

## Best Interest of The Child- a Tribal Judge's Perspective<sup>i</sup>

The Honorable Lisa L. Atkinson

“A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.”

-Carlisle Indian School founder Capt. Richard H. Pratt<sup>ii</sup>

“The Hoh Indian Tribe recognizes that there is no resource that is more vital to the continued existence and integrity of the Hoh (and others) Indian Tribe than our children and that we have a direct interest in protecting our Indian children who are members of, eligible for membership, or descendants of the Hoh Indian Tribe...”

- Title 6 of the Hoh Youth Code

### A Brief History Lesson

To understand what “best interests of the child” means from a tribal perspective, a brief history regarding the United States’ government-sanctioned removal of Indian children provides some insight into why tribes work so hard to retain tribal children within tribal communities to the greatest extent possible. Two major policies and programs used to remove Indian<sup>iii</sup> children from their homes were the establishment of Boarding Schools, beginning in 1860, and the Indian Adoption Project of 1958.

The establishment of Indian Boarding Schools<sup>iv</sup> was, in some instances, a requirement negotiated in treaties with certain tribes. Despite being a feature in some treaties, there was a fairly significant resistance to sending children away to boarding school, particularly schools far from the children’s reservation. In some instances, the police would remove children; in others, the local Indian Agent (government official placed on the Reservation to oversee the distribution of treaty-secured goods and services) would withhold rations until parents enrolled their children in these

schools. The number of children who died during the Boarding School Era is unknown (from disease, abuse, and/or neglect), and information continues to be revealed today regarding instances of abuse and neglect that occurred within these settings, including the discoveries of mass graves on or near these sites.<sup>v</sup> The purpose of boarding schools was to erase all aspects of tribal life and culture, teach English and trades, and eventually return the children home to live in a manner that met with the approval of the dominant non-Native culture, with the hope of changing the cultures of the tribes, i.e., assimilation.

The Indian Adoption Project of 1958 (which lasted until approximately 1967), was a partnership between the Bureau of Indian Affairs and the non-profit Child Welfare League of America, in collaboration with private adoption agencies, to adopt Indian children out into non-Indian homes. The purpose of the Project was purportedly “an effort to assimilate them into mainstream culture and offer them better lives outside impoverished reservations.” The orchestrators of this Project believed that their altruistic goals of improving the lives of Indian children could only be accomplished by adopting them out of tribal communities.<sup>vi</sup> For an excellent journaled article with more information on the Indian Adoption Project and its successor Adoption Resource Exchange of North America (“ARENA”) project, please refer to Margaret D. Jacobs’ “Remembering the ‘Forgotten Child’: The American Indian Child Welfare Crisis of the 1960s and 1970s.”<sup>vii</sup>

In response to the above efforts to “save” the Indian child (which were later largely acknowledged as failures<sup>viii</sup>) by removing her from her family and community, tribal activists began demanding, in the mid to late 1960’s, that there be federal protections put into place for the reduction of the unwarranted and unnecessary removal of Indian children from their families and their communities. This led to the passage of the Indian Child Welfare Act in 1978.<sup>ix</sup>

“The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.”<sup>x</sup>

ICWA directs non-tribal courts on matters involving Indian children who are subjects of dependencies, guardianships and adoptions. ICWA’s provisions are not discretionary in nature, and many states have since adopted their own versions of ICWA that, in some cases, provide even greater protections for matters involving tribal children within their court systems than the original statute required.

### A Changing Tide

While there have been many federal programs, policies and laws used to remove Indian children over more than a century (and basically only one to reduce removal), there is a critical body of laws that have increasingly been used to keep tribal children home or to bring them home: tribal laws and customs. Tribal laws and customs may be in written form, or they may be oral; they may be similar to “western” laws (i.e. codified, with Resolutions and Legislative History), or they may be much more traditional. It is up to each tribe to determine what is most appropriate for their community.

