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When the Rules Shift:

A Review of the Indian Child Welfare

Act, M.C.R. 2.615, and Tribal Court

Jurisdiction in Michigan Family Law

Cases

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A woman comes to court with a tribal custody order, seeking to modify its provisions. A child is removed from her home and her mother is a tribal citizen. A couple seek a divorce, both are tribal citizens. When these cases appear in front of a state court, practitioners need to know how family law and Indian law intersect, and how the law differs from the majority of family law cases in Michigan state courts. Because family law is such a large portion of the civil docket, it is easy for certain procedures to become routine. However, some cases involving tribal citizens require the application of different laws and different standards, which are hardly routine. The intersection of family law and Indian law may account for a small number of cases, but particularly in Michigan, with its twelve federally recognized tribes, it is necessary for all state court practitioners to have a basic understanding of the issues involved in these cases.

The appearance of a tribal citizen or tribal court order in state court may cause confusion. Judges and lawyers may try to handle the case under the family laws with which they are already familiar. However, there are specific federal and state laws which govern many of these situations. These include the Indian Child Welfare Act, the Violence Against Women Act, the Full Faith and Credit for Child Support Order Act, Michigan Court Rule 2.615 and the Uniform Child Custody Jurisdiction and Enforcement Act. Understanding which one applies in which case requires a complete and thorough understanding of the factual situation of the case. In addition, issues surrounding full faith and credit, comity and tribal court jurisdiction may also arise in these cases.

The Indian Child Welfare Act is likely the most familiar of the laws governing Indian family law cases in state court. Passed in 1978, the Indian Child Welfare Act (ICWA) is a federal statute governing the removal of an “Indian child” from the home, the termination of parental rights, pre-adoption and adoption placement procedures. The goal of this statute was to preserve Indian families and keep children connected to their tribe against an onslaught of state agency attempts to break up these families and place the children with non-Indian families. For example, from 1971 to 1972, Indian children were adopted at eight times the rate of non-Indian children, and virtually all of these children were placed in non-Indian homes.¹ Because the very existence of a tribe is based in its children, this misplacement of children strikes at the heart of tribal sovereignty and tribal existence. Understanding ICWA’s goal is to protect both the child and the tribe is the first step in understanding the various provisions of the law.

ICWA changes the rules of traditional family law practice by requiring different standards based on a child’s tribal status. ICWA is unique because while it is a federal law, its enforcement rests entirely in the state courts.² While ICWA singles out a specific group for different treatment, such as higher standards of proof for terminating parental rights, or requiring more effort by the state in maintaining the family ties, this federal law is not unconstitutional. ICWA is based on the relationship between the federal government and Indian tribes, and the political status of tribal members.³ The federal government has long recognized a “trust relationship” with tribes, based on treaties, statutes and court cases. The trust relationship is also traced to the Commerce Clause and Treaty Clause of the Constitution. *Art. I, §8, cl. 3; Art. II, §2 cl. 2.* As stated in the Handbook of Federal Indian Law, “[t]he commerce clause has become the linchpin in the

more general power over Indian affairs recognized by Congress and the courts.”⁴ The Commerce Clause, therefore, “anticipat[es] and affirm[s] federal law singl[ing] out Indian nations and their members for separate treatment.”⁵ The Supreme Court also provides a basis for the trust relationship in various decisions as early as 1831.⁶

The trust relationship now covers a broad range of federal legislation designed to provide services to tribes and tribal members, and is often cited by Congress when passing legislation designed for tribes or tribal citizens. In ICWA, Congress started the findings section by “recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people . . .”⁷ Because of this special relationship, the Supreme Court has held that Congress has the power to “legislate on behalf of federally recognized Indian tribes” *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This singling out is also based on tribal members’ political status as citizens of their own tribes. *Id.* at 554. As citizens, or potential citizens, of a tribe, a child is due both the benefits of the trust relationship and the benefits and responsibilities of a tribal member. In removing a child from a tribe, not only does a tribe lose one of its citizens, the child loses her tribe.

