be →

31. Mukherjee, S., *The Gene: An Intimate History*, Scribner, New York, 2016, at pp. 128, 298-300, 405-406, 485.

32. *Op.cit.*, footnote 17, at p.1.

33. *Id.* p.2

34. *Id.*

35. 25 CFR Part 23, Indian Child Welfare Act Proceedings; Final Rule, *Federal Register*, Vol. 81, No. 114, June 14, 2016, at pp. 38777 – 38876.

36. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings; *Federal Register* / Vol. 80, No. 37 / Wednesday, February 25, 2015.

37. *Op.Cit.* footnote 35 at pp. 38801-38802.

38. Houston, W., “Report states tribal child custody laws neglected on statewide level,” *Eureka Times-Standard*, 6/27/16; <http://www.times-standard.com/general-news/20160627/report-states-tribal-child-custody-laws-neglected-on-statewide-level> (last accessed on June 28, 2016).

39. <https://www.azcourts.gov/stfcf/>; Center for Families, Children & the Courts, Operations & Services, <forum@jud.ca.gov>; [http://www.tribal-institute.org/WOCC/tribal\\_courtstate\\_court\\_forums.htm](http://www.tribal-institute.org/WOCC/tribal_courtstate_court_forums.htm); <https://www.wicourts.gov/courts/committees/tribal.htm>; see also <http://WalkingOnCommonGround.org>

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critical if these goals are to be accomplished. Agencies in the justice system should work collaboratively to ensure justice for all persons. Tribal and state law enforcement agencies, prosecutors, probation officers, defense counsel, and court clerical staff should create and maintain a seamless criminal justice system that both protects children, their families, and communities, and provides justice to all. Child welfare workers whether working for the state or local government should partner with tribal social workers to ensure that children are protected and families are provided with needed services to protect children and preserve families. All of this can be accomplished if we overcome the temptation to try to “save” children living in a different culture and, instead, work together collaboratively to improve outcomes for all children within their own cultures.

So, should Indian children be treated differently than other children? Given the history of Indian children in the United States and the trust relationship promised to them by the United States government, the answer is Yes. Congress has passed the ICWA and other laws and signed treaties indicating that Indian children must be protected. Drawing upon a remarkably large number of comments, the new regulations affirm and clarify the intent of Congress when it wrote the ICWA. It is now becomes our task to ensure that Indian children receive the special treatment they deserve. ■



## EXECUTIVE DIRECTOR'S MESSAGE

### Your Voice, Your Forum

Would that child welfare, juvenile justice and family and custody law provided us with tidy questions suitable for neat, simple answers.

Organizations like NACC would then be able to deliver pre-packaged solutions to every child and family law problem. Members could just enter a question of policy and law into a database and walk away with the answer in hand.

The reality is that much of what we confront in practice is a tangle of law, social work, politics and local agency and courtroom traditions. It's possible for a thoughtful attorney to wholeheartedly support a piece of legislation, for example, but loudly oppose how the law is being implemented in one jurisdiction. Differential Response is often in that spot, supported in concept but opposed as implemented. The Indian Child Welfare Act also inspires support for its broader aims and opposition, at times, for its complex interaction with individual cases.

That's part of why we have *The Guardian* as our monthly journal and *Children, Families and the Law* as our weekly blog. When advocates and experts weigh in on all sides of a given issue, we all get a little smarter (and I'll admit to learning more from folks who think I'm wrong than from those who tell me I'm right.)

**This is where you come in.** Our members are often humble about how much they know and can share, but the reality is that you, the daily practitioners in this field, are often the closest observers and best-informed critics of our work. You understand the purpose and provisions of the law in question, but you also understand how all that affects real kids, parents and families.

**Write for us.** When an issue grabs your attention, tell us what we need to know about it. If someone has written something you find incomplete or just plain wrong, write us that counterpoint, for the benefit of all members. Contact me at

[Kendall.Marlowe@childrenscolorado.org](mailto:Kendall.Marlowe@childrenscolorado.org) or our Programs and Administrative Coordinator Amanda Butler at [Amanda.Butler@childrenscolorado.org](mailto:Amanda.Butler@childrenscolorado.org). Some of the strongest relationships within NACC began when someone asked, “I'd like to write about this – would you be interested?” Give us the chance to enthusiastically reply, “Yes!” ■

**Kendall Marlowe**  
Executive Director

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# Making Space for Cultural Differences in Child Welfare

...A mom could not afford childcare so she often brought her nine-year-old daughter with her to work. A few times, the mom left her daughter to play alone at a nearby, popular park. The mom trusted her daughter and the strength of the community to protect her. One day, an adult asked the girl about her mother. "She's at work," the daughter replied. The adult called the cops, who then arrested the girl's mother for unlawful conduct toward a child (a felony punishable by up to ten years in jail) and placed the child into the custody of child protective services.<sup>1</sup>