Many written tribal codes regarding the care and treatment of children have a “Findings” or “Purpose” paragraph similar to the Hoh Tribal Code quoted above. Nearly all tribal codes cite the “unwarranted break-up of Indian families” as a major purpose or guiding principle in their dependency, children’s or domestic relations codes.<sup>xi</sup>

In most every written tribal code for tribes exercising jurisdiction over domestic relations, dependencies, and/or delinquencies, there is a section regarding the “best interests of the child.” For some tribes, “best interests of the child” is spelled out within the code itself or established through case law. For others, it is much more subjective and may be determined by cultural practices, teachings from elders, or through other traditional means. The latter is much more difficult to reduce to an article (and in many cases, not appropriate for public dissemination), so the focus here will be on the former- codes, procedures, and case law.

The Oneida Tribal Code (“O.C.”), under Title 7 (“Children, Elders, and Family”), Chapter 705.1-2 states, “It is the policy of this law to create fair and equitable legal custody, physical placement, and visitation orders based on the facts surrounding each case and the best interest of the child.” Best Interests is defined as:

- (a) “Best interest of the child” means the interest of a child to:
- (1) have a full, meaningful, and loving relationship with both parents and family;
  - (2) be free from physical, sexual and emotional abuse;
  - (3) receive appropriate medical care;
  - (4) receive appropriate education;
  - (5) be raised in conditions which maximize the chances of the child becoming a contributing member of society; and
  - (6) be raised in an environment that is respectful of the child’s race(s), culture(s), and heritage(s).<sup>xii</sup>

The Tulalip Tribal Code (“TTC”), Title 4, states that “[T]he best interest of the child shall be the focus whenever making decisions regarding a child. Best interest determinations are generally made by considering a number of factors related to the child’s circumstances and the parent, guardian or custodian’s circumstances and capacity to parent, with the child’s ultimate safety and well-being being the paramount concern.”<sup>xiii</sup>

The very name of Tulalip Tribes' child welfare department demonstrates the importance of children in this community. The department, formerly known as the Indian Child Welfare Department, was renamed to "beda?chelh" a number of years ago. "In lushootseed, the traditional language of Coastal Salish People, the word beda?chelh means, "our children". It is significant that this concept is depicted in a single word because, traditionally, children were considered to be sacred gifts to the entire community. beda?chelh's mission further demonstrates the commitment to the best interests of the child. **'MISSION:** Provide a strong and healthy foundation, in the best interest of the child, to achieve an immediate and lasting positive change in their life.'"<sup>xiv</sup>

Renowned Judge Abby Abenanti has written extensively on the view of children within tribal societies. In her article "Passports for Native Children," published by the Tribal Law and Policy Institute in 2006, she cites that although there is a wide diversity between and among Native cultures, "early accounts reveal numerous crosscultural similarities in Native American perspectives on child rearing. These include allowing children to learn through their own observations; relying strongly on nonverbal cues rather than verbal directions; engaging the spiritual world in the child-rearing process by praying, chanting, and sing[sic], as well as by conferring special names to give children guidance and power; educating children for their future roles by including them from infancy in all social, economic, and ritual activities; giving children the same range of freedom of behavior as adults; using stories to provide an understanding of the world and its relationships, both those between individuals and that between man and nature; respecting the individuality and desires of children to the same degree that those are respected in adults; teaching children their responsibilities to each member of their kinship group; allowing children to fulfill their physical needs such as sleeping, eating, and physical activity with minimal

adult direction or restraint; impressing children with their roles in society through marking their passage into new stages of development with public ceremonies, especially at puberty.

Underlying these characteristics is a view of children, from birth, as full participants in society, with standing equal to that of adults. This attitude is a reflection of the religious orientation of Native Americans, in which all things in nature are accorded equal respect, be they inanimate or animate. Consequently, children were not expected to be supervised by adults but to be free like their elders, their freedom limited only by social obligations. As a result, child-care practices emphasized responsiveness to the wishes of the child. For example, children were usually toilet trained when they were ready, and not according to a schedule based on adult needs, and in some societies children nursed for as long as five to seven years. Thus Native Americans allowed children to fit themselves into the social order, rarely using corporal punishment or other coercive methods to force conformity.”<sup>xv</sup>

In essence, children belong to the community and are essential to the continuation of culture and traditions. Keeping them in the community is essential to their emotional, cultural, physical and spiritual growth. And above all, this must be done in a manner that protects and nurtures children in safe and loving environments.

