

# Who Is an Indian Child under the ICWA?

## A Proper Look at Membership and the Existing Indian Family Doctrine

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The question of who is an Indian child is one of the most important issues under the Indian Child Welfare Act ("ICWA") – that is not to say it is more significant than the rest of the Act, but it is a key and paramount issue that determines whether the rest of the statute is activated. It is the first question that has to be answered in a child custody proceeding and, in that respect, is key to the Act's overall effectiveness. Unfortunately, in reality, there is a significant failure to identify Indian children under the Act – and when a child is identified as Indian, it is too often too late in the proceedings. This reality leads to an undermining of the Act's overall effectiveness and is one of the reasons we have seen little to no improvement in the rates Indian children are being removed from their homes since the ICWA was enacted. Given the importance of identifying a child as an Indian child under the Act, in practice, it is probably better to ask in every child custody proceeding from the first moment *whether* the child is an Indian child under the Act to ensure no Indian child is overlooked.

The definition of Indian child in the act references membership and eligibility for membership. This is fairly straight forward, but most people tend to miss the fact that membership does not necessarily equate to enrollment. To read the definition as being limited to enrollment or eligibility for enrollment is giving it much too narrow of a reading. Generally, yes, membership includes enrollment, but it also would include what should probably best be referred to as those recognized by the community as an Indian child.

When it wants to, Congress uses the word "enrollment" if that is how it wants to limit the scope of a definition of Indian or tribal member. In the case of the ICWA, Congress chose not to use the term "enrolled." Additionally, the very purpose of the Act to provide a means of strengthening tribes and tribal culture supports a reading that a recognized community member is included in the definition of Indian under the Act. This applies to both the child and the parent of a child. Thus, in terms of eligibility for membership, the child of a parent who is considered a recognized community member (but not enrolled) can still be considered an Indian child under the Act.

As an example, you might see cases where one child is enrolled and his half-brother is not enrolled because the half brother is like 1/16 short of the blood quantum. But, the two brothers grow up in the same home, live essentially the same life, with the same family, and the same culture. If you equate membership to enrollment, then the first child receives the protections of the ICWA and the second one does not. If this is the case, the ICWA is basically irrational and contrary to its very

purpose. Therefore, in order to ensure the act is a rational statute that is meant to serve its purpose, membership must be read as potentially including not just those who are enrolled, but those recognized by the tribal community as members.

Of course, who is a member will vary from tribe to tribe – for some tribes, it may very well be that enrollment equals membership and no one else is considered a member. And, of course, if that is the tribe's standard, that is the standard that applies to determine if a child in an Indian child under the ICWA. But, other tribe's I have worked with make a discrete distinction between "tribal members" and "community members" – the former being enrolled members and the latter being recognized by the tribe as members, but for whatever reason not enrolled. For all intensive purposes, "community members" are treated the same as "tribal members," have the same participation in the community on a social, cultural, and, to a certain extent, political level, and are only distinguished by their status as enrolled or not enrolled.

This difference in determination of membership, naturally, raises the second important issue with determination of who is an Indian child: recognizing the determination of the tribe. The Bureau of Indian Affairs' ICWA guidelines are very clear in providing that when a tribe says a child is a member or eligible for membership or the child's parent is a member, that determination is conclusive. And, there should be no exception to this standard. A lot of states, however, will reject the BIA guidelines when it is inconvenient or conflicts with their notions of the Act. Additionally, there are some state courts that take it upon themselves to make the determination of membership and even outright reject the tribe's determination of membership. That is simply totally inappropriate.

Obviously, it is completely disrespectful of tribal self-government and self-determination and flies in the face of all of the uniform case law providing that tribes have the unfettered authority to determine their own membership. But, additionally, a state court is clearly not in the position to determine tribal membership on behalf of a tribe from a practical standpoint. A state court not only lacks the knowledge and expertise to determine tribal membership, the issue itself lacks judicially manageable standards when you consider there are nearly 600 Indian tribes all with different standards of membership.

The practitioner should also argue that state courts lack jurisdiction to determine tribal membership. Fundamentally, a state lacks subject matter jurisdiction where its actions would

interfere with a tribe's right of self-government – this is the rule from *Williams v. Lee*,<sup>1</sup> and it is still fully in tact. As the 9th Circuit pointed out in *R.J. Williams Co. v. Fort Belknap Housing Authority*,<sup>2</sup> when a state court attempts to determine a matter within the province of tribal law applying institutions, it is infringement and the state lacks subject matter jurisdiction. Since membership issues are clearly within the province of the tribe itself and its institutions that apply and interpret the law governing tribal membership, any time a state court takes it upon itself to determine tribal membership, it is direct infringement and outside of its authority.

