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Best Interests of an Indian Child

By Hon. Peter J. Herne

Family law treatises summarize New York's "Best Interest of a Child" standard as follows:

1. Maintaining stability for the child(ren)
2. Child(ren's) wishes
3. Home environment with each parent
4. Each parent's past performance and relative fitness
5. Each parents ability to guide and provide for child(ren's) overall well-being
6. Each parent's willingness to foster a positive relationship between the child(ren) and other parent.¹

Abundant case law in New York has identified factors (e.g., drug use, employment, health, history, etc.) which will have an impact on this standard. These factors will then help guide the court in making a custody determination that is in the best interests of the child.

Our focus is on Indian children, and our legal research did not disclose any New York cases containing the words "best interest of an Indian child."² We also did not discover any New York statutes or rules containing those terms, so we pose the following question:

"Where should the fact that the child is an *Indian child* be placed in New York's best interests of the child standard?"

It is likely that most attorneys simply consider Indian child merely as a racial factor in the standard. This response, however, fails to recognize that a best interest of an Indian child standard is inherently different from New York's best interest of a child standard.

Best Interests of an Indian Child and Tribal Nation Citizenship

While we could easily author a treatise on the subject of federal Indian law, discussing the foundational "trinity" of Supreme Court cases,³ the hundreds of Treaties entered into between the United States and Tribal Nations⁴ or the progeny of cases that have been decided since, most important for our discussion is to recognize that Tribal Nations are possessed with inherent sovereignty and that relationships between a Tribal Nation and its members are within the exclusive jurisdiction of the Tribal Nation.⁵

Due to this, Indian children possess "different interests," which can be affected by a custody determination. This is not due to any race factor, but rather to the political status of the child's being "Indian." An Indian child enjoys certain rights and privileges by virtue of being a Tribal Nation citizen/member.⁶ These include:

1. **Certain Rights and Privileges by Operation of Federal Law:** A multitude of federal laws and programs are specifically addressed to, or involve, Native Americans; the least of these are the Treaties between the United States and the Tribal Nations. Another example of federal legislative involvement is the Indian Child Welfare Act (ICWA).⁷
2. **Health Care:** Currently the United States Bureau of Indian Affairs (BIA) and Department of Health and Human Services (USDHHS) have a unique relationship with Indian Health Services (IHS). IHS operates numerous health clinics and hospitals on many Tribal Nation territories throughout the country. It is the primary health care delivery system for many Native Americans and is often the mechanism by which the United States meets its treaty obligations and/or trust responsibilities.⁸
3. **Educational Benefits:** BIA offers numerous primary schooling benefits as well as college assistance. New York State also offers educational benefits, and some Tribal Nations are now in the position to offer additional college assistance to Tribal Nation members.
4. **Border Crossing Rights:** Although for many years an issue for Tribal Nations in New York, this is actually related to the historic Jay Treaty which recognized the right of Native Americans to cross and re-cross the international border.⁹
5. **Right to Own and Inherit Reservation Property:** Although common legalese states that a respective Tribal Nation owns all the real property comprising an Indian Reservation, the reality is that in many Tribal Nations there is a historic and customary allocation of "real property" held by individual Tribal Nation citizens/members and their families.
6. **Right to Participate in Tribal Nation Governance:** Irrespective of the nature of the Tribal Nation government, nearly every Tribal Nation has some type of governance system. To hold office or participate in that system, one generally has to be a member/citizen of that Tribal Nation.
7. **Direct Assistance:** Some Tribal Nations are now in a position to offer a periodic payment to their citizens/members (often called per-capita payments).
8. **Belonging:** Many Tribal Nations recognize that the *best interests of an Indian child* can only be realized when an "Indian child" can establish, develop, and maintain political, cultural, and social relationships with their Indian family, community, and Nation.¹⁰

The foregoing list is synonymous with the rights and privileges of citizenship, and like such rights, it often does not require any level or degree of participation by an Indian child. Likewise, it very often also does not require the Indian child to "join" the Tribal Nation, and in many instances does not require residency within a Tribal Nation.¹¹

The point is, these rights and privileges are not the product of any racial consideration and/or classification. Instead, they originate and flow from a political classification, recognized in the law, due to the Tribal Nations' inherent sovereignty. Simply by being born, the Indian child is possessed with these rights and privileges, which is very often recognized by numerous Tribal Nations (if not universally) as being inherent. As such they are not benefits one acquires by joining the Tribal Nation. A Tribal Nation is not a fraternal organization.¹²

It is also important to recognize that the granting and defining of the rights and privileges is within the exclusive jurisdiction of the Tribal Nations themselves.¹³ These are *not* subject to the rulings of any state or federal court.

