What can practitioners do to avoid this problem? The simplest solution is for practicing attorneys to recognize when the ICWA applies to a case and to follow the law to the best of their ability. Recognizing the nature of the case, however, involves understanding the history of tribal families in the United States and the law that offers protection.

The historical removal of Indian children from their families was an attempt to destabilize tribal influence. As children’s advocates, we know well the value of an extended family to a dependency case. Living with a family member is often considered by children removed from their parents to be the “second best.” Such arrangements are often more comforting, less socially stigmatizing, and more capable at facilitating children’s normal daily routines, including school, medical care, and religious training, than stranger foster care. The social and psychological benefits of kinship care are well documented. One recent retrospective study concluded that children in kinship foster care have fewer behavioral problems three years after placement than do children who were placed into foster care with nonrelatives. Another review of multiple studies found that “children in kinship foster care experience better behavioral development, mental health functioning, and placement stability than do children in non-kinship foster care.”

But what rights attach to these new families that are formed by contract yet have their origins in biology? Do kinship foster children have a constitutionally protected liberty interest in residing with their kinship foster families? If so, are there limits on that liberty interest?

Continued on page 4

The Indian Child Welfare Act: The Obligations of Justice
By C. Steven Hager

America has historically struggled with the rights of Native Americans, guaranteed through law and treaty. Those struggles continue into the modern era. One of the most important of modern Indian laws is the federal Indian Child Welfare Act (ICWA), passed in 1978, with individual states passing complimentary statutes in the years following. Enforcement, however, remains contentious. Many cases to which the ICWA should be applied go unnoticed, and many more are reviewed and remanded on appeal. Even though the law is over 30 years old, application is problematic, especially among attorneys who have not experienced Indian law cases.

Do the obligations of justice change with the color of the skin? Is it one of the prerogatives of the white man, that he may disregard the dictates of moral principles, when an Indian shall be concerned?

—Sen. Theodore Frelinghuysen, April, 1830

What can practitioners do to avoid this problem? The simplest solution is for practicing attorneys to recognize when the ICWA applies to a case and to follow the law to the best of their ability. Recognizing the nature of the case, however, involves understanding the history of tribal families in the United States and the law that offers protection.

The historical removal of Indian children from their families was an attempt to destabilize tribal influence.

Continued on page 8

IN THIS ISSUE

2 Message from the Chairs
14 Denver Prevention Partnership: Protecting Children and Families
The Children's Rights Litigation Committee of the American Bar Association Section of Litigation is pleased to tell you more about a summit that we mentioned in our last chair's column. “Raising Our Hands: Creating a National Strategy for Children’s Right to Education and Counsel” is an invitation-only event that will focus on developing strategies to ensure children receive the right to counsel in abuse and neglect cases and to protect children’s right to education.

It will take place on October 23, 2009, at Northwestern University School of Law in Chicago, IL. The summit will provide an opportunity for children’s advocates, lawyers, judges, legislators, law professors, clinicians, and law students to come together in an effort to secure children’s access to these fundamental rights.

We will seek creative ways to combat the problems of children’s access to counsel and education. The event will consists of two tracks specifically designed to maximize efforts to address each issue: (1) ensure children have the right to counsel in abuse and neglect cases; and (2) secure each child’s right to an education. The tracks will apply a human rights framework to the issues.

Children’s Right to Counsel

In 2007, the First Star report on children’s right to counsel found that only about a third of the states provide the right to an attorney for child victims in abuse and neglect proceedings. These proceedings are critical, as they determine whether the child will remain at home, have contact with parents, or even have access to certain social services. These aspects are of fundamental importance to children and their future well-being, yet most children fail to receive legal counsel.

Track one will focus on developing an analysis on the applicability of the human rights framework to the right to counsel in abuse and neglect cases. This track will seek to develop specific tools for the implementation of the right to counsel in each state. It will be a unique opportunity for children’s lawyers and judges from around the country to come together to create a strategy focused on securing a child’s right to counsel.

Children’s Right to Education

Children attending U.S. public schools are dropping out at alarming rates. In 2004, the Civil Rights Project reported that only 68 percent of students who enter ninth grade graduate with a regular diploma. These rates are even lower for children of color. Only 50 percent of African-American students, 51 percent of Native American students, and 53 percent of Latino students graduated from high school in 2001. Researchers believe this crisis is related to school conditions and policies that push certain youth out of school.

Track two will seek to develop a model code that integrates universal human rights principles, builds on lessons learned by the advocacy community in challenging school pushout, and promotes child-centered alternatives to zero tolerance. The model code will serve as an instrument for policy change at the school district, state, and national level. The model code will also promote a child’s right to stay in school by providing a right to counsel in hearings that exclude children from school and criminalize their behavior, requiring policies that respect the inherent dignity of the child, ensuring a quality education without discrimination of any kind, and protecting due process rights of parents and children. A working group of experts will be formed prior to the summit and divided into subcommittees that will develop and analyze a list of issues.