...A father disciplined his seven-year-old son for recklessly playing with a kitchen knife and frightening his grandmother. The father slapped his son's hand with the dull end of that same knife, leaving a bruise. This form of punishment was accepted, and even expected, in his Lao Lu Mien culture. A teacher saw the bruise and reported the boy and his three siblings to social services. All four children were removed from the home the following week. The youngest, a five-week old baby, died within weeks of foster care placement. Even so, the father was not permitted to visit the children until he attended parenting classes.<sup>2</sup>

...Medical staff told the parents of a four-week premature newborn that she might need a blood transfusion to live. The parents, honoring religious principles, refused that intervention. The staff urgently sought, and obtained, a court order granting the county wardship over the baby and depriving the parents of custody and visitation rights for almost a month. Ultimately, the blood transfusion proved unnecessary, and the parents were thrown into a long battle to regain custody of their child.<sup>3</sup>

1. Vignette based on media coverage. See Kelly Wallace, *Mom arrested for leaving 9-year-old alone at park*, CNN (July 21, 2014); South Carolina mom arrested for leaving 9-year-old alone isn't only parent struggling to find child care, NY Daily News, The Associated Press (July 29, 2014). For more examples, see Andrea McCarren, *Parents in trouble again for letting kids walk alone*, USA TODAY (April 13, 2015) (reporting how child protective services took custody of two children whose parents left them alone to play at a park); Kelly Wallace, *Maryland family under investigation for letting their kids walk home alone*, CNN (January 21, 2015) (describing how parents faced a neglect investigation for letting their 10 and 6-year-old children walk home from the playground, about a mile from their house, by themselves).

2. Benjamin Pimental, *Grieving Laotian Family Mourns Infant*, San Francisco Chronicle, (February 19, 1994); Marilyn Lewis, *Infant's Death is Tragedy in East-West Culture Clash*, San Jose Mercury News, February 19, 1994; see also Alison Dundes Renteln, *Corporal Punishment and the Cultural Defense*, 73 LAW & CONTEMP. PROBS. 253, 262-63 (2010) (describing the case and stating that the Lao Lu Mien Cultural Association defended the father's conduct: "[I]n Lu Mien culture, some forms of physical punishment are acceptable to discipline children").

3. Shauna Van Praagh, *Faith, Belonging, and the Protection of "Our" Children*, 17 Windsor Yearbook of Access of Justice 154, 173 (1999). For another example, see Anne Fadiman, *THE SPIRIT CATCHES YOU AND YOU FALL DOWN: A HMONG CHILD, HER AMERICAN DOCTORS, AND THE COLLISION OF TWO CULTURES* (Anne Fadiman, Ed., 2012) (describing the experience of a Hmong family who clashed with American authorities and doctors in the treatment of their epileptic daughter because they preferred traditional, Hmong healing methods, not western medicine).



by **Melissa Romero**

Melissa Romero is an appellate law clerk for the Honorable Terry Fox on the Colorado Court of Appeals, where she handles a mixed docket of state criminal and civil appeals. In the fall, she will begin a clerkship with the Honorable Christine Arguello on the United States District Court for the State of Colorado.

In each vignette, the parents and the authorities had the same interest — the well being of the children. When they diverged in how best to protect this interest, the authorities won. No one asked the parents *why* they acted as they did. No one tried to understand the parents' cultural perspective. It was "different," outside the mainstream parenting standard, and therefore, intolerable.

These circumstances are hardly the exception. Childrearing practices differ by culture, race, nationality, religion, and neighborhood. With the majority of child welfare professionals belonging to the dominant, middle-class group of white, Judeo-Christian Americans<sup>4</sup> and the recipients of child protective services being disproportionately poor, nonwhite, →

4. Theresa Hughes, *The Neglect of Children and Culture: Responding to Child Maltreatment with Cultural Competence and a Review of Child Abuse and Culture: Working with Diverse Families*, 44 FAM. CT. REV. 501, 502 (2006); Amy Sinden, *Why Won't Mom Cooperate?: A Critique of Informality in Child Welfare Proceedings*, 11 YALE J. L. & FEMINISM 339, 352-53, 366-67; Sandra T. Azar and Phillip Atiba Goff, *Can Science Help Solomon? Child Maltreatment Cases and the Potential for Racial and Ethnic Bias in Decision Making*, 81 ST. JOHN'S L. REV. 533, 571; Nell Clement, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L. J. 397, 427-28.

and culturally-diverse,<sup>5</sup> a clash in parenting preferences is inevitable. This clash, in and of itself, is not problematic. But, all too often, the mainstream perspective prevails and risks removing children from their families based on little more than cultural differences.

