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Children of the Tribe - Determining Children's Identity under the Indian Child Welfare Act

Joan Heifetz Hollinger
Berkeley Law

CHILDREN OF THE TRIBE

Determining Children's "Identity" Under the Indian Child Welfare Act

by Joan Heifetz Hollinger

Bridget and Lucy R., twin sisters who will be three years old in November 1996, are unable to comprehend the threatened loss of the only parents and family they have ever known. The twins are at risk of being deprived of the trust and emotional security which arise from daily interaction with their adoptive family. Until the California or federal courts determine whether the twins are to be classified as "Indian children" on the basis of a small percentage of their genetic makeup—they are approximately 3/32 Pomo Indian—or simply as American children with a richly varied ethnic and racial background,[1] the finalization of the adoption by non-Indians remains in doubt.

The twins' unmarried birth parents had a troubled and, at times, violent relationship before the twins' birth in California in November, 1993. In selecting a prospective adoptive couple from Ohio, the birth parents said they did not want their own extended families to know about the birth or the adoption. They deliberately withheld information concerning the father's partial Indian descent from the adoptive couple as well as from the agency to which they relinquished their parental rights.

Several months later, the paternal grandparents learned of the placement. Having been advised that they lacked standing under state adoption laws to question the validity of the placement, the grandparents convinced their son and the birth mother to challenge the adoption as violating the federal Indian Child Welfare Act of 1978 (ICWA).[2] The plaintiffs claimed that the twins were eligible for membership in the Pomo Indian tribe by virtue of their father's and grandmother's descent from historically recognized tribal members. They further claimed that as "Indian children" subject to ICWA, the twins should not have been placed with a non-Indian adoptive family and

should be "returned" at once to their Indian family.

If the twins are *not* subject to ICWA, their birth parents' voluntary relinquishment of parental rights in November 1993 remains valid under California law. Their adoption by the Ohio couple who has cared for them since they were born can be finalized. If the twins *are* ultimately classified as Indian children within the scope of ICWA, the Pomo tribe that has now enrolled them as members would be permitted to intervene in the adoption proceedings. Moreover, ICWA might allow their birth parents to set aside their release of their parental rights and demand that custody of the twins be transferred to them or their Indian relatives.

IN RE BRIDGET R.

At the heart of the case concerning Bridget and Lucy R., now wending its way through California appellate courts, are fundamental questions about children's identities. To what extent should the destiny of children be determined by their racial or genetic heritage, their affiliation with various ethnic, cultural, or tribal communities, their birth parents' voluntary placement decisions, or, when they grow up, their own choices concerning their individual or group identities?

In January 1996, the Second District Court of Appeals concluded in *In re Bridget R.*[2] that ICWA does not apply to the voluntary adoptive placement of a child of Indian lineage unless the child is part of an "existing Indian family" in which one or both parents have a "significant social, cultural, or political relationship" with a federally recognized tribe. Appellate courts in several other states have similarly construed ICWA to apply only to existing Indian families. These courts have reasoned that this judicial doctrine is consistent with ICWA's policy of promoting the stability and survival of Indian tribes and culture through federal standards intended to prevent the unwarranted removal of Indian children from their families and tribal communities. When a child's family is not actually affiliated with a tribe or tribal culture, appellate courts have found that the voluntary placement of the child with non-Indian adopters is not a "removal" and certainly not an "unwarranted removal" under ICWA.[4]

ICWA may unconstitutionally restrict the power of the states.

The *Bridget R.* decision goes beyond policy justifications for the existing Indian family doctrine. The court insisted that the doctrine is necessary to protect ICWA against various constitutional "impediments." The court also stated that ICWA's legitimate, often compelling, purposes should be served through procedural and substantive rules appropriately tailored to achieve those purposes. Without some tailoring, ICWA is vulnerable to attack for impermissibly burdening the due process and equal protection rights that the court convincingly argued are guaranteed to all children under the Fifth and Fourteenth Amendments. If applied to non-reservation children whose only connection to a tribe is a specific quantum of "Indian blood," ICWA may also unconstitutionally restrict the power of the states, reserved to them by the Tenth Amendment, to govern the domestic relationships of their residents.

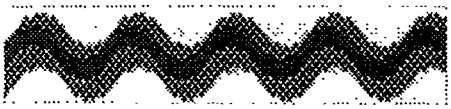
TRIBAL SELF-GOVERNANCE

The court had no quarrel with the U.S. Supreme Court's holding in *Mississippi Band of Choctaw Indians v. Holyfield.*[5] In Holyfield The Court held that ICWA's goal of enhancing tribal self-government requires strict adherence to the Act's provisions for exclusive tribal court jurisdiction over foster care and adoptive placement of children who are domiciled on reservations. The California court

agreed with *Holyfield* that tribal interests in Indian children are on par with, and in some instances superior to, parental interests. The court concluded, however, that tribal interests have to yield to the interests of children who were never part of a recognizably Indian family in remaining with the non-Indian adoptive families to whom they were voluntarily and legally relinquished.