Overview of the Summit

The summit will begin with a morning plenary on the Human Rights Based Perspective to Children’s Rights of
Education and Counsel. This session will give the attendees a chance to come together and assess the overall goal of the summit before breaking off into the two separate tracks. After the plenary, the two tracks will each have sessions dedicated to resolving a specific problem.

**Right to Counsel Track**
The morning sessions will focus on exploring the lessons learned and litigation strategies used in bringing about the right to counsel. The first session will examine how states that currently provide a right to counsel in abuse and neglect cases perform the task, how they fund it, and generally the lessons learned from those experiences. This panel will also discuss outcome studies that exist and that are needed to illustrate the importance of counsel for children. This panel will also focus on the important role of the judiciary in the right to counsel movement. The afternoon sessions will conclude with working group meetings that will develop materials focused on implementing the strategies discussed throughout the day. At the end of the day, participants will have a clear idea of next steps and action items.

**Right to Education Track**
The morning sessions will provide an update on the national campaigns against pushout, which will feature presentations by groups around the country that have challenged school pushout through litigation, organizing, policy, and legislative campaigns. The working group will also present its recommendations for a model code and facilitate a general discussion.

In the afternoon, the participants will divide into groups, debate, and finalize the language for the model code. After the breakout sessions, the groups will present their recommendations and participants will vote on the code. After the summit, the working group will be in charge of drafting the code based on the outcome of the summit.

These two issues—the right to counsel in abuse and neglect cases, and the right to education—are of critical importance. The summit will provide a real and working opportunity for children’s advocates to come together to effect real change and ensure that all children can realize these fundamental rights.

To learn more about the summit, including how to attend, please contact our committee director at krebsc@staff.abanet.org or 202-547-3060.

Lisa Dewey is Pro Bono Partner at DLA Piper in Washington, DC.

Shari Shink is the founder and director of the Rocky Mountain Children’s Law Center in Denver, Colorado.

Angela Vigil is the North American Director of Pro Bono and Public Service for Baker & McKenzie LLP in Miami, Florida.
The Fourteenth Amendment
(Continued from page 1)

This article addresses the applicability of substantive due process to families providing kinship foster care to children, and provides specific suggestions for strengthening the rights of such families in various jurisdictions.

Background
For more than half a century, the Supreme Court has extended constitutional protections to extended families of one sort or another. In Prince v. Massachusetts, the Court recognized that a custodial aunt should have the same liberty interest as a “parent . . . to bring up the child in the way he should go,” free of government interference. Three decades later, in Moore v. City of East Cleveland, the Court invalidated a housing ordinance that excluded a grandson from a household, holding that the child’s grandmother had a fundamental liberty interest in residing together with him as a family unit. The Court wrote “Ours is by no means a tradition limited to the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”

Exactly two weeks after the Court decided Moore, however, the Court also handed down Smith v. Organization of Foster Families for Equality and Reform (O.F.F.E.R.). O.F.F.E.R. held that contracted, non-kin foster parents do not possess a liberty interest in maintenance of their foster families. In this case, longtime foster parents brought a case challenging the procedures governing the removal of unrelated foster children from their homes after more than a year of residing together under a foster care contract. Noting, among other things, that “the usual understanding of ‘family’ implies biological relationships,” the Court denied the foster parents’ challenge, holding that “whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset.”

After O.F.F.E.R. was decided, however, state reliance on blood relatives as foster parents—that is, the use of relatives as “parties to an arrangement in which the State [is] a partner from the outset”—began to climb. Of course, the state is a partner to the contract, but not to the creation of the biological ties that led to the formation of the contract in the first place; this sets the stage for the developments discussed in the following.

Evidence shows that the percentage of relatives as foster parents has been rising since the 1980s. According to a Report to Congress on kinship foster care, the adoption and Child Welfare Act of 1980 was passed, forming the basis of the Federal foster care program, it was very rare for a child’s relative to act as a foster parent. Today, child welfare agencies increasingly consider kin as the first placement choice when foster care is needed and kin can provide a safe home.

Enter Rivera v. Marcus a few years later. In this case, children were “placed” into foster care with an adult half-sister with whom they had already been continuously residing for many years. When the children were subsequently removed from her care, Ms. Rivera brought a challenge under the Fourteenth Amendment, alleging an unlawful deprivation of her constitutionally protected substantive due process right to family integrity. The Second Circuit, forced to choose, eschewed an O.F.F.E.R. analysis in favor of a Moore analysis and held that a kinship foster family should be treated more like a nuclear family than a business deal for the purpose of determining whether it possesses a liberty interest. The court wrote that custodial relatives like Mrs. Rivera are entitled to due process protections when the state decides to remove a dependent relative from the family environment. Indeed, we find no legally principled distinction between Mrs. Moore’s rights in East Cleveland and Mrs. Rivera’s in Hartford. Although separated by several hundred miles, both women carried on the laudable American tradition of providing food, shelter, and comfort for members of their respective extended families in times of adversity.

The court specifically noted that the signing of a foster care contract after the family had lived together as a unit for many years, and after the children’s mother became unable to care for them, did not vitiate the blood ties and close associations among family members that predated government interference in the family.

