

TRIAL ADVOCACY SKILLS FOR ICWA ADVOCATES

Presented by CILS on
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Pala Band of Mission Indians

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California Indian Legal Services

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Goals of Training

- ❑ Identify the role of the ICWA Advocate when representing a tribe without legal counsel and the best practices in common hearing phases.
- ❑ Address the most distinct phases of Dependency cases and what the Lay Advocate should anticipate.

Removal of Indian Children & Remedies Under California Law



Agenda

- Historical Context of the ICWA
- Overview of Dependency System – Primary Stages
- Lay Advocates' Role in Dependency & Application of the ICWA: Summary of Advocate Skills Training

Advocates Acting as Attorneys

- (1) Don't cut your own hair.
- (2) Don't wear metal pants at the airport.
- (3) Don't act as your own attorney.
- (4) Going to do it anyway, so training serves as measure of guidance.

Fourth Advocate Training at Morongo on June 13-15, 2016

- Training Agenda & Topics:
- DYMYSIFYING THE JUVENILE DEPENDENCY SYSTEM
- OVERVIEW OF ICWA
- ADVOCATE'S ACTIONS AND ACTIVITIES
- STAGES OF DEPENDENCY AND PROCEEDINGS

Lay Advocates' Actions & Role

- Intervention
- Transfer Motion
- Request to Change Venue
- Doomsday Remedy: Invalidation Motion

Additional Advocate Roles

- Making a Record
- Lodging Objections
- Submitting Written Reports, Pleadings or Motions
- Opening/Closing Statements

Protection of Children & Culture



Historic Context Predates 1978 When the ICWA Became Law



Marketing Children

WANTED Homes for Children

A company of homeless children from the East will arrive at
TROY, MO., ON FRIDAY, FEB. 25th, 1910

These children are of various ages and of both sexes, having been thrown friendless upon the world. They come under the auspices of the Children's Aid Society of New York. They are well educated, having come from the various orphanages. The citizens of this community are asked to assist the agent in finding good homes for them. Persons taking these children must be recommended by the local committee. They must treat the children in every way as members of the family, sending them to school, church, Sabbath school and properly clothe them until they are 17 years old. The following well-known citizens have agreed to act as a local committee to aid the agents in securing homes:

O. H. Avery E. B. Woolfolk H. F. Childers
Wm. Young G. W. Colbert

Applications must be made to, and endorsed by, the local committee.

An address will be made by the agent. Come and see the children and hear the address. Distribution will take place at the

Opera House Friday, Feb. 25, at 1:30 p. m.

B. W. TICE and MISS A. L. HILL, Agents, 105 E. 22nd St., New York City.
REV. J. W. SWAN, University Place, Nebraska, Western Agent.

The Orphan Train



1854 to 1929

- Between 1854 and 1929 between 150,000 to 200,000 children were shipped, paraded, and placed in wholesome, unimpoverished homes in the mid-west, often without their parents' knowledge or consent.
- First Orphan Train left New York for Dowagiac, Michigan with 46 boys and girls between the ages of 10 and 12 years old.

Birth of Licensed Foster Care

- ❑ The practice of sending children away on orphan trains was seen as a modern, efficient way to take the surplus juvenile population from an overcrowded city. The children would be placed in decent Yankee homes where they could receive a proper upbringing.
- ❑ When public outrage curtailed the practice of involuntarily taking children from their parents, to uncertain homes, the birth of foster care licensing and social services oversight began.

Indian Children

- ❑ In 1971 the BIA estimated that 35,000 Indian children were in Boarding Schools or placed away from their families.
- ❑ Senator Abourezk of South Dakota testified in the April 1974 ICWA Congressional hearings that 25% of all Indian children were in foster care, adoptive home or boarding schools.

Foster Care Protections for Indian children – over 40 years after the last Orphan Train

- ❑ Justification for removing Indian children from reservation: poverty; lack of spiritual structure; incubation of delinquency; illiteracy; failure to assimilate; were the same justifications used for the Orphan Train riders, except public policy stopped the exportation of non-Indians on the trains.
- ❑ The Indian Child Welfare Act Hearings commenced in April of 1974, and became law in November of 1978.
- ❑ The Act codified protections for Indian children.

Indian Child Welfare Act Safeguards

- The ICWA required:
 - -Written Notice to Tribes
 - -Right to Intervene *as a party*
 - -Minimum Standards for Removal from Parents or Indian Custodian
 - -Right to Transfer Case to Tribal Court
 - -Active Efforts condition
 - -Invalidation of Improper Orders

ICWA → Dependency



Five Segments –
Dependency Cases are like a
5 slice pie:

- 1) Detention
- 2) Jurisdiction
- 3) Disposition
- 4) Review Hearings
- 5) Permanency

Missing Piece of Pie

- Tribal Participation
- -Notice
- -Intervention
- -Discovery/Disclosure
- -Active Efforts
- -Placement Preferences
- -Expert Witness
- -Transfer

Tribal Participation Makes Pie Whole = Compliance With Law

- ❑ ICWA is a component of Dependency Law
- ❑ Applies to Voluntary Adoptions
- ❑ Procedural Safeguards Triggered by Definitions of Indian Child and Custody & Removal
- ❑ Essential: Familiarity with Dependency Procedures and timetables



Five Dependency Stages & Hearings

- (1) Detention
- (2) Jurisdiction
- (3) Disposition
- (4) Review Hearings
- (5) Permanency Planning

Detention Hearing

- ❑ Detention: Emergency. Continued custody with parent or Indian custodian is contrary to welfare of child. (Welfare & Institutions Code § 319) [Also known as “initial hearing”].
- ❑ Lower *burden of proof*: prima facia showing.
- ❑ Release within 48 hours w/o showing.

