Indian Child Welfare Act Practice
Issues for Child Advocates

Diane Payne, Justice for Native Children
justice4nativechildren@gmail.com
Historical Trauma

- The definition of historical trauma is the cumulative emotional and psychological wounding over the life span and across generations that comes from massive group trauma such as GENOCIDE, which has been cited by: Maria Yellow Horse Brave Heart Eduarado, www.speroforum.com/site/article: August, 2005.
- The impact of history on Alaska Native people has been passed down from generation to generation.
They must be withdrawn, in tender years, entirely from the camp and taught to eat, to sleep, to dress, to play, to work, to think after the manner of the white man.

It is admitted by most people that the adult savage is not susceptible to the influence of civilization and we must therefore turn to his children, that they might be taught to abandon the pathway of barbarism and walk with a sure step along the pleasant highway of Christian civilization.
Historical Trauma

- “What happened to us is very bitter” – Rita Blumenstein, Yupi’k, Traditional Healer/Elder
- “We were prevented from speaking our language & punished for practicing our culture” – Cheryl Evan, Tlingit/Haida Elder
- “We were taken away from our culture. They beat it out of us in boarding school. We have lost so much, some of us don’t even know what we have lost.” - Alfred Stevens, Koyukon Elder
- “The impact of historical trauma is so great that it isn’t even spoken about.” Inupiat Tribal Leader
United Nations Convention on Genocide (UNCG)
The definitional article included in the 1948 convention stipulates:

Article II
In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

How is trauma passed from generation to generation? Through behaviors, environment, and feelings; and on a spiritual and cellular level. Do you recognize the chaos? - Danialle Rose, 2007.

- 1820  Great Great Great Grandparents
- 1850  Great Great Grandparents
- 1870  Great Grandparents
- 1900  Grandparents
- 1934  Parents
- 1950  My generation
- 1980  Children
- 2000  Grandchildren
- 2030  Great Grandchildren
“We have to know we have been before we can know where we are going” - Alutiiq Elder

HISTORY IS THE CONTEXT FOR INDIAN CHILD WELFARE PRACTICE ISSUES
Historical Context for ICWA

European invasion of homelands of Native people after centuries of indigenous community existence

- European view of Native people as uncivilized, savage
- European perception that Native children were unsupervised & untaught

European beliefs about children:

- Children are to be seen/not heard
- Spare the rod & you’ll spoil the child
- Poor children sent to workhouses (contributed to the idea of children as property)
Historical Context for ICWA for ICWA

Alaska Native Peoples:

- Emphasis on family, group, village – tribal cultural identity
- Emphasis on spirituality
- Learning through stories of the past
- Emphasis on sharing rather than acquiring possessions
- Role models, hands-on learning
Historical Context for ICWA for ICWA

- Native children regarded as gifts from Creator
- Extended family responsibility/role in child raising & guidance
- Kinship included “chosen” families as well as birth family
- Different standards for maturity/immaturity
Historical Context for ICWA for ICWA

Native Values:
- Knowledge of family tree
- Domestic skills
- Hunter success
- Respect
- Humility
- Honoring Elders
TIMELINE

- Native American Colonial Years
  1492 – 1776

- Removal Period
  1776 - 1830

- Child Welfare
  Institutionalized care: orphanages, asylums – 1700’s
  Reacting to institutionalized care - Foster care movement
  Mid 1800’s
TIMELINE

- **Native American Reservations & Treaties**
  1831 – 1880
  - Allotment Era
  1880 – 1930

- **Child Welfare**
  Until late 1880’s children were transferred from family to family via property deeds
Native American
1880 – 1930: INSTITUTIONALIZED CHILD ABUSE
- Boarding Schools
- Reservations
- Missionaries
- Families Separated

Child Welfare
American families “rescued” Indian children following massacres and forced relocations

*Reading suggestions:
Fifty Miles From Tomorrow
Children of the Dragonfly, Lost Bird of Wounded Knee
Graves @ Carlisle Indian School

**THE CARLISLE INDIAN INDUSTRIAL SCHOOL**

This school was the model for a nationwide system of boarding schools intended to assimilate American Indians into mainstream culture. Over 10,000 indigenous children attended the school between 1879 and 1918. Despite idealistic beginnings, the school left a mixed and lasting legacy, creating opportunity for some students and conflicted identities for others. In this cemetery are 186 graves of students who died while at Carlisle.
TIMELINE

- **Native American Indian Reorganization Act Era 1930 – 1950**
  - BIA domination
  - Boarding Schools continue
  - Tribal constitutions
  - Court of Indian offenses

- **Child Welfare**
  Prior to 1930’s transracial adoptions were rare; stricter adoption laws led to “black market” adoptions by 1929
TIMELINE

- **Native American Termination Era**
  - 1950 – 1970
  - Economic termination
  - Relocation to cities
  - Private adoptions
  - Coercion to give up children

- **Child Welfare**
  - Child Abuse Protection Act
  - 1974 passed
TIMELINE

- **Native American**
  - Self – Determination Era 1970 to present
  - Sterilization of Indian Women 1960’s – 70’s
  - By 1960’s Tribes lose more than 50% of children
  - Indian Religious Freedom Act passed 1979
TIMELINE

- **September 2000:** During their 175th anniversary celebration, the Bureau of Indian Affairs apology for their destructive policies and practices.