Since the Rivera decision, a handful of other cases have reinforced the substantive due process rights of extended families that later became foster families. In
Johnson v. City of New York, a custodial grandmother who was also a foster parent was found to have a liberty interest in caring for her foster grandchildren; and in Harley v. City of New York, the Eastern District of New York found grandchildren have a liberty interest in living with their grandmother: “Children of custodial relatives like Lucille Harley possess a liberty interest in preserving the stability of their family, and, under Rivera, they are entitled to due process protections when the State decides to remove them from the family environment.”

A.C. & H.C. and Balbuena
The most recent additions to this line of cases strengthening the rights of relatives who sign foster care contracts is a pair of challenges to New York City’s procedures governing removals of children from foster homes: A.C. & H.C. v. Mattingly and Balbuena v. Mattingly. These cases push the liberty interest line closer still to biological factors, relying less on the other factors, such as the presence of a preexisting relationship.

A.C. was born addicted to drugs in 2003. While she was still in the hospital, the child protective agency approached A.C.’s aunt, Norma Balbuena, and inquired whether she wished to become the child’s foster parent. Having not yet met the child, Ms. Balbuena agreed to take her in and A.C. was brought straight from the hospital to her aunt’s home. The following year, A.C.’s sister H.C. was born; again the agency approached Ms. Balbuena about becoming a foster parent and again Ms. Balbuena agreed. Thus, H.C., too, went straight from the hospital to live with Ms. Balbuena. Two weeks later, however, both children were removed on a report of neglect in Ms. Balbuena’s home. In side-by-side cases, the children and their aunt challenged the constitutionality of the process by which that removal was carried out.

At the outset, these cases are factually distinguishable from earlier cases. In both Moore and Rivera, a long-standing relationship with biologically related children that began prior to placement through foster care factored into the courts’ decisions to uphold a liberty interest. Here the children had no preexisting relationship with their aunt prior to being placed through foster care. Newborn infants, they were brought to Ms. Balbuena only after she agreed to become their foster parent. The state argued that although the foster family was related by blood, the family nonetheless was formed by a contract. Having its genesis in contract, the state argued, required the court to apply an O.F.F.E.R. analysis and ultimately a finding that the family, brought together by the state, did not possess a liberty interest.

The children argued that the creation of a foster care contract did not weaken the blood ties that they shared with their aunt that were present at birth. As the aunt noted in her complaint, the state “did not create the biological relationship, and . . . cannot destroy it.” Additionally, the children argued, the reason the state sought to create a contract with the aunt in the first place was because she was an aunt and not a stranger. (New York, like many other states, statutorily requires its child protective agencies to seek out family members and advise them of their right to apply to become their minor relative’s foster parent.)

To discount a biological relationship because a relative accepts the state’s invitation to become a paid foster parent to that child is to turn the tables on a kinship resource and subjugate her biological ties to the foster care contract, the children complained. Ultimately, the court in A.C. & H.C. and Balbuena determined that this foster family possessed a protected liberty interest, holding that the condition of residing with their aunt since birth—essentially the babies’ entire lives (even though for one of the children, this amounted to approximately two weeks)—was sufficient basis to satisfy the criteria set forth in Rivera. The court noted that living with their aunt since birth created “a relationship as strong as that in Rivera.”

Most importantly, however, the A.C. & H.C./Balbuena court reaffirmed the answer to the question posed in Rivera: whether a child’s foster parent “should be treated for purposes of procedural due process as a natural parent or a foster parent.” Rivera relied at least in part on the foster parent’s long-standing role as a “surrogate mother” to the children. A.C. could not, and did not, rely on any long-standing relationship: For H.C., the family relationship lasted just two weeks before she was removed (though they were two very significant weeks, being the first, and only, two weeks of her life). Under the circumstances, the court determined that Norma Balbuena should be treated more like a natural parent to A.C. and H.C. than a foster parent for the purposes of determining whether there existed a substantive due process liberty interest in the foster family unit.

After Liberty Interest: Identifying Deficient Procedures
Once a liberty interest is identified for a particular foster family, the question turns to what process is due before the state may interfere with that interest. Certain basic principles apply: “Due process fundamentally requires that the aggrieved party be provided with an opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” In Mathews v. Eldridge, the Supreme Court set forth a three-part test for the “meaningfulness” of process. The Court must look to

the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
**Private Interest**
The “private interest” affected by the official state action in these types of cases—that of children maintaining a family relationship with their extended relatives—is substantial: “Mrs. Rivera and the Ross children seek protection from state action that threatens the integrity and stability of their familial relationship. This important interest has consistently been recognized and afforded far-reaching due process protection.”

**Erroneous Deprivation**
The “risk of erroneous deprivation” in destroying kinship foster families is also significant. In Duchesne v. Sugarman, the Second Circuit noted that “the ‘fact specific’ nature of the determination of the fitness of a [caretaker] presents a grave risk of erroneous deprivation when the action of the state is not promptly reviewed.” As the Rivera court noted, limited pre-deprivation procedures increase the risk of erroneous deprivation.