The last main consideration in determining who is an Indian child under the ICWA is the existing Indian family doctrine. A lot of states have adopted this doctrine and a few, like Arizona and Utah, have rejected it. In short, the existing Indian family doctrine attempts to look at the child's culture and relationship with his or her tribe to determine whether there is significant contact with the tribe and culture in order for the child or its family to be considered "Indian enough" for the protection of the Act. I am not concerned here with the ins and outs of the doctrine, but rather with the fact that the fictional doctrine is simply a gross misreading of the Act. Nonetheless, it is worth noting that the doctrine can be applied in two ways. One is to look at the child's connection to the tribe or tribal culture and the other is to look at the child's family's ties. Courts typically will follow one method or the other. For example, California has rejected the idea of looking at the child's connections on the grounds the child cannot be considered to have had the opportunity of his or her own accord to establish those connections.

But, that's somewhat irrelevant for my purposes here because the existing Indian family doctrine is simply bogus. States have pretty much always been hostile to tribes in general and the ICWA in particular. We must always remember where Indian law jurisprudence first began: the hatred of a state for an Indian tribe and its peoples. The existing Indian family doctrine is, to me, an excuse to avoid the ICWA – a way to undermine it and interfere with its effectiveness that stems from state hostility over the Act. In this respect, one should note that one of the factors a state court will look to in determining whether there is an existing Indian family is whether the family has ever lived on its tribe's reservation. Yet, the *only* cases a state court should be dealing with under the ICWA are those cases where the child is domiciled *off* reservation.

The ICWA expressly provides for exclusive tribal jurisdiction over children domiciled on reservation, except where *existing* federal law provides for state jurisdiction. Many people assume Public Law 280 is such a federal law, but that is actually a false notion. P.L. 280 only gives states jurisdiction over private civil litigation involving individual Indians and arising in Indian country within the state. With the exception of private adoption proceedings, a child custody proceeding under the ICWA is not private civil litigation – it is the state exercising police powers in an action of a public nature, so P.L. 280 is not

an authorization of jurisdiction for on-reservation child custody proceedings. This principle is essentially clear after both *Bryan v. Itasca County*,<sup>3</sup> and *California v. Cabazon Band of Mission Indians*.<sup>4</sup> Since state courts only are dealing with children who are not domiciled or residing on-reservation, essentially, every Indian child in a state court proceeding starts out with a strike against him in terms of the existing Indian family doctrine because he would not be in front of the state court in the first place if he was not domiciled off-reservation. With just this small amount of digging, the ridiculousness and inappropriateness of the doctrine become readily apparent.

Of course, states give several reasons for the existing Indian family doctrine. First, state courts really reach and try to say the language of the Act requires that before its provisions can apply, the court must be faced with a child that is being removed from an "Indian family." The courts point to the findings and purpose of the Act, which refer to "an alarmingly high percentage of Indian families [being] broken up,"<sup>5</sup> and "promot[ing] the stability and security of Indian . . . families"<sup>6</sup>. Some also point to the reference to "Indian family" in the remedial service provisions of the Act.<sup>7</sup> But, that is a stretch.

If you look to the actual substantive provisions of the Act, it uniformly speaks of "child custody proceedings" involving an "Indian child."<sup>8</sup> Nowhere does the Act state "child custody proceedings" involving "an Indian child" that is "being removed from an existing Indian family." Thus, the express language of the Act, which normally should rule its construction, would not allow for any existing Indian family doctrine. In fact, state courts are rewriting the Act by inserting the phrase "being removed from an existing Indian family" throughout the Act's substantive provisions. The argument that the Act's language mandates the doctrine simply does not fly.

State courts also say that the Act's purpose is to preserve Indian culture and if the child does not come from an Indian culture, the Act's purpose is not served. This is extraordinarily short-sighted. Even if we can say a child is not culturally Indian at present, it presumes that in a child's entire life, he or she will never become part of the tribe or engage in the tribe's culture. That is simply not something that can be predicted, especially by a non-Indian judge in a non-tribal jurisdiction. Regardless, contrary to the assertion, the Act's purpose is precisely served even if a child who in a non-Indian court's eyes is not "Indian enough" obtains the protections of the Act. If one of the Act's chief purposes is to help tribes preserve their culture, placement of the child with his extended family or another family from the child's tribe will likely result in the child becoming more closely

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<sup>1</sup>358 U.S. 217, 220 (1959).

<sup>2</sup>719 F.2d 979 (9th Cir. 1983).

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<sup>3</sup>426 U.S. 373 (1976).