For these reasons, ICWA is a particularly important statute. While ICWA is not a long or complex statute, practitioners should be aware of number of provisions of note.. ICWA applies to specific “child custody proceedings.” These proceedings are usually non-voluntary, such as foster care placement where the child “cannot be returned upon demand” of the parent, or permanent, such as termination of parental rights, pre-adoption and adoption placement procedures.⁸ For example, while deciding to allow a child to be adopted may be a voluntary act by the parent, it is a permanent severance of the child

from the parent, and likely the tribe, and therefore falls under the ICWA. ICWA does not apply in custody disputes stemming from a divorce case. However, as discussed below, laws other than ICWA or state divorce laws may govern in those cases.

For ICWA to apply in these situations, the child must be considered an “Indian child.” The state agency bringing the action falling under ICWA has the affirmative duty to determine whether the child might be a tribal member or eligible for tribal citizenship. In Michigan, the Department of Human Services must follow the notice requirements of ICWA.⁹ The Michigan Appeals Court agreed with a Vermont Supreme Court case that “it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child.”¹⁰ The court also has a role in determining whether the tribe qualifies under ICWA, which requires federal recognition of the tribe. Interestingly, the Department of Human Services, in its *Childrens Foster Care Manual*, encourages Michigan state courts to apply ICWA to “members of non-federally recognized tribes” and to tribes in Canada.¹¹ The *Manual* is not binding on courts, though, and in 2005, the Michigan Appeals Court maintained ICWA’s narrower definition, holding that ICWA does not apply when the “minor child is claimed to be an Indian child from an Indian tribe that is not recognized as eligible for services provided to Indians by the Secretary of the Interior.”¹² The tribe in question in *In re Fried* was neither a non-federally recognized tribe located in Michigan nor a Canadian tribe. Whether the court would consider those under ICWA standards is questionable.

While the court must determine if the child is potentially an “Indian child,” it is not, nor ever is, the state court’s role to determine if the child is *eligible* for tribal membership. That is a decision of the tribe, and implicates a key area of tribal

sovereignty. The Supreme Court, in *Santa Clara Pueblo v. Martinez* stated “a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” 436 U.S. 49, 72 n.32. In 2001, the Michigan Appeals Court affirmed this in *In re N.E.G.P.*, holding that the tribe must determine whether the child is a member, or eligible for membership. 626 N.W.2d 921, 924.

After determining if ICWA applies to the case, a second important provision is the notice provision. The state is required to notify the tribe, the parent, the “Indian custodian” or the regional BIA office of the proceedings as soon as the state has any knowledge the case might fall under ICWA. The agency making the petition has the duty to make the notification and make it properly. Lack of notice at the start of a case can be an incurable flaw later in the case. For example, the Michigan Appeals Court has held that “failure to comply with the requirements of the ICWA may render invalid a proceeding terminating a parent’s rights.”¹³ Without notice, the tribe is unable to exercise its right of intervention and petition for removal. No notice means ICWA cannot be properly applied to the rest of the proceeding, since the tribe may have no way of knowing the case even exists. This notice is of particular importance given the jurisdictional aspects of ICWA.

Initially, ICWA shifts jurisdiction slightly from general civil tribal jurisdiction discussed below. In an ICWA case, if the Indian child resides off of the reservation, the state and tribe have *concurrent* jurisdiction. If the child resides on the reservation the tribe has *exclusive* jurisdiction. This does not need to be evaluated under principles of civil tribal jurisdiction; ICWA clearly provides for the jurisdictional boundaries in these

cases. If the state is exercising its concurrent jurisdiction, the tribe, or Indian custodian has the right to intervene in the case. The tribe also has the right to petition for transfer of the case to tribal court. Absent “good cause to the contrary” the state court “shall” transfer the case to the tribal court.¹⁴