A close examination reveals no inconsistency between *Holyfield* and the California court's analysis of certain constitutional issues that were not raised or addressed in *Holyfield*. These include: What are the constitutional boundaries within which a child may be classified as an "Indian child" for purposes of ICWA? What is the effect of retroactively conferring tribal membership on children and parents whose predominant, if not sole, tribal tie at the time of relinquishment was genetic?

The California court could have bolstered its own resolution of these issues by drawing an analogy from *Holyfield* for the purpose of deciding when ICWA applies to non-reservation domiciliaries. Just as *Holyfield* found a federal definition of "domicile" necessary to effectuate ICWA's commitment to tribal autonomy, ICWA's constitutionality could be protected through a more uniform procedure for assessing a child's Indian status. This procedure could combine a tribe's determination of its own membership—which should continue to be conclusive for internal tribal purposes—with additional evidence that a child's family perceives itself and is perceived by others as Indian. This procedure also comports with Felix Cohen's classic treatment of the problem of Indian legal identity: regardless of whether a tribe recognizes someone as a tribal member, individuals may sever their tribal relations through their own actions and behavior. Once they do so, they are no longer within the scope of federal power to regulate Indian tribes.[6] Only those who have affirmed their tribal affiliations before placing a child in foster care or for adoption should come within ICWA's purview.



RIGHTS OF CHILDREN UNDER THE CONSTITUTION

What is most welcome about the California court's opinion in *Bridget R.* is its unflinching focus on the children caught in disputes about their individual, familial and communal identities. The court understood that much of our constitutional jurisprudence on parental rights is based upon the state's reliance on parents to support, raise and nurture their children. If a birthparent's rights and duties are transferred to others with the expectation that the transfer will be permanent, it is appropriate, as the court said, to treat any remaining parental rights as "subordinate" to the children's substantive liberty interest in being raised by the individuals who are committed to adopting and parenting them. Similarly, tribal claims—which are not based on any constitutional imperative, but on federal statutory law—should not be invoked to challenge a valid state adoption, unless the challenge serves a compelling interest threatened by the adoption. Although the interest in maintaining a genuine Indian family is arguably compelling, an interest in interfering with an adoptive placement of a child who was never part of an existing Indian family is clearly not compelling.

To cast the court's analysis in somewhat different terms, children have substantive due process rights to remain with the adoptive families which their birth parents voluntarily selected. These due process rights should not be limited unless a tribe can show that ICWA does not pose a threat to the children's equal protection rights. Such a threat arises when a tribe stakes a claim to children solely on the basis of one component of their genetic makeup. By contrast, if the tribe invokes ICWA to rekindle and preserve a sociocultural and political tie that previously existed, the children's classification as Indian would not run afoul of the Equal Protection Clause. Application of ICWA to

children whose families have significant ties to tribal communities would be consistent with the many other federal Indian laws that have withstood equal protection challenges because they are rationally related to an essentially political—and not predominantly race-based—classification of individuals.[7] Application of ICWA to children who lack such tribal ties would be an unwarranted burden on the children's substantive due process rights.

PROCEDURE UNDER ICWA

The court's focus on children's interests culminates in its discussion of situations in which children are clearly within the scope of ICWA and ICWA requires that their adoption be set aside. In these situations, any remedies intended to rectify the wrongs suffered by parents and tribes who were deprived of ICWA's statutory benefits must take account of children's due process rights. In many instances, these rights would be impermissibly burdened if children were precipitously removed from their stable custodial environments in order to be "returned" to individuals who are social and psychological strangers to them. Instead, as other courts, including tribal courts, have concluded, and as the proposed Uniform Adoption Act (1994) recommends,[8] a decision to deny an adoption must be followed by a custody hearing to determine where the children should reside. At this hearing, the court could decide that the children should remain with their would-be adoptive parents while having some contact over time with members of their extended Indian family.

A custody hearing should not be based on a simple "best interest" test but on an "avoidance of detriment" test.

The appellate court, drawing upon the American Academy of Adoption Attorneys' amicus and supplemental briefs, carefully explained that a custody hearing in the wake of an adoption that has to be set aside should not be based on a simple "best interests" test but on an "avoidance of detriment" test. It should give due regard to the reasonable expectations of the parties at the time of the initial placement as well as to the harms likely to be suffered by children removed from a stable or long-term custodial environment.