**Government Interest/Burden**
As noted previously, the government has a strong interest in encouraging and protecting kinship foster families. Study after study shows improved outcomes for children in kinship care. The fiscal and administrative burdens of ensuring due process for families facing government interference will depend on the extent to which procedural structures are already in place in a given jurisdiction, but are certainly minimal when compared with the overall societal cost, as well as the social and psychological cost to individual children, resulting from erroneous deprivation.

Using the aforementioned factors, children’s advocates can scrutinize their own states’ procedures governing removals from kinship foster care, with an eye toward ferreting out procedural deficiencies that render those schemes constitutionally defective and vulnerable to challenge. Advocates can make use of the checklist laid out in Rivera, which identifies the minimum elements of a constitutionally sound kinship foster care removal procedure:

1. Timely and adequate notice of the reasons for termination;
2. An opportunity to retain counsel;
3. Upon request, and in the absence of exceptional circumstances, a pre-removal hearing;
4. An opportunity to confront and cross-examine witnesses;
5. An opportunity to present evidence and arguments;
6. An impartial decision maker; and
7. A written statement of the decision and a summary of the evidence in support thereof.

Post-Rivera kinship foster care removal cases in New York reveal repeated complaints about an administrative scheme in varying degrees of compliance with the procedural due process laid out in Rivera. Children’s advocates across the country are invited to review the procedures affecting children in their own jurisdictions and fashion challenges to those schemes where they are deficient.

**Looking Forward**
And where will the courts go from here? While it is true that for decades the courts have been steadily strengthening the rights of relatives, including kinship foster families, to reside together, making it more difficult for the state to interfere in these extended families, at least one court stopped short of compelling the government to create extended kinship foster families. In Lipscomb By and Through DeFehr v. Simmons, the Ninth Circuit denied a challenge to Oregon’s foster care payment scheme that paid nonrelatives, but not relatives, to act as foster parents.

Notwithstanding the fact that the lack of financial assistance for some family members meant that in their cases (but not the cases of more affluent relatives) a foster family relationship would not be formed, the court held that “[t]he existence of a negative right to freedom from governmental interference [...] does not dictate the recognition of an affirmative right on the part of foster children to be placed by the state with relatives. The government generally is under no obligation to facilitate or fund the exercise of constitutional rights.”

But additional questions are still left unanswered in this emerging field: How far will—and should—the courts go in treating kinship foster families more like nuclear families? No cases have yet been decided in which a kinship foster family (presenting biological ties) having a “relationship as strong as that in Rivera” (i.e., a preexisting relationship or a relationship since birth, as in A.C. & H.C.) also presents the tension spoken of in O.F.F.E.R., between the right sought by the foster family to remain intact, and the potentially countervailing interest a parent may have over that particular choice of kin. Will the courts support the integrity of a kinship foster family unit over the opposition of the child’s parent? If so, would or should the stage of the dependency proceeding in which that opposition was voiced matter?

Questions such as these surely will test our courts in the coming years as children’s advocates continue to wrestle with the constitutional issues presented...
when extended families are brought together through state foster care contracts to care for children.

Jennifer Baum is an assistant professor of law and the Director of the Child Advocacy Clinic at St. John’s University School of Law in New York. Professor Baum previously litigated children’s rights and poverty law issues, including kinship foster care cases, for a decade and a half at New York’s Legal Aid Society.

Teresa J. Grogan is the Supervising Attorney of the Child Advocacy Clinic at St. John’s University School of Law in New York. Professor Grogan’s 20+ years of litigation experience include representing children, families, and adults at New York’s Children’s Law Center.

Endnotes
5. Id. at 504–05.
7. Id. at 845.
9. 696 F.2d 1016 (2d Cir. 1982).
10. Id. at 1025.
and tribal culture. Motivated by mandated requirements to “integrate” Indians into a culture openly hostile to them, children were removed on the thinnest of pretext. This policy did not fade with time. A 1974 study by the Association of American Indian Affairs found that 25 to 35 percent of all Indian children had been removed from their families and placed in foster, adoptive, or institutionalized care at some point in their lives. The national adoption rate for Indian children was eight times higher than for other children, with 90 percent of those placements in non-Indian homes. It was against this backdrop that the ICWA was formulated, passed by Congress, and signed into law by President Carter.

Statistical Background of Tribes
About 4.1 million people listed themselves as American Indian in the 2000 census, (1.5 percent of the population). More than one in four (25.7 percent) Indians live below the poverty line, a ratio twice as high as the general population (12.4 percent); the number below poverty increases to 35 percent on reservations. More than 32 percent of Indian children live below the poverty line.

Off-reservation Indian children are involved in 5.7 child abuse and neglect cases per 1,000, compared to 4.2 percent per 1,000 of the general population. According to the 2000 census, “Although the percentage of children under 18 who were American Indian and Alaska Native is small, a higher percentage of adopted children were American Indian or Alaska Native (1.6 percent) than the percentage of biological (1.0 percent) or stepchildren (1.2 percent) who are American Indian or Alaska Native.”