Some of the most litigated ICWA cases include the intervention and transfer of cases to tribal court. “Good cause” is a difficult standard to quantify, and each state has determined for itself what “good cause” may be. There are no reported cases in Michigan defining “good cause,” though one case, *Gray v. Pann*, does support the tribal right of intervention. 513 N.W.2d 154, 156 (1994). The Bureau of Indian Affairs has published the *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584. While the *Guidelines* provide different factors involved for determining “good cause,” including the timeliness of the petition for transfer, the best interests of the child standard are not to be considered by the court. Because the best interest standard is used by many family law courts, including those in Michigan, there have been some cases where courts have incorrectly applied the best interests standard. In South Dakota, the supreme court overturned a decision by the trial court to deny a transfer to tribal court based on an evaluation of the best interests of the child. The court held “that a substitute parent might provide a child with good care or even better care than its natural parent is not appropriate standard for determining the best interests of the child in the context of a ICWA transfer decision.”¹⁵ As an appellate court in Illinois pointed out, the best interests test was “relevant not to determine jurisdiction but to ascertain placement.”¹⁶

“Good cause,” however, is also an exception to the ICWA placement preferences, where some state courts have inserted the best interests test. Since the goal of ICWA is

to keep Indian children within their family and the tribe, ICWA provides a list of preferences when an Indian child has to be removed from her immediate family. This list, which differs slightly between foster care and adoption placements, prefers placement with extended family, then with tribal members, and then with tribal members from other tribes. If the child's tribe has a preference order, the court must follow that order over either ICWA or any state standards.¹⁷ For a court to deviate from this order, it must provide "good cause to the contrary." Again, the BIA Guidelines provide some guidance as to what "good cause" can be, but specifically does not list a best interests standard for a court to weigh. ICWA assumes the best interests of the Indian child are served by following the placement preferences. Using the best interests standard of the state court to undermine the placement preferences ignores Congressional intent and fails to acknowledge the reasons ICWA had to be passed in the first place.

Finally, some courts have used the existing Indian family exception to avoid using ICWA's placement preferences or applying ICWA at all. Courts created the existing Indian family exception for children and families the court determines has no contact with the tribe. In some ways this parallels the more traditional personal jurisdiction sufficient contacts inquiry. However, this exception is not in ICWA, which defines an Indian child regardless of his actual contacts with a tribe. Michigan has rejected the existing Indian family exception, in *In re Elliot*. The Michigan Appeals court held that "application of the exception undercuts the plain import of the ICWA and fails to consider adequately the interests of the Indian tribes themselves, especially in involuntary proceedings." 544 N.W.2d. 32, 36 (1996). A more recent case, *In re Dougherty*, does not overrule *Elliot*. In *Dougherty*, a non-Indian father's parental rights were terminated. In

his appeals case, he tried to claim the protections of ICWA, specifically that the state did not do enough to prevent the breakup on an Indian family.. However, his wife was the tribal member, she retained custody of her children, and she was the parent with ties to her tribe. The court found that the termination of the father’s parental rights did not break up an Indian family.¹⁸

Dougherty also demonstrates the different standards of proof in non-ICWA and ICWA cases. Under ICWA, removal of an Indian child from the home requires clear and convincing evidence, and testimony by qualified experts, that leaving the child in the home will lead to “serious emotional or physical damage to the child.” Under ICWA, termination of parental rights requires evidence beyond a reasonable doubt, and testimony by qualified experts, that the child will suffer “serious emotional or physical damage.” In Michigan, both the federal and state levels of evidence must be met. Therefore, to terminate the parental rights of a parent to an Indian child, the court must prove the ICWA standard, and also “find clear and convincing evidence that one or more enumerated statutory grounds for termination exist”¹⁹

ICWA also provides rules for the enforcement of any tribal court orders a state court might encounter in an ICWA case. Under ICWA, tribal court judgments are to be enforced by the state court without any question into the nature of the tribal court or previous tribal court proceedings. In other words, in ICWA cases, tribal court orders, tribal laws and judicial proceedings are granted full faith and credit by the state courts²⁰. Other federal statutes such as the Violence Against Women Act and the Child Support Order Act also include this provision. When these statutes apply, the state court does not

invoke a state statute, rule or comity when enforcing the judgment. Enforcement of the judgment should be automatic under these federal statutes.