The court's holding in *Bridget R.* deals specifically with ICWA's relevance to adoptions already begun or completed under state law. Nonetheless, the case has many implications for ICWA's role when an adoption is being contemplated but has not yet occurred. At this stage, the due process interests of children residing with one or both birth parents are presumed to be subordinate to the parents' rights to make decisions on the children's behalf. According to this analysis, the children do not have due process interests separate from those of their birth parents until the parents place them for adoption by others. If one or both birth parents wish to invoke ICWA and seek tribal assistance in making a placement with tribal members, at that point the children have no independent interest in being placed with non-Indians. Alternatively, if one or both parents insist that they are not affiliated with any tribe, the children's interests are co-extensive with the parents' interest in avoiding tribal intervention in an adoptive placement.

BEST INTERESTS

Tribal advocates have a well-founded fear that non-reservation parents who wish to avoid tribal intervention will be able to do so, as the birth parents in *Bridget R.* did, simply by withholding information about their Indian heritage from adoption agencies, lawyers, or courts. This would indeed be unfortunate for the many children born into existing Indian families

who deserve the protections ICWA offers, including the possibility of being raised within an extended Indian tribal family.

Children should have equal protection rights *not* to be classified on the basis of blood alone and *not* to be "protected" against adoptive placements that pose no threat to their sociocultural identity. Children also have rights *not* to be retroactively claimed as Indian tribal members simply for the purpose of challenging an otherwise valid adoption under state law. Nonetheless, the court may have drawn too bright a line between ICWA's commitment to preserving tribal connections that already exist and ICWA's goal of ensuring long-term tribal survival. From the tribes' perspective, their survival depends on being able to reach out to current and future generations of children of partial Indian descent whose initial tribal ties may be nonexistent or quite attenuated. From the perspective of children whose immediate families have grown apart from or actively disavowed tribal culture, it may or may not be beneficial to establish or re-establish a tribal connection. We are still a long way from achieving what Justice Stevens refers to in his *Holyfield* dissent as "the delicate balance between individual rights and group rights."[9] This balance could be achieved over time, however, if federal and state family laws remain attentive to the individual due process and equal protection rights of children and their parents, while also devising ways to increase the sensitivity of birth and adoptive parents, whether Indian or non-Indian, to the multiple aspects of their children's heritage. ■

Joan Heifetz Hollinger is a Visiting Professor of Law at UC Berkeley, and was a Visiting Professor at UC Davis during the fall semester, 1995. She is the editor and principal author of ADOPTION LAW AND PRACTICE *vol. 2 (Matthew Bender Co. 1988 and Supp. 1989-95) and the Reporter for the 1994 Uniform Adoption Act. With the assistance of Norma Formanek of Farella, Braun & Martel, Professor Hollinger wrote an amicus brief for the American Academy of Adoption Attorneys on behalf of the children and the adoptive family in* Bridget R.

FOR INFORMATION ABOUT PROPOSED AMENDMENTS TO THE INDIAN CHILD WELFARE ACT, SEE PAGE 52.

ENDNOTES

[1] Although the U.S. Supreme Court has not explicitly stated the Constitutional source for protecting families based on ties other than blood, it has noted the importance of "emotional attachments that derive from the intimacy of daily association... as well as the from the fact of blood relationship." Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977).
The Court has also implied that the First Amendment encompasses liberty interests in personal and intimate associations that the federal government cannot lightly tread upon or distrust. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984) (stating that family relationships are inherently special and distinctively personal).

[2] 25 U.S.C. §§1901-63.

[3] 41 Cal. App. 4th 1483, 1484 (1996).

[4] *See, e.g.*, In the Matter of Adoption of Crews, 825 P.2d 305 (Wash. 1992)(finding that ICWA only applies to removal of child from existing Indian family unit of environment); In re G.E.H., 837 S.W.2d 947 (Mo. App. 1992)(holding in part that courts should not apply ICWA when dismissal of adoption action would not further goals of ICWA); In the Matter of the Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982)(holding that by its own terms ICWA did not apply).

[5] 490 U.S. 30 (1989).

[6] F. Cohen, HANDBOOK OF INDIAN LAW 135 (1945).

[7] *See, e.g.*, Morton v. Mancari, 417 U.S. 535 (1974) (upholding employment preferences for tribal members in Bureau of Indian Affairs, federal agency responsible for administering federal Indian laws).

[8] §§ 2-408, 2-409, 3-506, 3-704, 3-707.

[9] 490 U.S. at 55.