In April 2005, the Government Accountability Office (GAO) completed a 14-month survey of the implementation of the ICWA. Indian children are 1.8 percent of children in the United States, but are 3 percent of the children in foster care. The statistics reviewed by the GAO were limited—just five states had information on ICWA compliance that was available for examination. However, the agency was able to produce some interesting statistics. In 2003, 62 percent of the children in foster care in Alaska were Indian. In South Dakota, 61 percent of foster children were Indian; in Montana, 35 percent; in North Dakota, 30 percent; in Oklahoma, 25 percent.

Clearly, significant problems remain in the Indian population.

The ICWA attempts to address these concerns by balancing the interests of the child, the parents, and the tribe against the interests of the state. While there are many areas of protections and issues, three significant ones are threshold to an ICWA case: (1) whether or not the child can be considered a member of a tribe; (2) whether notice fulfills the requirements of the Act; and (3) the proper jurisdiction of the case.

Definitions of the ICWA
Under the definitions found at 25 U.S.C. §1903, “child custody proceedings” include adoptive placements, preadoptive placements, terminations, and foster care placements. If an Indian child is in one of these proceedings, the ICWA must be applied to the case. It is important to note that it does not matter if it is a state agency or a private actor who brings the matter to court; if the action is in state court, the ICWA applies. However, the ICWA does have specific exceptions for custody orders to parents in divorce proceedings and juvenile delinquency proceedings in cases involving non-status offenses.

A crucial set of definitions includes “Indian,” “Indian child,” “Indian child’s tribe,” “Indian tribe,” and “parent.” An “Indian Tribe” must be eligible for services from the Secretary of the Interior; i.e., they must be a federally recognized tribe. This excludes tribes from Canada, Mexico, Hawaiian natives, unrecognized or disenfranchised tribes, and state-recognized tribes. Simply put, the status of being “Indian” in the United States is a political one; while heritage, culture, or racial background all play a part, it is the quasi-sovereign nature of tribes that grant tribal members their status. If the tribe doesn’t receive Bureau of Indian Affairs (BIA) funding, or if they claim to be a “treaty tribe” or an “unrecognized band,” they are not likely to fall within the ICWA.

An “Indian” is a member of a recognized Indian Tribe; an “Indian Child” is an unmarried person under 18 years of age who is a member of, or eligible for, membership in an Indian tribe. It is important to note that neither of these terms requires enrollment per se, and
that the tribe is the ultimate arbiter of membership. If a tribe determines that a person is a member of the tribe, the trial court cannot disturb that determination. However, the lack of a tribal determination of membership is not conclusive proof of nonmembership. Courts have found that “membership” may include children outside of the definition of “Native” in the Alaska Native Claims Act; children whose Indian ancestry is uncertain, and children whose tribes fail to make conclusive determinations of eligibility for membership. Other courts have ruled that without proof of “membership,” people cannot be considered Indians under the ICWA.

An Indian child’s tribe may actually include multiple tribes, depending on the membership and potential membership of the parents. For example, the child’s father may be enrolled Comanche through his father but have a mother of Choctaw membership. The child’s mother may be enrolled Pawnee, with Tonkawa and Ponca heritage. The child then could be a member of the Comanche, Choctaw, Pawnee, Tonkawa, or Ponca tribes, depending upon tribal enrollment criteria. In determining the child’s tribe, the issue devolves into selecting the tribe with the closest ties to the child or giving notice to all possible tribes and letting the tribes sort it out.

The definition of a “Parent” is important to understand. Any biological parent or parents of an Indian child are included in this term. The parent does not have to be Indian in order to invoke the ICWA protections. A non-Indian parent of an Indian child is protected to the same degree as an Indian parent of the same child. In addition to the biological mother and father, the definition of “parent” includes an Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. This definition does not include a non-Indian who has adopted an Indian child. This is the only difference between Indian and non-Indian parents for the purposes of the act. “Parent” specifically excludes unwed fathers if their paternity has not been acknowledged or established. It is the third exception to the ICWA, following divorce custody and juvenile delinquency.

Once a practitioner determines that a child may be Indian, there is an ethical obligation to notify the court even if the client may not wish the ICWA to be applied. The Bureau of Indian Affairs’ Guidelines for State Courts; Indian Child Custody Proceedings lists five possible (but not exclusive) scenarios that should trigger inquiry into a child’s possible membership: (1) a party to the case, a tribe or Indian organization, a public or a private group tells the court that the child is an Indian child; (2) a licensed agency discovers information that suggests the child is Indian; (3) the child gives the court reason to believe he or she is Indian; (4) the residence of the child, the parents, or Indian custodian is an area known to be a predominantly Indian community; and (5) an officer of the court has knowledge that the child may be Indian. The child’s membership does not have to be confirmed in order for the ethical duty to arise; simply put, it is the court’s obligation, not the attorney’s, to make the determination of membership. A failure of an attorney to notify the court of even suspected Indian status could conceivably result in malpractice charges, ethical sanctions, or contempt proceeding. The Oklahoma Court of Appeals has made it clear that a failure to follow these requirements, even when acting as an advocate for adoptive parents, is sanctionable. The court stated that “... every attorney involved in matters concerning Indian children subject to the ICWA is under an affirmative duty to insure full and complete compliance with these Acts.”