Consider the situation where a boy's chest and back were covered with what looked like bruises and slash marks. A medical professional noticed the lesions, believed them to be consistent with child abuse, and reported the boy's parents to law enforcement. The parents were arrested, and social services took custody of the child. The parents denied abusing their son and insisted they had merely administered a traditional Chinese healing ritual. No one listened. Finally, a bilingual Chinese detective learned of the situation and called off the arrest. He explained to social services and the police department about the widely-accepted practice of coining or *cao gio*, a traditional healing ritual that involves massaging the body with a medicated substance and then rubbing a serrated coin (or spoon) into the individual's back to release toxins and alleviate illness. Although the ritual leaves superficial lesions, they are not painful and disappear within a day.<sup>6</sup>

Another moving example: A social worker substantiated a charge of child abuse against Mexican parents who forced their child to kneel on uncooked rice as a punishment. This common disciplinary practice is called *hincar* and is practiced among many cultures. Although the marks from the rice vanished quickly and the children knelt for just a few minutes, the social worker said the practice seemed "so bizarre that she thought it might have been a sign of the parents' mental illness and inability to care for their children."<sup>7</sup>

In each case, mere cultural difference resulted in swift and uninformed government intervention.

The phenomenon is not new. Historically, our society has tolerated, and even expected, a high degree of government regulation in the private lives of citizens with different viewpoints.<sup>8</sup> This regulation has not always served the best interest of children. Authorities have easily condoned removing "immoral" children from non-Christian homes,<sup>9</sup> "uncivilized" youth from Native American reservations,<sup>10</sup> and "unfortunate" kids from interracial unions.<sup>11</sup> Still today, culturally-diverse chil-

dren are overrepresented in almost every part of the child welfare system. Fiscal Year 2014 marked 415,129 children in foster care, about sixty percent of which were non-white, minority kids.<sup>12</sup> Compared to white families, families of cultural minority groups are investigated more frequently; found "guilty" of child abuse, neglect, or maltreatment more often; and experience a higher percentage of child removals.<sup>13</sup> Recent studies have found that even after controlling for family income and risk of abuse, cultural difference "remains a significant predictor of disparities at various decision-making points."<sup>14</sup>

This is not to say that child safety should be sacrificed in the name of cultural relativism. Few would disagree that starving a child or beating her impulsively until bruised warrants swift intervention, whether sanctioned by a cultural practice or not. But, many cases are not so clear-cut. For situations where harm is less apparent — as in the cases of coining or *hincar* described above — a few pieces of culturally misinterpreted information can color impressions of parental fitness and a child's well-being.<sup>15</sup> →

5. See, e.g., U.S. DEPARTMENT OF HUMAN SERVICES, ADMINISTRATION ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN'S BUREAU, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (2014), available at [www.acf.hhs.gov/programs/cb](http://www.acf.hhs.gov/programs/cb); see also Clement, supra note 4 at 400 (defining "cultural diversity" as the absence of the dominant American American culture" and stating that "culturally-diverse families" are those that "do not reflect aspects of the dominant American culture in terms of race, ethnicity, religion, language, class, or values, practices and beliefs.").

6. See William Y. Chin, *Blue Spots, Coining, and Cupping: How Ethnic Minority Parents Can Be Misreported as Child Abusers*, 7 J. L. Soc'y 88, 92-93 (2005); see also Miles Corwin, *Cultural Sensitivity on the Beat*, L.A. Times (Jan. 10, 2000); Rachel Endo, 8 J. OF MULTICULTURALISM IN EDUC. 1 (2012) (discussing ten Southeast Asian American children who were removed from their homes in 2002 and placed in state custody based on suspected child abuse); Renteln, supra note 2 at 259-61 (describing numerous healing customs, including coining and cupping, that have been misinterpreted as child abuse because they leave temporary marks).

7. See Renteln, supra note 2 at 262 (quoting Lisa A. Fontes & Margarita R. O'Neill-Arana, *Assessing for Child Maltreatment in Culturally Diverse Families*, HANDBOOK OF MULTICULTURAL ASSESSMENT: CLINICAL, PSYCHOLOGICAL, AND EDUCATIONAL APPLICATIONS, 627, 647-48 (Lisa A. Suzuki, Joseph G. Ponterotto & Paul J. Meller eds., 3d ed. 2008)).

8. Jeanne M. Giovannoni & Rosina M. Becerra, *DEFINING CHILD ABUSE* 31 (Collier Macmillan, Pubs. 1979).

9. *Id.*

10. John P. Lavelle, *Strengthening Tribal Sovereignty Through Indian Participation In American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL'Y 533, 537 (2001); Robert B. Porter, *The Demise of the Ongwehweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L. J. 107, 108-109 (1999) (footnotes omitted) (quoting U.S. Colonel Richard Henry Pratt, founder and president of Carlisle Indian Industrial School, quoted in Peter Nabokov, *FACING THE INDIAN FUTURE*, 1492-1992 404, 405 (Peter Nabokov ed., 1991)).