However, when faced with a tribal court decision which does not fall under ICWA or the other federal court proceedings, there can be confusion distinguishing between full faith and credit, comity and the Michigan Court Rule 2.615

Full faith and credit is guaranteed in Art. IV of the United States Constitution, to ensure the sister states give full force to the judicial proceedings in other states. When faced with an order from another state, the implementation and enforcement of it ought to be automatic. There are no discussions of due process standards or otherwise going behind the order itself. A federal statute, 28 USC §1738, expanded the full faith and credit clause to territories and possessions of the United States. The statute does not explicitly include tribes, however, two states, Idaho and New Mexico, interpret the statute to include tribes.²¹ These states conclude the tribes are equivalent territories, and therefore grant full faith and credit to tribal court judgments. However, the vast majority of states do not interpret that statute or the Constitution to ensure full faith and credit for Indian tribes.

When faced with a foreign court order, a state or federal court will invoke principles of “comity.” Comity is a far more amorphous concept, based on the respect of another sovereign. The Supreme Court, in *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) stated that comity was “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation . .

.”, which it has cited approvingly in later cases.²² Enforcing a foreign court order is not guaranteed or required. Comity requires a discussion of a number of factors, including due process concerns and public policy issues. Indeed, it has been noted that the use of comity may even bring up concerns of separation of powers and political question issues, as only? Congress and the Executive Branch have the power to deal with foreign nations. The granting, or not granting, of comity to a foreign court may have the potential to cause larger foreign policy problems.²³

All states, when enforcing tribal court judgments not governed by federally mandated full faith and credit laws still use principles of comity to determine the enforcement of the judgment. Some states, however, have passed a statute or court rule to provide guidance for state courts when enforcing a tribal court judgment. In Michigan, court rule 2.615 governs the enforcement of tribal court judgments when there is no other state or federal law dictating otherwise. M.C.R. 2.615 is not quite full faith and credit, but is a higher standard than comity, and is a reciprocal rule. In order for a tribe to have its orders enforce in a Michigan state court, it must pass a law or rule ensuring the tribe’s courts enforce state court judgments. The tribe must notify the State Court Administrators Office (SCAO) of their rule. The SCAO maintains a list of which tribes qualify under M.C.R. 2.615. In addition, M.C.R. 2.615 does not limit reciprocity to tribes located in Michigan. Any federally recognized tribe can file with the SCAO, provided the tribe has passed the rule regarding the enforcement of Michigan state court judgments in their court.

Under M.C.R. 2.615, a tribal court judgment is presumed valid. The party challenging the order must prove otherwise. This is a distinct difference from comity,

where the burden of proof is on the party seeking to enforce the foreign order. Therefore, a tribal court judgment is presumed valid by the court unless challenged, and when challenged, that party must demonstrate one of five factors applies to the order. Four of the factors are types of evaluations the state courts do elsewhere, and include obtaining through fraud or duress, without notice or hearing, the order is “repugnant” to public policy or is not final. The fifth factor is a lack of personal or subject matter jurisdiction, a determination which requires an understanding of civil tribal jurisdiction.

Civil tribal jurisdiction requires a complex analysis and complete understanding of the parties’ tribal citizenship and residence.²⁴ As a sovereign entity, a tribe has inherent jurisdiction over its own citizens residing on the reservation. If the tribal citizens are not domiciled on the reservation, the state and tribe may have concurrent jurisdiction, depending on the tribe’s code. In some instances, the tribe has jurisdiction over non-Indians as well. If a dispute occurs between a tribal citizen and a non-Indian on the reservation, the tribe has jurisdiction, but if the same dispute arises off the reservation, the state has jurisdiction. Of course, a non-Indian can consent to tribal jurisdiction, and in some cases the tribal code extends jurisdiction to non-Indians living on the reservation.