#### Putting Codes and Procedures into Practice

Tulalip Tribal Code provides that “whenever a “best interests” determination is required, the following factors shall be considered in the context of the child’s age and developmental needs:

- (1) The physical safety and welfare of the child; including food, shelter, health, and clothing;
- (2) The child’s sense of attachments, including: where the child actually feels love, attachment, and a sense of being valued (as opposed to where adults believe the child should feel love, attachment, and a sense of being valued);

- (3) The child's need for permanence, which includes the child's need for stability and continuity of relationships with parent figures, siblings, and other relatives;
- (4) The child's background and community ties, including familial, cultural, friend, school, and religion;
- (5) The least disruptive placement alternative for the child;
- (6) The recognition that every family and child is unique;
- (7) The exposure to violence in the home; and
- (8) The risks associated with being in out-of-home care."<sup>xvi</sup>

Many of these factors look similar to what you might find in state laws. How, then, does the context differ in tribal court? The answer lies within the lens of community and culture. It is not uncommon in tribal communities for a parent who may be struggling with mental health, addiction, or other issues to ask a family member to care for his/her child. These arrangements are often informal, and the court may not get involved. If the court does become involved, then a "best interests" determination will likely be required. From the bench, tribal judges must not only apply the laws as written but consider that the impacts of placing a child outside of the community, even when it is clearly in the best interests of the child, could have negative effects on the child and the community if care is not taken to maintain the child's connection to biological family (as appropriate) and the community. One option available in tribal courts is to require that non-Native placements (or if awarding custody in a domestic relations matter to a non-Native parent) agree to a culture contract. A culture contract may require that the placement or non-Native parent brings the child back to the community for important cultural and spiritual events, as well as for family events (as appropriate). Culture contracts can be incorporated into the underlying court order, with admonitions that failure to honor the contract could result in remedies including contempt of court, or possible removal of the child from the placement home. Given that tribal communities are usually very close-knit, persistent violations of a culture contract would likely be brought to the

court's attention quickly, and an appropriate remedy could be put into place without the child missing too many opportunities to participate in her culture.

### Conclusion

Children are the lynchpin connecting the past to the future. Children in tribal communities are an integral part in maintaining, promoting, and preserving tradition and culture necessary for tribes to continue to maintain our unique and important place in this country. Keeping the best interests of the Indian child in mind while applying the laws of the tribe is key to achieving this goal and to ensuring well-adjusted and culturally grounded children who will become the next generation of valuable community members and leaders.

### **POSTSCRIPT, MARCH 2023.**

Since the original publication of this article in the American Bar Association publication "Judges Journal" (Vol. 58 No. 1, January 2019), a set of cases challenging ICWA have made their way up to, and have been argued before, the United States Supreme Court. The consolidated cases referred to as *Brackeen v. Haaland* ("*Brackeen*") were argued during the October 2022 sitting on the issues of: (1) Whether the Indian Child Welfare Act of 1978's placement preferences — which disfavor non-Indian adoptive families in child-placement proceedings involving an "Indian child" and thereby disadvantage those children — discriminate on the basis of race in violation of the U.S. Constitution; and (2) whether ICWA's placement preferences exceed Congress's Article I authority by invading the arena of child placement — the "virtually exclusive province of the States," as stated in *Sosna v. Iowa* — and otherwise commandeering state courts and state agencies



to carry out a federal child-placement program.<sup>1</sup> To date, no opinion has been issued. There was enough concern following oral arguments, however, that a number of states have introduced legislation codifying ICWA protections directly into state law in an effort to mitigate any damage that could result from the Opinion<sup>2</sup>. Ten states already had ICWA laws on the books, and some of those have amended the laws to strengthen protections and accountability for Native children who may be found in need of care.<sup>3</sup>

Regardless of how the U.S. Supreme Court rules, it is clear that tribal nations face the threat of eventual extinction by operation of court. If ICWA is overturned in whole or in part, the future of Indian tribes is uncertain-without Native children living and learning their cultures, there is no future for the original peoples of this land.