11. See, e.g., *In re Adoption of a Minor*, 228 F.2d 446, 447 (D.C. Cir. 1955) (reversing the lower court's denial of a black man's petition to adopt his white step-child; the lower court reasoned that "the boy when he grows up might lose the social status of a white man by reason of the fact that by record his father will be negro... the court should not fashion the child's future in this manner."); *Ward v. Ward*, 36 Wash. 2d 143, 144-45 (1950) (awarding custody of

two mixed children to their black father over their white mother, saying "these unfortunate girls, through no fault of their own, are the victims of a mixed marriage and a broken home. They will have a much better opportunity to take their rightful place in a society if they are brought up among their own people.").

12. See, e.g., U.S. DEPARTMENT OF HUMAN SERVICES, ADMINISTRATION ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN'S BUREAU, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (2014), available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport22.pdf>.

13. National Technical Assistance and Evaluation Center for Systems of Care, *Cultural Competency, A Closer Look*, 1 (2009); Hughes, supra note 4 at 501, 503; Alan J. Dettlaff, *Racial Disproportionality and Disparities in the Child Welfare System*, Center for Advanced Studies in Child Welfare, CW360: A comprehensive look at a prevalent child welfare issue, 4-5 (2015).

14. Dettlaff, supra note 13.

15. See generally Craig A. Mason, Chanequa J. Walker-Barnes, Shihfen Tu, Julie Simmons, and Rafael Martinez-Arrue, *Ethnic Differences in the Affective Meaning of Parental Control Behaviors*, 26 J. OF PRIMARY PREVENTION 59 (2004) (conducting a study that looked at a sample of 288 youth of varying cultures for differences in affective meaning of parental

So what can we do about this deep-seated problem?

We all have the same goal: to keep kids in safe, happy, permanent homes that are free from harm. Accomplishing this and respecting cultural diversity is simultaneously possible. Cultural competency has been defined as employing the “capacity, skills, and knowledge to respond to the unique needs of populations whose cultures are different than that which might be called dominant or mainstream America.”<sup>16</sup> For decades, child welfare scholars have called upon the profession to intentionally strive for this ideal.<sup>17</sup>

Progress has been made. The Indian Child Welfare Act was born as a culturally-sensitive attempt to preserve and dignify Native American cultures.<sup>18</sup> Legal education programs and school of social work accreditation standards promote curricula that seek to prepare students to deal sensitively with diverse clients and encourages their global learning of cultural diversity.<sup>19</sup> The National Child Welfare

Workforce Institute and various child welfare agencies across the country have begun developing and implementing culturally-competent workforce models.<sup>20</sup>

These are steps in the right direction, but simply put, we need more. Dominant American cultural biases run deep, and creating a space for cultural difference in the mainstream parenting perspective will take intentionality, exploration, time, and



resources.<sup>21</sup> We might look to other professions for guidance. For example, the Joint Commission, which accredits and certifies thousands of U.S. health organizations, requires culturally competent care “as essential to the safest, highest quality, best-value health care.”<sup>22</sup> Novant Health, among other health care providers, has thus created diversity guides for medical professionals that emphasize the importance of asking a patient about her personal, cultural, and religious beliefs before providing medical care.<sup>23</sup> Among other things, the

*Educational Policy and Accreditation Standards for Baccalaureate and Master’s Social Work Programs* 7, 14 (2015) (requiring schools of social work to provide curricula that prepares students to better serve diverse populations and encourages their global learning of cultural diversity).

20. See, e.g., Mederos, F., & Woldegiorgis, I. *Beyond cultural competence: What child protection managers need to know and do*, 82 CHILD WELFARE LEAGUE OF AMERICA 125 (2003); National Child Welfare Workforce Institute, *Building a Culturally Responsive Workforce: The Texas Model for Undoing Disproportionality and Disparities in Child Welfare* (2014).
21. See, e.g., Renteln, supra note 2 at 262 (emphasizing the history of cultural bias in social-welfare agencies and courts in North America); Hughes, supra note 4 at 504 (“Despite pioneering efforts to teach cultural competence in the field of child welfare, stereotypic thinking nonetheless clouds professionals’ evaluations, intervention efforts, and representation.”).
22. See The Joint Commission, *Accreditation Survey Activity Guide for Health Care Organizations*, 75-76 (2016).
23. The diversity guides also intentionally educate medical professionals about various religious and cultural mores concerning healthcare and the history of minority racial and ethnic groups in the United States. See generally *Cultural*

guides require staff to thoughtfully and continuously examine their own unconscious biases about culturally “different” practices and to explain medical terms using respectful, culturally-sensitive language.<sup>24</sup>

Maybe we begin by simply re-opening the dialogue and exploring the lines between benign cultural difference and abusive parenting. Change could be as basic as committing to asking families questions about their “unfamiliar” culture before intervening; engaging in more cultural competency studies and discussions; initiating partnerships with cultural liaisons in the community; and taking tips from culturally-competent models in other professions.