Jurisdictional Hearing

- Jurisdiction or Adjudication: Must prove that a child falls within one of the 10 jurisdictional categories: § 300(a) – (j).
- (a) Serious Physical Harm: child has/substantial risk of serious (non-accidental harm)
- (b) Failure to Protect
- (c) Serious Emotional Damage
- (d) Sexual Abuse

Additional Jurisdictional Grounds

- (e) Under 5 years old – severe physical abuse
- (f) Parent/Guardian caused sibling death
- (g) No provision for support (abandoned, incarcerated parents)
- (h) Voluntary relinquishment by parent (for adoption)
- (i) Acts of cruelty by household member
- (j) Sibling Abuse

Dispositional Hearing

- ❑ Hearing and adoption of case plan for reunification of family (if minors removed).
- ❑ Distinguish Family Maintenance and Family Reunification. [Active Efforts to ICWA cases].
- ❑ Contain all matters relevant to disposition and recommendations, and placement. Qualified Expert Witness required.
- ❑ Caveat: § 361.5(b) bypass grounds.

Periodic Review Hearings

- Six Month Review Intervals.
- Serve as a Report Card for Case Plan compliance and modification of services.
- Younger children (under 3 years old) 12 months maximum, older children up to 24 months of services.

Selection & Implementation Hearing

- ❑ Welfare & Institutions Code (and AFSA) compel permanency (§ 366.26).
- ❑ Select a permanent plan for children:
Return to parents, guardianship, adoption (termination of parental rights), customary adoption.
- ❑ 120 days to schedule hearing, second time expert witness is needed.

Tribes in California today

- With over 500,000 Indian in California we have the largest American Indian population of any state.
- 110 federally recognized tribes in California.
- Approximately 50 CA tribes petitioning for recognition.

Indian Child Welfare Statistics (Pre-ICWA)

- Congressional hearings revealed pattern of wholesale public and private removal of Indian children

- in California
 - Indian children are 8 times more likely to end up in adoptive placement

 - Over 90% placed in non-Indian homes

...Congress' Findings

- ❑ An “alarmingly high” percentage of Indian families are broken up by often unwarranted removal of children.
- ❑ An “alarmingly high” percentage of such children are placed in non-Indian foster and adoptive homes and institutions.
- ❑ State courts have often failed to recognize:
 - Essential tribal relations of Indian people.
 - Cultural and social standards prevailing in Indian communities and families.



Additional Bases for ICWA

Indian children placed in non-Indian homes frequently suffer serious adjustment problems during adolescence.

Goals of ICWA (25 USC 1902)

- ❑ To protect the best interests of Indian children
- ❑ To promote stability and security of Indian tribes and families
- ❑ How to Accomplish?
 - Establish minimum Federal standards for removal and placement, which reflect the unique values of Indian culture. Now adopted in California by SB 678.
 - Assist Tribes in operation of child and family service programs.

Overview of ICWA

- Definitions
- What cases or proceedings are covered
- The Steps to Implementation
 - Inquiry & Notice (Forms ICWA 010-030)
 - Intervention (Written or Oral) § 1911(c) W&I § 224.4
 - Right to Continuance, Counsel
 - Access to Records – Discovery & Disclosure
 - Remedial Services § 1912(d)
 - Expert Witnesses/Evidentiary Burdens § 1912(e)
 - Placement Preferences § 1915 W&I § 361.31

Definitions under the ICWA

- Indian Child
- Indian Custodian
- Indian parent
- Tribe and Tribal Membership
- Tribal Jurisdiction
- Child Custody Proceeding

Indian Child

- An Unmarried minor that is either a
 - member of Indian tribe; or
 - eligible for membership and biological child of a member

- Enrollment not necessarily prerequisite for membership. Many Tribal Members will not have a “membership card” or “proof” that they are Indian.

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. It does not include the unwed father where paternity has not been acknowledged or established [25 USC § 1903(8)].
- ❑ To be an Indian parent, the person does not have to be Indian.

Indian Custodian

- Any Indian person who has legal custody of an Indian child under:
 - Tribal law or custom
 - State law (e.g., guardianship or adoption)

- Any Indian person to whom temporary physical care, custody and control has been transferred by the parent.

- Indian Custodians have the same rights as a parent under ICWA - Examine if Removal is from the Indian Custodian.

Indian Tribe

- Any tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native villages defined in Section 1602c of Title 43.
- Common term “Federally Recognized Tribe.”

Tribal Membership

- ❑ Tribe's retain sovereign power to determine membership.
- ❑ Tribe's determination of membership or eligibility is conclusive.
- ❑ In absence of a tribal determination, BIA's determination is conclusive.

Role of ICWA Advocate at Jurisdiction and Beyond (Isaiah W. Pending)

- 1) Determine if Proper Notice was given.
- 2) Refer to Tribe's Enrollment Office.
- 3) Intervene (Oral or Written)
- 4) Request Discovery and Disclosure
- 5) If Tribe has not received access to records make record ask for continuance
- 6) Request permission to examine witnesses
- 7) Determine if Tribe has exclusive jurisdiction
- 8) Determine if Transfer to Tribal Jurisdiction is appropriate
- 9) Object to inappropriate pre-jurisdictional orders

Advocate Training Curriculum and Common Issues

- Delia Parr: Primary Trainer

- Curriculum Covers:
 - Dependency Procedure
- -Transfer to Tribal Court
- -Role of BIA Guidelines (regulations)
- -Rules of Court vs. Statutory Law
- -Contested Issues & Best Practices