The Notice Requirements of the ICWA

Under 25 U.S.C. § 1912 (a), notice must be given to the parents, Indian child’s tribe, and the Indian custodian if applicable. If the Indian child’s tribe is not known, then the Bureau of Indian Affairs must be given notice so that they can discover the child’s tribe and pass the notice along. The notice must be given 10 days before the hearing and must be sent by registered mail. Under the BIA’s guidelines, it must contain specific elements that are designed to provide sufficient information to identify the child and inform the parties of their rights.

The notice requirement does not hinge on parental participation or information. Tribal notice is not dependent on any parental action. As one California court has observed, “The ICWA ... is designed to protect Indian children and tribes notwithstanding the parents’ inaction.” The onus of notice is on the court, not the parents. Notice sent to the wrong address or wrong tribe is similarly found to be invalid, requiring remand.

Problems occur when parties are not sure if a child is Indian and the tribe is unresponsive, or if the only evidence submitted has been vague allegations of heritage. Another problem is when a
parent does not raise the possibility of tribal membership or Indian heritage until late in the process, then asserts it to try to defeat the previous court decisions. Some courts have tried to determine what is sufficient notice to require investigation.

For instance, California’s 4th District Appellate Court has held that the mere statement of Indian heritage is sufficient to trigger further investigation, but once a tribe has indicated the child is not a member, there is no need for further notice. The court has held that notice must contain enough information for the tribe to determine if the child is a member. This information required far exceeds the recommendations of the BIA Guidelines, but the courts feel that it is necessary to sufficiently determine tribal membership.

Understanding Indian land can be daunting. It consists of reservations, dependent Indian communities, and allotment lands, which includes trust and restricted lands.

The need for proper notice, and the pain a child suffers by that failure to comply with the law, is well stated in the case of In Re Elizabeth W., from California’s Second District Appeals court. In Elizabeth W., permanency placement for a child had to be delayed until the trial court corrected its years of malfeasance and reviewed the allegations of tribal membership. The appeals court eloquently stated the cost of that delay:

After years of bouncing from foster home to foster home, eight-year-old Elizabeth W. has a chance at a normal life as the adopted child of her present caregivers. The only thing standing between Elizabeth and the pot of gold at the end of her rainbow is her father’s challenge to the Department of Children and Family Services’ failure to comply with the notice requirements of the Indian Child Welfare Act. Because we must, we hold that Elizabeth’s chance at stability will be delayed—but we publish this opinion with the hope that other children will fare better in the future, and that the Department and its lawyers will at some point learn to give the proper notices at the proper times, and to file the required documents with the dependency court, keeping in mind that childhood is brief and fleeting, as is a foster child’s hope of finding and keeping a stable home.

The Jurisdiction of the Court

Understanding Indian land can be daunting. It consists of reservations, dependent Indian communities, and allotment lands, which includes trust and restricted lands. Reservations, perhaps the easiest to understand, are tracts of land reserved for the exclusive use of a specific tribe. These are often traditionally held lands. Perhaps the most well known example of this is the Navajo Nation, which incorporates parts of four states within its boundaries. Inside reservation boundaries, tribal law applies, even to land owned by non-Indians, although this is growing less clear.

Dependent Indian communities are places outside of a reservation that are set aside for the use and benefits of Indians under federal supervision. “Indian” schools throughout the country, and tribal buildings on federal trust land, are also included in this definition. The key is that the land must be set aside for Indians and is maintained for Indian purposes, and is regulated and maintained by Indian sources.

The title to allotted trust land is held by the United States for the benefit of the individual Indian owner; the BIA must approve any action on the land, and it cannot be taxed, sold, or adversely possessed unless it is removed from trust status. Restricted land is land held to be an individual Indian member of the Five Civilized Tribes, but with restrictions against alienation. This means that leases, sales, probates, or other actions must be approved by state district court, as authorized by federal statute. This land can be adversely possessed, sold with approval, and taxed in some situations.

Under Section 1911 (a), any Indian child domiciled in these areas is subject only to tribal court jurisdiction. Even if the child is subject to an event off reservation, the ICWA requires that the child be returned to reservation custody as soon as practicable.

There is, however, an exception to this jurisdiction: If other laws grant the jurisdiction to the state, then the tribe must seek retrocession from the Department of Interior to exercise that jurisdiction. This is a direct reference to the so-called PL-280 states, which hold jurisdiction over some or all of tribal reservations within their boundaries. In these states, the effect of PL-280 is not to erase jurisdiction over tribal children, but rather to grant the state concurrent jurisdiction over them.