Consider mainstream American childrearing practices, such as leaving young kids to sleep in a room alone, forcing children to “cry it out,” sending a disobedient child to bed without dinner, or circumcising male infants. What if these practices, instead of being considered mainstream, were unique to your minority culture and your child risked removal based on their application? What if no one even asked you *why* you parented this way? You might view state intervention as arbitrary, biased, disrespectful, or untrustworthy. Culturally-diverse families, i.e. the *majority* of child welfare recipients, deserve a better, more culturally-competent, experience than this. And, more importantly, children deserve better-investigated outcomes. The stakes are too high to deliver anything less. ■

and *Religious Consideration to Competent Healthcare*, DiversityInc (Nov. 17, 2014) for a description of the guides and accompanying videos.  
24. *Id.*

control behaviors and finding that similar parenting behaviors elicited significantly different reactions in children of different backgrounds. For example, parenting methods that led one child to feel love and concern made another youth feel controlled and angry.); Sandra T. Azar and Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 RACE, ETHNICITY, AND THE LAW, 249, 259-61 (1994) (describing multiple studies finding that children from distinct cultural backgrounds respond differently to similar parenting styles).

16. Susan L. Brooks, *Representing Children in Families*, 6 NEV. L. J. 724, 738-39 (2006); Lori Klein, *Doing What’s Right: Providing Culturally Competent Reunification Services*, 12 BERKELEY WOMEN’S L. J. 20, 20 (1997); Terry Cross, *Developing a Knowledge base to Support Cultural Competence*, 14 FAM. RESOURCE COALITION REP. 2, 3-4 (1996).
17. See supra note 16; Amy Laquer Estlin, *Global Child Welfare: The Challenges for Family Law*, 63 OKLA. L. REV. 691, 7 (2011).
18. Indian Child Welfare Act, 25 U.S.C.A. § 1901 (1978).
19. See Roy Stuckey, Clinical Legal Education Association, *Best Practices for Legal Education: A Vision and A Road Map*, 66 (2007) (promoting a law student’s ability to “deal sensitively and effectively with diverse clients” as one of the top five professional values that deserve special attention during law school); Council on Social Work Education, Commission on Educational Policy and Commission on Accreditation,



# Child Welfare Law Certification



by Daniel Trujillo,  
Certification Director

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Thank you for all your submissions! We will announce the award winner shortly and again at the conference in Philadelphia. We truly enjoy sponsoring a CWLS to attend this awesome seminar in an awesome location.

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We're continuing our series of scholarships to promote diversity in our specialty area with our LGBTQ+ scholarship where at least one applicant will receive a full funding to apply for certification. **Deadline is August 15.** Form and details can be found at [on our website](#). We have completed and awarded our racial diversity scholarship and later this year we will promote persons with disabilities and young lawyers.

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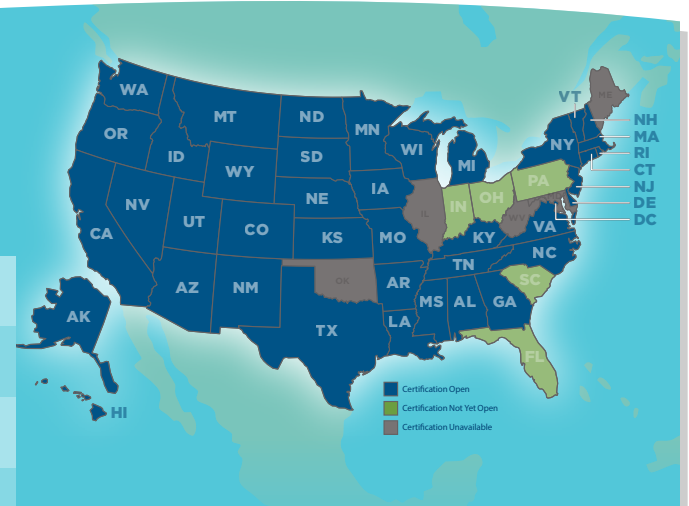
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## A Word from New CWLS Christine Saban Ton



*"I am a Supervising Attorney with Children's Advocacy Group in San Bernardino County, California. I am appointed by the juvenile court to represent abused and neglected children in the county's dependency system. Becoming*

*a certified Child Welfare Law Specialist through the National Association of Counsel for Children represents my commitment to advocating for a community where our children belong in strong, stable, and safe families. Improving the quality of performance of attorneys practicing in this unique and increasingly complex area of*



*the law, promotes greater outcomes for children and their families. It is a privilege to be part of a group so focused on improving the child welfare and juvenile justice systems."*

## Raleigh Hot Shots

Need a child welfare law referral for Raleigh, North Carolina? Consider **Batch, Poore, & Williams, PC** where Sydney Batch and Shannon Poore have just joined our CWLS community. We would like to thank these two amazing attorneys for making certification a priority in their practice. We asked them to tell us why they chose to become certified and this is what they had to say:

*"Over the past ten years I have dedicated the majority of my practice to representing parents in abuse, neglect and dependency court. As a parent attorney and family law attorney, I advocate maintaining the family unit and protecting my clients' constitutionally protected rights. In a collaborative way, I work with child welfare agencies and children's attorneys to ensure that my clients are afforded every opportunity to reunify with their children as soon as possible. Becoming nationally certified gives me more credibility with my clients, as well as with other →*



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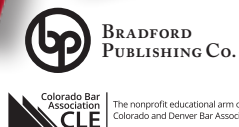
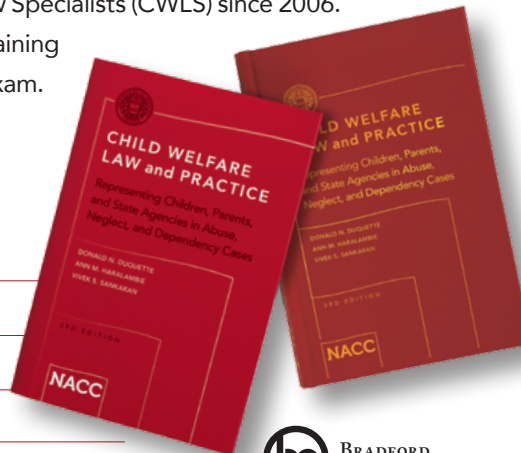
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## Child Welfare Law Certification

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*professionals in the child welfare system. I am very passionate about ensuring that parents are treated fairly and with dignity*



*throughout the juvenile welfare process. Being a part of the CWLS community provides me with additional resources and relationships to assist me in advocating for my clients and their children." — Shannon Poore*

*"I have dedicated the vast majority of my legal career to advocating for parents in juvenile proceedings and custody cases. My Master's in Social Work in conjunction with my law degree has provided me with particular insight into the child welfare system. While I have advocated for parents for ten years, I chose to become certified as a child welfare specialist in order to hone my legal skills and become a part of a dynamic, well-respected and knowledgeable organization that focuses on the best interests*



*of children and family integrity. I am honored and humbled to be a part of NACC and look forward to working with a national network of attorneys who share a passion for resolving complex child welfare issues." — Sydney Batch*

# Case

## **In re Alexandria P.: “Good Cause” Required to Depart from ICWA Adoptive Placement Preferences**

In *In re Alexandria P.*, the California Court of Appeal, Second District, Division 5, held that an Indian child’s foster parents failed to prove by clear and convincing evidence that good cause existed to depart from the Indian Child Welfare Act’s adoptive placement preferences.<sup>1</sup> ICWA states that when an Indian child is put into an adoptive placement, “a preference shall be given, in the absence of good cause to the contrary, 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.”<sup>2</sup> California expands upon federal requirements by stipulating that the party requesting departure from ICWA’s placement preferences maintains the burden of establishing good cause.<sup>3</sup> The Court of Appeal remanded this matter twice prior to the current decision because the lower Superior Court of Los Angeles County applied an incorrect standard in considering good cause.<sup>4</sup> After reviewing the correct standard to be applied, the Court of Appeal held that substantial evidence from the record supported the Superior Court’s finding that the foster parents did not prove by clear

1. *In re Alexandria P.*, No. B270775, 2016 WL 3676682 (Cal. Ct. App. July 8, 2016).  
2. *In re Alexandria P.*, *supra* note 1, at 9 (quoting 25 U.S.C. § 1915(a)).  
3. *In re Alexandria P.*, *supra* note 1, at 9 (quoting Welf. & Inst. Code, § 361.31, subd. (j)).  
4. *Id.* at 1.

and convincing evidence that there was good cause to depart from ICWA’s placement preferences.<sup>5</sup>

Alexandria P. was removed from her parents’ custody at the age of 17 months.<sup>6</sup> Her father was an enrolled member of the Choctaw tribe, qualifying Alexandria as an Indian child under ICWA.<sup>7</sup> The tribe consented to Alexandria’s placement with a non-Indian foster family while Alexandria’s father worked toward reunification.<sup>8</sup> However, if reunification efforts were to fail, the tribe and the Department of Children and Family Services recommended that Alexandria be placed with her biological father’s extended family, a non-Indian couple in Utah.<sup>9</sup> When Alexandria’s father discontinued reunification services, she had been living with the foster parents for two and a half years and the couple decided they wished to adopt her.<sup>10</sup> They argued to the Superior Court that good cause existed to depart from ICWA’s adoptive placement preference for extended family because Alexandria had been in their care for two and one half years and would experience severe trauma if their bond were to be broken.<sup>11</sup> In March of 2014, the Superior Court determined that the foster parents had not proven by clear and convincing evidence that it was a “certainty that the child would suffer emotional harm by the transfer,” and ordered Alexandria’s placement with her extended family.<sup>12</sup> The foster parents appealed, and the Court of Appeal held that the Superior Court had used an inappropriate legal

5. *Id.*  
6. *Id.*  
7. *Id.*  
8. *Id.*  
9. *In re Alexandria P.*, *supra* note 1, at 1.  
10. *Id.*  
11. *Id.*  
12. *Id.*