- **April 2001:** During a NICWA conference, the Child Welfare League of America issued a public apology for their role in the massive removal of Native children from their families and communities.
ALASKA FACTS

- 1786 – 1st Native school opened in Kodiak; 40 Native children sent to Siberia by Russians
- 1805 – a report to Empress Catherine II indicated that school for Natives and Creoles (Native/non-Native) was unsatisfactory with only 20 students
- 1835 – 1840 smallpox epidemic in southeast Alaska (400 die in Sitka)
ALASKA FACTS

1867 – Alaska sold to the United States
Alaska remained a territory until 1959

1880 Census
- 24,516 Natives and 145 non-Natives on the mainland
- 8,900 Natives and 1,900 on southeastern islands

1900 “The Great Death” – smallpox, measles, chicken pox – 60% of Natives died
ALASKA FACTS

1900 Census
63,592 people: 29,536 Natives and 29,365 non-Natives

- 1918 Influenza epidemic in northwest villages
- 1921- orphanages established to care for children left homeless by the epidemic
- Alaska Native children sent to boarding schools in lower 48
EXPLORER’S NOTES:

- Indigenous inhabitants of the arctic and sub-arctic regions described as “vigorous, hospitable and intelligent” (1840)
- Early traders, naturalists and missionaries express respect and admiration for the skills and intelligence of Alaska Native people “thriving” in the hostile environment
Boarding School Impacts on Alaska Natives

Broke up families, often permanently

Mental health consequences

- 49% developed social and emotional problems in 1st year, 25% were serious (1977, Kleinfeld & Bloom)

- High levels of emotional disturbance found in 2nd year students.
Research on impact of these losses:

- Personality disorders among Alaska Native children directly related to boarding school cultural discontinuity, attacks on Native identity, impersonality and sterility of boarding schools as well as the poor quality and lack of qualified staff. (Neligh, 1990)

Why is it important to talk about historical trauma?

- “Intergenerational transfer of historical trauma can happen on two levels – personal and community…”
- “Related affects might carry forward for as long as that loss remains unreplaced….”

T. Evans-Campbell, Historical Trauma in American Indian/Alaska Native Communities
ICWA Practice Issues
**CONGRESSIONAL FINDINGS:**

- Congress has plenary power over Indians.
- Congress has assumed responsibility for the protection and preservation of Indian tribes and their resources.
- There is no resource more vital to the continued existence and integrity of Indian tribes than their children.
PURPOSE OF THE INDIAN CHILD WELFARE ACT

To set minimum standards for States when child abuse, neglect and adoption cases involve Native children – State courts, State child protection agency and adoption agencies are required to follow ICWA;

To authorize Tribal courts to handle child abuse, neglect and adoptions involving Tribal members
IDENTIFYING AN INDIAN CHILD WELFARE ACT CASE

STATE COURT CASE

CHILD CUSTODY PROCEEDING §1903 (1)

INDIAN CHILD §1903 (4)
ICWA ONLY APPLIES TO

STATE COURT CASE (not Tribal court) WHEN IT INVOLVES:

✓ A Child custody proceeding: foster care placement or termination of parental rights or pre-adoptive placement or adoptive placement (any placement where the child cannot be returned on demand)

§1903 (1) AND

✓ The child is an Indian Child as defined by ICWA §1903 (4)
ICWA DOES NOT APPLY TO

- Juvenile placements made as a result of an offense that would be considered a crime if it was committed by an adult;
- Divorce or custody between parents, when one parent will be awarded custody. §1903 (1)
BIA Guidelines Clarification

- **ICWA does not** apply if there is a divorce proceeding where a parent (bio or Indian adoptive parent) will get custody of the child. A. (e)

- **ICWA does not** apply to voluntary placements which do not prevent the parent or Indian custodian from regaining the child “upon demand” – which means the parent can just ask for the child back without any other conditions such as paying expenses. Guidelines A. (f)
Definitions §1903

- **Indian Child:** member of a Tribe or eligible for membership and biological child of a member of a Tribe
  - *Only the Tribe of which the child’s biological parent is a member or eligible for membership can decide if the child is a member of the Tribe*

- **Indian Tribe:** Federally recognized Tribe on list provided by Secretary of Interior

- **Indian Child’s Tribe:** Tribe in which child is member of/eligible for membership OR Tribe with which child has most significant contacts (if eligible for membership in more than one)
DEFINITIONS § 1903 continued

Tribal and/or Custom Law

- Extended Family Member (2)
- Indian Custodian (6)
- Parent (9)
- Tribal Court (12)
Indian Custodian is....