Joining of "Best Interest" and "Indian Child" Language

ICWA contains "best interest" and "Indian child" language for the establishment of minimum federal standards in relation to Indian child welfare matters,¹⁴ but this must be read with other parts of ICWA. For instance, ICWA also recognizes the right of Indian parents and Indian children to be maintained as an Indian family.¹⁵ ICWA weaves this interest with the Tribal Nations' interests in children of their Tribal Nations.¹⁶ Therefore, ICWA's best interest of an Indian child language is intertwined with the interests of Indian parents and Tribal Nations. This structure recognizes that, for Tribal Nations, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."¹⁷

ICWA is not the only place to find the phrases "best interest" and "Indian child," however. In fact, it has been at the state level that some of the most noteworthy efforts at joining these terms into a "best interest of an Indian child" standard can be found.

Jurisdiction

As one can imagine, numerous states must address jurisdiction issues with various Tribal Nations; these states include Washington, Wisconsin, and Minnesota.

These states are noteworthy not only because they have a best interest of an Indian child standard in their domestic law, but also because they are Public Law (PL) 280 states.¹⁸ Under PL 280, the federal government in essence grants states the right to exercise state jurisdiction within a Tribal Nation territory, which may include some civil jurisdiction inclusive of family law matters. We note this because the PL 280 scheme is very similar to that found in New York, which is under 25 U.S.C. § 233.¹⁹

Like New York, Washington, Wisconsin, and Minnesota have multiple Tribal Nations and territories located within their external boundaries.²⁰ Nonetheless, in many instances Tribal Nations in these PL 280 states continue to exercise family law jurisdiction over their members even in light of (or, in spite of) the jurisdiction-granting statute.

Each of these states has seen recent changes to its domestic laws and policies with respect to Indian children in the state. In Wisconsin, this may have been prompted by a U.S. Department of Health and Human Services review; in Minnesota, by a study that identified disparities in the treatment of Indian children; or, in Washington, due to a concerted effort by Tribal Nations to have jurisdiction retro-ceded to the Tribal Nations and/or federal government and away from the state.²¹ In any event, the result has been policy changes creating and incorporating a best interest of an Indian child standard.

Now both Washington and Wisconsin provide for this basic definition of a best interest of an Indian child standard:

[It] reflects and honors the unique values of the child's tribal culture and is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, social, and spiritual relationship with the child's tribe and tribal community.²²

Minnesota has taken a different approach.²³ Although Minnesota is also a PL 280 state, it is unique from Washington and Wisconsin in that although it has not made any recent legislative changes to its Indian child welfare laws, it has made significant changes in how the existing laws are implemented – that is, policy changes. Most noteworthy was the state's entering into Social Service Agreements with Tribal Nations in 2007.

The Minnesota agreements not only echo the best interest of an Indian child standard found in Washington and Wisconsin, but go even further by providing that the Tribal Nation defines the best interests of Indian children and Indian families, that the intent of the state's laws is to protect Indian children's sense of belonging with their family and Tribe, and that child-rearing practices are best obtained from each Tribe.²⁴

Perhaps the most interesting aspect of the Minnesota/Tribal Nation agreements is the treatment of foster care payments. In changes brought on by the agreements, Minnesota also permitted Indian children to receive foster care support irrespective of the court that placed them into foster care.²⁵ Therefore, in Minnesota an Indian child who may have been placed into a Native American foster home by a Tribal Nation court would still receive a foster care payment from the state.

Best Interest of an Indian Child Standard in New York

New York has no mention of the best interest of an Indian child standard in any statute, case, or regulation. In fact the closest thing to such a standard can be found in N.Y. Court Rules applicable to N.Y. Supreme, Family, and County Courts. The Rules simply mandate those courts to "proceed . . . in accordance with" ICWA.²⁶

An interesting twist to the New York statutory scheme is that, like Minnesota, there are provisions for Tribal Nations to enter into agreements with the New York State

Office of Child and Family Services for social services inclusive of foster care.²⁷ Although these Section 39 agreements provide for reimbursement to Tribal Nations, those reimbursements can be made only if the Indian child has "been remanded, discharged, or committed pursuant to the Family Court Act of the State of New York."²⁸ Therefore, these agreements result in an Indian child only being able to access foster care support if he or she goes through a New York family court, a court system that has not recognized, nor has been legislatively mandated to follow, a best interest of an Indian child standard.