## **Case Review by Robyn Jordan**

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standard to determine good cause.<sup>13</sup> The Court of Appeal held in *Alexandria I*<sup>14</sup> that a showing of good cause requires that it be proven “by clear and convincing evidence that there is a significant risk that a child will suffer serious harm as a result of a change in placement.”<sup>15</sup> Because the Superior Court incorrectly defined the good cause standard as a certainty that the child would suffer emotional harm by the transfer, the Court of Appeal reversed and remanded the case for another good cause determination.<sup>16</sup> In November of 2015, the Superior Court concluded on remand that the foster parents had not proven good cause by clear and convincing evidence and again ordered that Alexandria be placed with her extended family.<sup>17</sup> The foster parents sought a writ staying the order to transfer Alexandria to her family in Utah.<sup>18</sup> The →

13. *Id.* at 2.  
14. *In re Alexandria P.*, 228 Cal. App. 4th 1322, 176 Cal. Rptr. 3d 468 (2014), *reh’g denied* (Sept. 4, 2014), *review denied* (Oct. 29, 2014).  
15. *In re Alexandria P.*, *supra* note 1, at 2.  
16. *Id.*  
17. *Id.*  
18. *In re Alexandria P.*, *supra* note 1, at 2.

» Case from previous page

Court of Appeal concluded that the Superior Court had again applied the same incorrect standard for the second time in assessing good cause and directed the Superior Court to apply the correct standard.<sup>19</sup> On remand in March of 2016, the Superior Court again concluded that the foster parents had not shown good cause to depart from ICWA's placement preference and ordered that Alexandria be removed from the foster parents' custody and placed with her extended family.<sup>20</sup> The foster parents appealed for the third time and the current decision was rendered.<sup>21</sup>

The foster parents first argued that the Superior Court was required to make an individual assessment of Alexandria's best interests but failed to do so.<sup>22</sup> They also claimed that by considering the impact on Alexandria's cultural identity if she were to remain with her foster parents, the Superior Court impermissibly expanded the scope of its inquiry.<sup>23</sup> The Court of Appeal rejected this argument, and emphasized that inquiries regarding the substantial risk of serious harm and the best interests of children are intertwined and fact-specific.<sup>24</sup> According to the Court, the best interests of the child is one of many factors courts consider when determining good cause, and Alexandria's connection with her extended family and cultural identity could not be excluded from consideration.<sup>25</sup>

The foster parents then argued that good cause to depart from ICWA placement preferences existed

19. *Id.*  
20. *Id.* at 3.  
21. *Id.*  
22. *Id.* at 12.  
23. *Id.*  
24. *In re Alexandria P.*, *supra* note 1, at 12.  
25. *Id.*

as a matter of law.<sup>26</sup> According to the foster parents, Alexandria had been a part of their family for four years by this time and would inevitably suffer trauma if that bond were broken.<sup>27</sup> The Court of Appeal rejected this argument, concluding that the longevity of a foster placement may sometimes be relevant to deciding whether good cause exists to depart from ICWA placement preferences, but could not be the deciding factor.<sup>28</sup> To use the vague standard of the best interests of the child to determine good cause would disregard the overall policy behind ICWA.<sup>29</sup> To carry out the purpose of ICWA in preserving Indian families, courts should abstain from giving excessive weight to ordinary bonding that may occur in a placement that is noncompliant with ICWA.<sup>30</sup>

The foster parents next argued that the court's finding of no good cause lacked evidentiary support, and that there was no evidence to support the court's conclusions that the tribe would support Alexandria's transition or that Alexandria recognized her father's extended family as her own.<sup>31</sup> The court rejected this argument. Alexandria's counsel, the Department, and the tribe contributed testimony in hearings in support of maintaining Alexandria's cultural identity and her ability to develop new attachments.<sup>32</sup> Alexandria had formed a healthy attachment to her extended family through regular visits and phone calls and had the opportunity to be raised with access to her half-sisters.<sup>33</sup> The Court noted concern that the

26. *Id.*  
27. *Id.*  
28. *Id.*  
29. *Id.*  
30. *In re Alexandria P.*, *supra* note 1, at 10.  
31. *Id.* at 13.  
32. *Id.* at 14.  
33. *Id.* at 15.

foster parents were unwilling or unable to support Alexandria's relationship with her extended family by resisting visitation and insisting Alexandria complete therapy with the foster parents rather than individually.<sup>34</sup> Alexandria's attorney and guardian ad litem disagreed with the foster parents regarding the existence of good cause to prevent Alexandria's placement with her extended family.<sup>35</sup> Due to these factors the Court held that the foster parents' argument that good cause existed to depart from ICWA placement preferences was unsupported by the evidence in the record.