- Person who has legal custody of Indian child under tribal law or custom or under state law – whichever is more favorable to the rights of parents – OR to whom temporary physical care, custody and control has been transferred by the parent of such child.

(2015 BIA Guidelines clarification)
NEW: clearly defined “ACTIVE EFFORTS”

BIA Guidelines: “active efforts are intended... to maintain and reunite Indian child with... family or Tribal community.....”

BIA Guidelines A.2 provides 15 examples of “active efforts”

(10) “…provide family interaction in the most natural setting that can ensure the Indian child’s safety ….”
Adoption & Safe Families Act (ASFA) relationship to ICWA

- “Active Efforts” under ICWA requires state to do more than ASFA requirements
- ASFA exceptions to reunification efforts do not apply to ICWA proceedings
ICWA v. State Law

- Emergency Custody
- Parties
- Removal Standards
- Reunification efforts
- Placement Preferences
- Stipulations/voluntary relinquishments
- TPR Findings
EMERGENCY CUSTODY

- Emergency custody

  If not returned to parent, Petition filed in 24 hours

- Temporary Custody Hearing (Probable Cause) within 48 hours
PARTIES

- Child
- Parents
- Legal guardians
- Social worker
- Tribe
- Indian custodian
- GAL/CASA
Removal Standards

State Law
- Continued placement in home contrary to welfare of child

ICWA
- Removal necessary to prevent imminent physical damage/harm
- Child likely to suffer serious emotional or physical damage
  - clear and convincing evidence
  - expert witness
BURDEN OF PROOF AT TEMPORARY CUSTODY HEARING (within 48 hours)

- If child is not returned, State must prove
  1. it is more likely than not still necessary to keep the child in custody to prevent imminent harm or damage to child; or
  2. clear and convincing evidence, including qualified expert testimony, that child would likely suffer serious physical or emotional damage if left with parent

- Finding must be made: active efforts have been made to prevent breakup of family and have been unsuccessful
FOSTER CARE PLACEMENT

1. With a member of the child’s extended family
2. In a foster home licensed, approved or specified by child’s tribe
3. In an Indian foster home licensed by non-Indian licensing authority
4. In an institution for children approved by tribe or operated by Indian organization that can meet child’s needs.
ADOPTIVE PLACEMENT

1. With a member of the child’s extended family
2. With other members of the child’s Tribe
3. With another Indian family.
For Foster Or Adoptive Placement

- if the tribe has intervened
- must be done by resolution
- must be the least restrictive setting that would allow the needs of the child to be met
ADJUDICATION/DISPOSITION

- Same standards for continued custody as applied at Temporary Custody Hearing
- State must prove
  1. is it more likely than not still necessary to keep the child in custody to prevent imminent harm or damage to child; or
  2. clear and convincing evidence, including qualified expert testimony, that child would likely suffer serious physical or emotional damage if left with parent

**Court should inquire about “active efforts to reunify the family” and placement**
TERMINATING PARENTAL RIGHTS

- State must present evidence to prove beyond a reasonable doubt that child is likely to suffer serious physical or emotional damage if left with parent.
- State must also show by a preponderance of evidence that “active efforts” have been provided to reunify the family and correct parent behaviors AND that those efforts have failed (see Temporary Custody).
- State must show by a preponderance of evidence that the plan is in the best interest of the child.
BURDENS OF PROOF: What Evidence is Required?

- **Probable Cause**
- **Preponderance**
- **Clear and Convincing**
- **Beyond a Reasonable Doubt**
Tribal Involvement

- Some Tribes do not have a designated ICWA worker
- Tribal Council may assume representative role or designate function to regional non-profit
- Other community members and/or the child’s relatives may put pressure on ICWA worker or other Tribal representatives
- Parent may not want Tribe to participate – possibly due to misunderstanding of Tribe role or past experiences with Tribal government or community member/s
SOME (but not all) KEY POINTS FOR TRIBAL INPUT

- Confirming Tribal member child status when first contacted
- Advising OCS of extended family & relative placements available when first contacted
- Providing support and services to parents before removal
MORE KEY POINTS
FOR TRIBAL INVOLVEMENT

- Intervening as a legal party
- Developing culturally specific case plan
- Identify long term placement if reunification fails
- Assisting with visitation – include relatives, others
- Providing Native food & other cultural resources to child in foster care