<sup>4</sup>480 U.S. 202 (1987).

<sup>5</sup>25 U.S.C. § 1901(4).

<sup>6</sup>*Id.* § 1902.

<sup>7</sup>*Id.* § 1912(d).

<sup>8</sup>*E.g., id.* § 1911(a),(b),(c), § 1912(a).

tied with its tribe and its culture which would directly serve the purpose of the Act. In addition, the Act inherently seeks to reverse the problems state courts caused in the first place by inappropriately dealing with Indian child custody proceedings. Therefore, even assuming a child is not “Indian enough,” returning that child to its tribal connections serves a direct purpose of the Act to reverse that disconnection in the first place. One Utah court actually pointed out that the irony of applying the existing Indian family doctrine is that the child may not have significant tribal ties because his or her parents were subject to inappropriate state court actions that the ICWA is designed to stop prior to the ICWA being adopted. In the end, the “purpose of the Act” justification simply does not cut it either.

It should also be noted that, implicitly, *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>9</sup> rejects any construction of the Act which would limit its application because of the parents’ actions. There, the Supreme Court rejected the idea that the child’s mother could avoid application of the Act by giving birth off-reservation. In other words, the mother’s actions could not limit the Act’s scope. Certainly the same rule would have to apply when considering the existing Indian family doctrine.

The final reason states try to give to justify the existing Indian family doctrine is that it is necessary for the Act to be considered constitutional. But, again, this simply is not true. The states look at the 10th Amendment and equal protection for their argument. Under the 10th Amendment, states assert that they have reserved authority over family matters and children and if Congress is going to act on those issues, it must be in order to prevent the application of state law from injuring a substantial federal interest. So, the state courts claim that a federal interest can only be involved if the child is “Indian enough” to fall within Congress’ interest in assisting tribes with preserving their culture and vitality. But, again this is much too narrow of a reading of the Act and of Congress’ interests. As mentioned above, the purpose of the Act to assist tribes with preserving their cultures and vitality is directly served by ensuring that a child has the opportunity to develop and maintain its ties to its tribe and culture, even if the child at the moment is not “Indian enough” in a non-Indian court’s eyes. Furthermore, the 10th Amendment argument also ignores the simple fact that, in Indian affairs, the states have zero authority. The Supreme Court reminded the states of this just a few years ago in *Seminole Tribe v. Florida*,<sup>10</sup> when it said that the Indian commerce clause actually transfers more power to the federal government than the Interstate commerce clause. The Court said states “have been divested of virtually all authority over Indian commerce and Indian tribes.”<sup>11</sup> Thus, there is no 10th Amendment reservation of power to the states when dealing with Indian children, even in child custody proceedings, and even when within the state’s territorial jurisdiction.

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<sup>9</sup> *E.g.*, *id.* § 1911(a),(b)©, § 1912(a).

<sup>10</sup> 517 U.S. 44, 62 (1999).

<sup>11</sup> *Id.*

As for equal protection, the argument goes that, if the Act applies to a child who has no “Indian culture,” then the definition of Indian child becomes a race based classification. The courts say that, without any cultural distinction, the definition of Indian child becomes purely an issue of biological heritage. But, that’s neither factually nor legally true. Even if one pretends that any child with Indian blood falls within the definition, it is still circumscribed by the definition’s use of Indian tribe, which is defined narrowly as a “federally recognized Indian tribe.” Therefore, even if biology became the only consideration, the definition still would exclude children of state recognized tribes, totally unrecognized tribes, every Canadian First Nation, and every indigenous population south of the United States. So, automatically, there is no racial classification – instead, you have a classification based on the status of an Indian child’s tribe being federally recognized, not his race as an Indian. And that is precisely where any equal protection issue falls apart. The Supreme Court already decided this issue a long time ago in *Morton v. Mancari*<sup>12</sup> in terms of the BIA hiring preference for Indians. The Supreme Court clearly stated that in the case of any preferential treatment of Indians, a rational basis standard applies.<sup>13</sup> The application of a rational basis analysis in *Mancari* had nothing to do with a cultural base, nothing to do with enrollment, nothing to do with blood quantum. Under *Mancari*, when dealing with a preference for Indians where that term involves only federally recognized tribes, the classification is a political one, not a racial one.<sup>14</sup> This is fairly straightforward – a person is Indian and a child is Indian under the ICWA because of his relationship with a federally recognized tribe in terms of membership. The relationship of a federally recognized tribe and its members to the United States is itself a political relationship between two governments, between two sovereigns. That relationship does not exist with Canadian First Nations, non-federally recognized tribes, or any other indigenous peoples outside the United States. ICWA’s findings themselves recognize the unique relationship between the United States and Indian tribes and their members and that is the foundation for the Act itself.<sup>15</sup> Therefore, all that is required for the ICWA to pass equal protection scrutiny is a rational basis. Truly, no one can reasonably argue that the Act is not rationally related to a legitimate governmental interest – the interest is stated within the Act itself.<sup>16</sup>

In the end, the idea that the existing Indian family doctrine is necessary to save the Act from being struck down as unconstitutional is also a fallacy, which brings us back to simply applying the ICWA’s clear terms – the Act applies to any child custody proceeding involving an “Indian child” without regard to any “Indian enough” standard.