Next, it is not only foster care which could result in the removal of an Indian child. Other N.Y. court proceedings may also have the same result (e.g., a person in need of supervision or PINS proceeding). It is interesting to note that Wisconsin has extended both ICWA and its best interest of an Indian child standard to proceedings commonly involving adolescents: uncontrollability, habitual truancy, school dropouts, and habitual runaways.²⁹ As of now, New York appears to have no inclination to do the same.

We could easily be left with the impression that it is simply a matter of advocating for a legislative fix. Perhaps it is better to recognize that it may be time to modernize the legal representation of the Indian child. Perhaps it is time to recognize, as Justice Antonin Scalia succinctly stated in his *Baby Girl* dissent: "We do not

Indian children possess "different interests," due to being "Indian."

inquire whether leaving a child with his parents is 'in the best interests of the child.' It sometimes is not; he would be better off raised by someone else. But parents have their rights, *no less than children do.*"³⁰

As members of the legal profession, we must recognize that every foster care placement order, adoption decree, or termination of parental rights decision involving an Indian child has the very real possibility of disenfranchising or alienating an Indian child from his or her respective rights and privileges as a citizen of a Tribal Nation. Very often this occurs without due process protections. In simplest terms, when does an Indian child get to present to a court?

"By operation of federal law I have the right to receive any rights and privileges due to me being a Tribal Nation member. I have the inherent rights to: own property within my Tribal Nation, to be the next leader of my Nation, or to decide who is going to be the next leader of my Tribal Nation. Furthermore, I have the right to know who my family and Nation is, and to enjoy the liberty and right to be with them."

There are very few reported cases addressing these issues, including the *Baby Girl* case. ■

1. This best interest of the child standard is primarily case-law driven and is passively included in some N.Y. statutes. See N.Y. Social Services Law §§ 358-a, 384-b (SSL).
2. We will use the term “Indian child” as it is that term is the one used in many legal documents (laws, regulations, decisions, etc.).
3. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 [1831]; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 [1832]; *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 [1823].
4. See Indian Affairs Laws and Treaties Vol. II (Compiled and edited by Charles J. Kappler, Wash. GPO 1904).
5. See *United States v. Mazurie*, 419 U.S. 544 (1975) “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and territory. They are a separate people possessing the power of regulating their internal and social relations.” (citation omitted) (citing *United States v. Kagama*, 118 U.S. 375 (1886); *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973)).
6. We use “citizen” and “member” interchangeably, as many Tribal Nations vary in their use of the terms.
7. See 25 U.S.C. §§ 1901 *et seq.*
8. It should be noted that this care is portable. Thus, by being a citizen of a Tribal Nation any Indian child will have access to this care at any I.H.S. facility (e.g., a St. Regis Mohawk child can receive care at the Seneca Nation I.H.S. facility, and vice versa).
9. See generally 8 U.S.C. § 1359 codifying this right. See also the cases decided under it.
10. It is interesting to note that on the International level this sense of belonging is an actual right for children. See United Nations “Convention on the Rights of the Child.”

Provisions from the UN “Convention on the Rights of the Child” include:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without lawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.
3. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
4. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

Please also note that currently the United States is *not* a signatory to this convention.

11. Similarly, ICWA does not require any domicile/residency on an Indian reservation for it to apply. See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).
12. See *United States v. Mazurie*, 419 U.S. 544 (1975): “Cases such as [*Worcester* and *Kagama*] surely establish the proposition that Indian tribes within ‘Indian Country’ are a good deal more than ‘private voluntary organizations.’”
13. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Patterson v. Council of Seneca Nation*, 245 N.Y. 433 (1927).
14. “The Congress 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 assistance to Indian tribes in the operation of child and family service programs.” See ICWA at 25 U.S.C. § 1902.
15. Mandated remedial services efforts are supposed to be provided prior to removal, and active efforts to re-unite are required, and certain evidentiary standards must be met to break up an Indian family. See ICWA § 1912(d), (e), (f).
16. Notice requirement to Tribal Nations, intervention right for Tribal Nations, placement selection right for Tribal Nations, and full faith and credit for Tribal Nation acts, orders, judgments. See ICWA § 1911, § 1912.
17. See ICWA at § 1901.