Therefore, if a party is challenging a tribal court order under M.C.R. 2.615 by arguing the tribe did not have jurisdiction, the party must be able to demonstrate that the tribe’s jurisdiction did not reach him. This would most often be the case if the party is a non-Indian living off the reservation with no tribal interests implicated. In a family law case, however, if there is a tribal court custody agreement or divorce decree, the likelihood is high that the tribe has jurisdiction over the case.

Finally, most practitioners are already aware Michigan has adopted the Uniform Child Custody and Jurisdiction Enforcement Act. Under the UCCJEA, tribes are treated as states, not as foreign nations, and tribal custody orders are given full enforcement. If the tribal court had proper jurisdiction over the custody proceeding, then the state cannot later exercise jurisdiction other than to enforce the custody order. Since the UCCJEA is used every day by family court practitioners, treating tribes as states does not require a difficult analysis. The same rules apply to a tribal court order as to a state court order. Of course, if the case falls under ICWA, the UCCJEA does not enter into consideration.

The interplay of these laws can be confusing, particularly if the practitioner is not familiar with their language or application. Family law cases are already emotionally difficult, with multiple parties trying to achieve what they believe will be the best conclusion for a child. When the family court routine shifts with the introduction of these different laws, it is clear how confusion and miscommunication can occur. An understanding of these laws and why they apply makes it easier for all involved parties. Misapplying these laws early will only lead to extended litigation of already difficult cases.

¹ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)

² A recent 9th Circuit case, *Doe v. Mann*, 1038 F.3d 1038 (2005) found a basis for federal review in Public Law 280, which does not apply in Michigan and the reasoning has generally not been followed elsewhere.

³ 25 U.S.C. §1901

⁴ *Cohen's Handbook of Federal Indian Law*, §5.01[4] (Nell Jessup Newton et al. eds 2005)

⁵ *Id.*, §14.03[2][b][i].

⁶ *Id.*, §5.04[4][a] (2005)

⁷ 25 U.S.C. §1901

⁸ *Id.*, at §1903(1)

⁹ *In re IEM*, 592 N.W.2d 751, 756 (Mich. App. 1999)

¹⁰ *Id.*, 757 (quoting *In re M.C.P.*, 571 A.2d 627 (Vt. 1989))

¹¹ *Children's Foster Care Manual*, Department of Human Services, available at <http://www.mfia.state.mi.us/olmweb/ex/cff/cff.pdf> (last viewed January 23, 2007)

¹² *In re Fried*, 702 N.W. 192 (Mich. App. 2005).

¹³ *In re N.E.G.P.*, 626 N.W.2d 921, 923 (Mich.App. 2001)

¹⁴ 25 U.S.C §1911.

¹⁵ *In re J.C.D.*, 686 N.W.2d 647, 650 (2004)

¹⁶ *Interest of Armell*, 550 N.E.2d 1060, 1065 (Ill. 1990), cited in Dale, Michael J. *State Court Jurisdiction under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 Gonz. L. Rev. 353, 390 (1992).

¹⁷ 25 U.S.C. §1918

¹⁸ 599 N.W.2d 722, 775 (1999).

¹⁹ *Id.* at 776

²⁰ 25 U.S.C. §1911

²¹ *Jim v. City Financial Services Corp.*, 533 P.2d 751 (N.M. 1975); *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982).

²² *Banco Nacional de Cuba v Sabbatino*, 376 U.S. 398, 408 (1964).

²³ *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Intern.*, 493 U.S. 400 (1990)

²⁴ For a more detailed discussion of tribal civil jurisdiction, see *Cohen's Handbook of Federal Indian Law* 7 (Nell Jessup Newton et al. eds 2005)