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<sup>12</sup> 417 U.S. 535 (1974).

<sup>13</sup> *Id.* at 554.

<sup>14</sup> *Id.*

<sup>15</sup> 25 U.S.C. § 1901(1),(2).

<sup>16</sup> *Id.*

It is worth noting as well that, when a state court sits and makes a determination of whether a child or his or her family is "Indian enough," the court is doing exactly what ICWA instructs them *not* to do. The ICWA recognizes on its face that the problems it is designed to remedy are caused by states "fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."<sup>17</sup> Yet, state courts applying the existing Indian family doctrine are still doing this – they are outsiders from the majority culture passing judgment on the culture of an individual Indian. My personal gut reaction is to say, "who do they think they are telling Indian peoples whether they are Indian enough?" Is some judge going to sit at his bench and tell an Indian person he or she does not eat enough fry bread in his opinion to be considered Indian? The idea of state court judges passing judgment on an Indian person's culture and tribal relations is fundamentally offensive. Regardless, the Act is specifically designed to *stop* state court judges from behaving in this manner because it inherently leads to the destruction of Indian tribes and Indian culture and brings us right back where we started in the days before the ICWA and it cannot be forgotten that whether a child is an Indian child is up to that child's tribe and not some non-Indian judge.

There is one final big fundamental problem with the existing Indian family doctrine – justiciability. It is elemental that courts do not deal with issues that are not justiciable – matters which lack judicially discoverable and manageable standards for resolving them are things the courts do not deal with. Yet, what can be more squarely within this classification of nonjusticiability than a court trying to determine a person's culture? What standard is a court suppose to apply? What is the rule of law? Rate of pow wow attendance, membership in the Native American Church, frequency of attending ceremony? It is really ridiculous. There are nearly 600 federally recognized tribes, each one with its own culture which is not static, but living and constantly growing and modifying, and each with its own standard of what constitutes a member. There is simply no way for the law to account for this in a meaningful way and no way for a court to apply any judicially manageable standard to properly identify who is "Indian" for purposes of determining whether there is an existing Indian family. Thus, there is yet another barrier to the validity of the existing Indian family doctrine. Essentially, once we look under the surface, it becomes readily apparent that the existing Indian family doctrine has no real basis and its only justification can be an attempt to undermine the Act by states who continue to be hostile to Indian tribes, Indian families, Indian culture, and Indian values.

In determining who is an Indian child under the Act, it is, unfortunately, not just a matter of identification, but a matter of having to push against constant attempts to limit the application of the ICWA and undermine its purpose. The problem stems, like many of the other problems with the Act's implementation, from a continued attempt to apply white values in an area where they simply do not fit – where even Congress has said to stop it. Some time ago, I listened to an attorney and a child services

organization complain that trying to determine whether a child is Indian results in too long of a delay in finalizing adoption proceedings and that delay hurts the children. So, they want to find a way to basically skip over the process of identification and limit who is an Indian child to an enrollment standard. Setting aside the fact that most of the attorney's complaints could be resolved if he would just stop being lazy, the entire complaint really stems from the refusal to recognize that ignoring that a child is Indian and risking his removal from his tribe, his extended family, and his culture is itself grave harm to the child. It is a refusal to set aside white values of what is in a child's best interest and recognize that they do not apply here. Actively working to stop that fundamental error may be the first step in actually seeing the Act's purpose fulfilled because the rates of removal of Indian children cannot go down until those white values are set aside when dealing with Indian children so that the child's tribe's values (and I must stress the "tribe's" values, because the values and what is appropriate for a child will vary from tribe to tribe) can have room and the true best interests of each Indian child can be determined. In the end, that is really what this is all about – it is about the children, and the actions of states to intentionally avoid the Act through ignoring a tribe's determination of membership, claiming to tell an Indian person he or she is not "Indian enough," and continuing to apply white values to the exclusion of tribal values really only leads to the suffering of and injury to Indian children.

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<sup>17</sup>*Id.* § 1901(5).