18. See 18 U.S.C. § 1162; 25 U.S.C. §§ 1321–1326; 28 U.S.C. § 1360.
19. We must also note that although the purported purpose of PL 280 and 25 U.S.C. § 233 are similar with respect to civil jurisdiction transfer, they are separate statutes. Wherein, PL 280 is more exacting in the forms of civil jurisdiction which were transferred from federal to state government and 25 U.S.C. § 233 is more akin to a choice of forum statute.
20. In New York these are the Shinnecock and Unkechaug on Long Island; Oneida, Onondaga and Cayuga in Central New York; St. Regis Mohawk in Northern New York; and Seneca, Tonawanda and Tuscarora in Western New York.
21. Washington has become the first state to ratify legislation in which a Tribal Nation can seek retrocession of state jurisdiction. See Washington State Statutes, Indians and Indian Lands – Jurisdiction, Chap. 37.12.160 (2012); *Governor Signs Tribal Retrocession Bill Into Law*, Seattle Times, Mar. 19, 2012.
22. See Washington Statute Indian Child Welfare Act Chapt. 13.38, 13.38.040 (2011). See also Wisconsin Laws Ref. § 48.01(2); § 938.01(3), which provide that: “when an out-of-home care placement, adoptive placement, or pre-adoptive placement is necessary, *placing an Indian child in a placement that reflects the unique values of the Indian child’s tribal culture and that is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child’s tribe and tribal community.*” (emphasis added).
23. In 1999, Minnesota passed the Minnesota Indian Family Preservation Act (MIFPA Minnesota Laws 260.751). This Act contains many of the provisions contained in ICWA. Interestingly though, in 2007 Minnesota entered into a comprehensive child welfare “Tribal/State Agreement, February 22, 2007” with many Tribal Nations there.
24. See 2007 Minnesota-Tribal Nation Social Service Agreement:

The purpose of this Agreement is to protect the long term best interests, as defined by the tribes, of Indian children and their families, by maintaining the integrity of the Tribal family, extended family, and the Child’s Tribal relationship. The best interests of Indian children are inherently tied to the concept of belonging. Belonging can only be realized for Indian children by recognition of the values and ways of life of the child’s Tribe and support of the strengths inherent in the social and cultural standards of tribal family systems. Family preservation shall be the intended purpose and outcome of these efforts. See “Tribal/State Agreement” at 2, 3.

The State recognizes its responsibilities to protect Indian children as required by the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act and the clear intent of those laws to protect and Indian child’s sense of belonging to family and tribe. The State further recognizes that executing these responsibilities will require collaboration with the tribes and the use of the guidance, resources and participation of a child’s tribe.” *Id.* at 3.

“The parties recognize that the necessary understanding of an individual tribe’s history, religion, values, mores, and child rearing practices is best obtained from each tribe. . . . *Id.* at 4.

The Best Interests of an Indian Child” means compliance with and recognition of the importance and immediacy of family preservation, using Tribal ways and strengths to preserve and maintain an Indian child’s family. The *best interests of an Indian child* will support the child’s sense of belonging to family, extended family, clan and Tribe. Best interests must be informed by an understanding of the damage that is suffered by Indian children if family and child tribal identity and contact are denied. . . . *Id.* at 11.

25. See Minnesota Dep’t of Human Services Bulletin #07-68-08.
26. See N.Y. Uniform Rules for the Family Court § 205.51 (Family Court), and § 202.68 (Supreme and County Court). Note that there is some debate as to whether this applies to ALL proceedings touching upon custody determinations (e.g. Matrimonial, Juvenile Delinquency, and Persons in Need of Supervision) or is it limited to just proceedings where ICWA specifically applies (e.g., TPR, Foster Care, Pre-Adoptive, and Adoptive placements).
27. See SSL § 39.
28. See SSL § 153(1)(f)(4).
29. See Wisc. Ref. § 48.02; § 938.00, 938.13 (making provisions applicable to these adolescent proceedings).
30. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2572 (2013) (emphasis added).