The California Court of Appeal reaffirmed in *In re Alexandria P.* that when determining whether good cause to depart from ICWA placement preferences exists, the individual challenging the ICWA preferences must prove "by clear and convincing evidence that there is a significant risk that a child will suffer serious harm as a result of a change in placement."<sup>36</sup> The Court concluded that factors which courts should consider in making good cause determinations include the child's attachment to her foster parents, the child's relationship with extended family, the ability of the child's extended family to maintain her cultural identity, and foster parents' resistance to support the child's connection to her extended family and the connection to her cultural identity.<sup>37</sup> The Court held that substantial evidence supported the Superior Court's finding that the foster parents in the present case did not prove by clear and convincing evidence that good cause existed to depart from ICWA placement preferences.<sup>38</sup> ■

34. *Id.* at 16.  
35. *Id.* at 17.  
36. *In re Alexandria P.*, *supra* note 1, at 2.  
37. *Id.* at 1.  
38. *Id.*



## Diving Deeper on Cultural Responsiveness



by Betsy Fordyce, JD, CWLS,  
NACC Staff Attorney

These are strange times in our world to be writing about cultural responsiveness – but perhaps our current times also make this one of the most crucial discussions we can be having. Cultural considerations are, of course, not new to child welfare. We have all talked about racial disproportionality, greater training on culturally competent practice, and the need for a more racially diverse foster care system. At base, these conversations require us to acknowledge the occasional divide between law and day-to-day practice in this field.

In 1994, Congress formalized some of its concerns about the interplay of race and our child welfare system with its passage of the Multi-ethnic Placement Act (“MEPA”). MEPA prohibits the denial or delay of placement on the basis of race, color, or national origin. Certainly, this Act properly recognizes that discrimination has no place in family formation. That said, MEPA’s requisite colorblindness also fails to create space for some of the greater practical implications of “culture.”

“Culture” indeed is the hot topic of the day. It has been for a while; in fact, the word “culture” was Merriam-Webster’s Word of the Year in 2014.<sup>1</sup> The dictionary defines “culture” as “the beliefs, customs, arts, etc. of a particular society, group, place, or time.”<sup>2</sup> Cultural considerations are not satisfied with a discussion of race, by checking (or not checking) the boxes. Culture is so much bigger than racial categories. It transcends

1. MERRIAM-WEBSTER 2014 WORD OF THE YEAR, <http://www.merriam-webster.com/words-at-play/2014-word-of-the-year/culture> (last visited July 25, 2016).
2. MERRIAM-WEBSTER: CULTURE, <http://www.merriam-webster.com/dictionary/culture> (last visited July 25, 2016).

the provisions that our laws, such as MEPA, can fully address. In other words, MEPA’s “goal of nondiscrimination does not preclude the acknowledgement and importance of cultural differences.”<sup>3</sup>

This bigger picture view of culture is also present in day-to-day practice. In individual cases, we have seen discussions of “culture” circle around whether placements speak the same native language as the children in their care, make food that the children are used to eating, take the children to church in a religion to which the children are accustomed, or are capable of properly grooming the children’s hair. In no way should we minimize these considerations regarding a child’s well-being and the appropriateness of placement. True discussions of culture, however, require us to ask more.

What is the culture of a particular child, youth, or family? This question should incorporate the larger view of “culture” including beliefs, customs, and world view of a family. How does the child’s culture – his or her day-to-day experiences in the world – impact his or her development? Sense of self? Goals for the future? How do the services we provide take a family’s culture into account? How do our agency policies or court procedures embrace or exclude a family’s culture?

Today more than ever, these are the conversations we need to be having. These are the hard talks that require awareness, understanding, and often times, vulnerable accountability. The NACC is engaged in these conversations through participation on the Capacity Building Collaborative’s Cultural Responsiveness Workgroup. Consider starting (or continuing) these conversations in your own offices, courts, and larger systems. Ask questions and challenge the status quo. That is what is required in moving us all towards a more authentic “culturally responsive” system. ■

3. Anna R. McPhatter & Dana Burdell Wilson, *Cultural Competence: Is it Still Important? How Culturally Competent Social Workers Could Transform Child Welfare*, in LaLiberte, T., Crudo, T., Ombisa Skallet, H., & Day, P. (Eds.), (2015, Winter). CW360<sup>®</sup>: Culturally responsive child welfare practice. St. Paul, MN: Center for Advanced Studies in Child Welfare, University of Minnesota, <http://caschw.umn.edu/wp-content/uploads/2015/03/CW360-Winter2015.pdf>.



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by Sara Whalen, NACC  
Membership Director

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### Frank P. Cervone, Esquire



Executive Director of the Support Center for Child Advocates (Child Advocates), the pro bono lawyer program for abused and neglected children in Philadelphia. Prior to his work at Child Advocates, Frank was a

Staff Attorney at Delaware County Legal Assistance Association and Adjunct Clinical Professor at Villanova University School of Law, where he instructed law students in domestic-abuse and child-support litigation. He previously served as counsel for Saint Gabriel’s System, an agency providing treatment services for juvenile offenders.

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