If this not confusing enough, Indian children living in non-Indian country are subject to concurrent jurisdiction under 25 U.S.C. § 1912 (b). However, there is a judicial presumption that the proceeding should be heard in tribal court. The preference for tribal court requires that, upon a proper petition to transfer made by either parent, the Indian custodian, or the tribe, the state court must transfer to the tribal court unless either parent objects or good cause exists not to
transfer. Objection by either parent, Indian or non-Indian, is an absolute bar to transfer. The absence of parental objection to a transfer cannot be found unless a parent is given a meaningful opportunity to object, meaning that the parent must be fully informed and represented by counsel before the motion to transfer is heard.55

Good cause to oppose transfer, outside of parental objection, is more difficult to quantify. Oklahoma, in the case of Adoption of S.W. and C.S., 49 provides a well-reasoned analysis of transfer and what is good cause to void it. Other states have found good cause to deny transfer is largely determined by the individual facts of the case, with the party opposing the transfer carrying the burden of proof to demonstrate the contrarian facts. The absence of a tribal court may constitute good cause, although the tribe may have a counsel or other tribal method to determine custody proceedings. When a tribal court system does exist, the adequacy of such a system, as perceived by the state court, should not be considered.50

Courts have found good cause not to transfer a proceeding if the petition to transfer is untimely and the proceeding has already reached an advanced stage; if the child involved is over the age of 12 and objects to a transfer; if the child involved is over the age of five, the parents are unavailable, and the child has had little or no contact with the tribe or its members; or if the evidence necessary to determine the case cannot be presented in tribal court without undue hardship to the parties or witnesses. The Washington Appellate Court and the Texas Court of Appeals have held that the determination to transfer is subjective and requires a balancing of the state’s, tribe’s, and child’s rights.51 Transfer can be declined by the tribal court; it should be noted that this does not mean that a tribal employee or government official can stop transfer.52 Only the tribal court can issue the proper order. If the court does so, then the matter returns to the state court for further action.

Conclusion

The ICWA makes significant changes to a child custody proceeding. Practitioners should carefully determine if the act is applicable to every case they litigate. If tribal membership, notice, and jurisdiction are determined at the beginning of the case, the conclusion of the matter is likely to be successful.

C. Steven Hager is the director of litigation at Oklahoma Indian Legal Services, Inc., one of five stand-alone Indian legal aid offices in the nation. He is the author of 13 editions of The Indian Child Welfare Act: Case and Analysis, published on CD each year by Oklahoma Indian Legal Services. He is a contributing author to The Child Fatality Review.

Endnotes

4. Id.
11. Id. at 13. It should be noted that Oklahoma had more Indian children in foster care (3,689) than California (3,646), a state with 10 times the population. Oklahoma numbers are also greater than Minnesota (2,292), Washington (1,690), and Oregon (1,219), all states with greater general populations. However, Oklahoma statistics, to some extent, include children in tribal custody and in tribal courts.
16. However, there may be some flexibility with transnational tribes, such as the signatory Canadian-American tribes of the Jay Treaty of 1794; and tribes like the Kickapoo Tribes of Texas, Oklahoma, and Kansas who have traditional grounds in Mexico, or the Tohono O’odham of Arizona.
19. The reverse is also true. When a tribe says that a person is not a members, the court will not apply the ICWA. Matter of Welfare of C.B., C.R.B., and T.A.B., 143 P.3d 846 (Wash. App. 2006).
20. Phillips A.C. II v. Central Council of the Tlingit and Haida Tribes of Alaska, 149 P.3d 51 (Nev. 2006); Welfare of S.N.R., 617 N.W. 2d 674 (Minn. App. 2000); Application of Angus, 655
In Interest of D.T. Jr., the tribe had responded that the child was not eligible for enrollment, which the court found to be insufficient; membership, not enrollment, was the issue that the tribe needed to address.


32. Dwayne P. v. Superior Court, 103 Cal. App. 4th 247, 126 Cal. Rptr. 2d 639 (Cal. App. 4th Dist. 2002). However, there must be some basis to believe that a child is Indian; if not, there is no duty on the court to continue to investigate, or to search, for that information. In re Aaliyah G., 135 Cal. Rptr. 2d 680 (Cal. App. 2d Dist. 2003).


34. In Interest of D.M., 2007 ND 62, 730 N.W.2d 604 (N.D. 2007), the court found that when a tribe does not respond to "repeated efforts to engage and contact" that the ICWA would not be applied absent definitive information of tribal membership. See also In re C.P.N.C., 641 S.E. 2d 13 (N.C. App. 2007); In re Arianna R.G., 2003 WI 11, 657 N.W.2d 363 (Wis. 2003).


36. In re Elizabeth W., 16 Cal. Rptr. 3d 514 at 525 (Cal. App. 2d Dist. 2004). See also In re Gerardo A. Jr. 14 Cal. Rptr. 3d 798 (Cal. App. 5th Dist. 2004), and In re Miguel E., 15 Cal. Rptr. 3d 530 (Cal. App. 4th Dist. 2004), which hold that the failure to provide full information to all tribes in which the child may be eligible for membership is reversible error.

37. 18 U.S.C. § 1151 defines Indian country. 38. U.S. v. John, 437 U.S 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978); however, there are exceptions to this rule, as held in Atkinson Trading Company v. Shirley, 121 S.Ct. 1825, 121 S.Ct. 1825, 149 L.Ed. 2d 889 (2001).


SECTION OF LITIGATION
ANNUAL CONFERENCE
ATLANTA, GA

APRIL 29–MAY 1, 2009 | ATLANTA MARRIOTT MARQUIS

What You Need to Know. Who You Need to Know.
All in One Place. At One Low Price.

WHAT YOU NEED TO KNOW
• Comprehensive trial skills training
• Twenty substantive, procedural, and ethics tracks
• Latest trends & developments
• Sixty different CLE sessions

WHO YOU NEED TO KNOW
• World-class faculty
• Leading trial lawyers & law professors
• People throughout the United States with similar practices

Register online at www.abanet.org/litigation/sectionannual

Published in Children's Rights, Volume 11, Number 2, Spring 2009, © 2009 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
A grandmother cared for her grandchild for two years after the child’s homeless, drug-addicted mother abandoned her. They struggled together without incident until a visit to the emergency room. The ER contacted the Department of Human Services (DHS) because the grandmother did not have legal custody of her grandchild. Despite the fact that this child was quite obviously safe in kinship care, DHS was forced to begin a lengthy, unnecessary legal process to provide a simple legal remedy.

Cases such as these are all too common. Families caring for a grandchild, niece, nephew, or even the child of a friend or neighbor are forced to participate in a lengthy and court process, at significant expense to the state, in order to legalize the living arrangement.

There are 2.4 million grandparents in America caring for their grandchildren.¹ These caregivers often lack the knowledge needed to address the legal issues that accompany the situation. Additionally, caregivers often struggle financially to meet the additional strain on the family budget from providing for the child(ren) in their care. A little more than 20 percent of relative-headed households live in poverty.² Most importantly, these at-risk families and children are distinctively affected by common struggles such as poverty, homelessness, criminal behavior, drugs, and alcohol.

Power of Prevention
The Denver Prevention Partnership program gives DHS an alternative for these at-risk families. This innovative program, created in 2005, remedies the frustrations felt by families in these situations by expediting services outside the traditional court system. The Denver Department of Human Services (DDHS) partners with the Rocky Mountain Children’s Law Center to provide legal services and community support to families providing kinship care to children at significant risk of entering the foster care system. This collaborative effort is also supported through resources provided by the local Annie E. Casey Family to Family network.

Process of Prevention
Families that come to the attention of DDHS, who are evaluated and found to be providing a safe home, but who need assistance to provide care for the child(ren) are referred to the Denver Prevention Partnership program. Referrals come from a variety of sources from within DDHS, including an Early Intervention Unit, Domestic Violence Cases, Court-Ordered Investigations For Services, and the Child Protection Current Voluntary Cases.

Team Decision-Making
The Prevention Partnership is unique in its holistic approach to helping children and families. It is not a formulaic, one-size-fits-all program. Instead, it is an individualized program designed to meet the particular needs of children and caregivers. The collaborative structure of the program fosters creative, innovative ideas to keep families together by building upon their strengths, making resources readily available, and connecting families with their communities. DDHS and the Rocky Mountain Children’s Law Center partner each family with a volunteer attorney, a caseworker, and, in some cases, other professionals to develop a plan for the family to preserve the placement and provide permanency for the child. In most cases, the volunteer attorney or the Denver Prevention Partnership Program Director begins the process by meeting with the family to confirm the appropriateness of the initial referral and assess the family’s needs.

This initial evaluation includes:

• Legal issues impeding continued kinship care
• Risk factors that may affect the success of the family, e.g., family history of alcoholism, drug addiction, poverty, and educational needs

The Denver Prevention Partnership strengthens and preserves families without traditional juvenile court involvement by pairing struggling families with volunteer attorneys who provide legal advocacy and resource guidance and referral. The overall goal of the program is to provide an avenue for families to have their legal needs met so that they can maintain custody of a child, and receive necessary intervention in their lives to stabilize the family and prevent the need for foster care further down the road.

The collaborative structure of the Prevention Partnership fosters innovative ideas to keep families together by building upon their strengths, making resources readily available, and connecting families with their communities.
The Denver Prevention Partnership volunteer attorney advocates for a plan of services to address the specific needs of each at-risk family and provides legal representation to the caregiver. The individualized plan strives to

- Resolve legal issues impeding the continuance of kinship placement, e.g., custody orders, guardianship, possible recovery of documents
- Advocate for additional case-specific services for all family members such as educational assistance or mental health therapy
- Connect the caregiver with Medicaid services and available financial support, e.g., TANF funds to support the caregiver

And, if appropriate and necessary:

- Connect families to resources in their local community to build a long-term, inclusive community network of support and provide the needed services to address family-specific risk factors

Results

The traditional court process associated with a dependency case should take approximately one year. Yet, the same case, with the same familial legal issues handled by the Denver Prevention Partnership program can be resolved within two to three months. It saves the county money and spares the children the trauma of being removed from a healthy family and placed in foster care unnecessarily. Building on the success in the City and County of Denver, the Prevention Partnership has expanded in 2009 and will soon be partnering with Jefferson County, the fourth-largest county in Colorado.

After earning her J.D. from the University of Denver College of Law, Nathifa Lewis served as Public Defender for two and a half years before she joined the Children’s Law Center in 1999 as a staff attorney. In 2006, she helped establish the Prevention Partnership and is now the Program Director.

Endnotes