---

<sup>i</sup> All opinions expressed in this article are solely those of the author, and not purported to represent the position(s) of any specific tribal nation or entity.

<sup>ii</sup> Quotation from the founder of Carlisle Indian School, given at a 1892 conference.  
<http://historymatters.gmu.edu/d/4929/> (last accessed 8/27/2018).

<sup>iii</sup> The terms “Indian,” “Native,” and “Tribal” are used interchangeably throughout this article. The legal term has been “Indian” since the United States Constitution was adopted. Article I, Section 8, Clause 3.

<sup>iv</sup> The first reported on-reservation Indian Boarding School was at Fort Simcoe on the Yakama Indian Reservation. The Treaty with Yakama stipulated as one of its terms that the federal government would provide a school, superintendent and two teachers. Article 5, Treaty with the Yakama, 12 Stat. 951 (1855). The first off-reservation Boarding School was Carlisle Indian School in Pennsylvania, established in 1879.

<sup>v</sup> See, e.g., [http://www.philly.com/philly/news/Those\\_kids\\_never\\_got\\_to\\_go\\_home.html](http://www.philly.com/philly/news/Those_kids_never_got_to_go_home.html);  
<https://www.aljazeera.com/indepth/features/2016/01/uncarthing-dark-native-boarding-school-160103072842972.html>; <https://www.indianz.com/News/2018/06/15/four-children-who-died-at-indian-boardin.asp>. (last accessed 8/29/2018)

---

<sup>1</sup> Synopsis courtesy of Scotusblog, found at: <https://www.scotusblog.com/case-files/cases/brackeen-v-haaland/> site last visited 3/6/2023.

<sup>2</sup> States that have introduced legislation since *Brackeen* was heard include Arizona, Utah, Montana, North Dakota, South Dakota, and Wyoming.

<sup>3</sup> California, Oregon, Washington, Iowa, Minnesota, Michigan, Nebraska, New Mexico, Wisconsin and Oklahoma already have ICWA-compliant legislation. Minnesota has introduced amendments to strengthen the laws already in place; New Mexico has adopted amendments to do the same.

---

<sup>vi</sup> “One can no longer say that the Indian child is the 'forgotten child,'” [Arnold] Lyslo proudly declared upon the project’s completion. Arnold Lyslo was the Director of the Indian Adoption Project.

<sup>vii</sup> Margaret D. Jacobs, *American Indian Quarterly*, Vol. 37, No. 1-2, Special Issue: Native Adoption in Canada, the United States, New Zealand, and Australia (Winter/Spring 2013), pp. 136-159. (last accessed 8/29/2018)

<sup>viii</sup> 2001 statement by Child Welfare League Executive Director Shay Bilchik: “No matter how well intentioned and how squarely in the mainstream this was at the time,” he said, “it was wrong; it was hurtful; and it reflected a kind of bias that surfaces feelings of shame.”

<sup>ix</sup> 25 U.S.C. §1901 et seq.

<sup>x</sup> 25 U.S.C. §1902.

<sup>xi</sup> See, e.g. Navajo Nation Code Annotated Title 9, Subchapter 1, Chapter 11, Section 1101(D); Kenaitze DR Code Ch 1 Section 1, “”; Hopi Children’s Code Chapter II, A. Purpose, (1) “preserve the unity of the family”.

<sup>xii</sup> 7 O.C. 705.3-1(a).

<sup>xiii</sup> TTC 4.05.040.

<sup>xiv</sup> <https://www.tulaliptribes-nsn.gov/Home/Government/Departments/bedachelh.aspx>. (last accessed 8/29/2018)

<sup>xv</sup> Abenanti, Abby, Passports for Native Children, Tribal Law and Policy Institute ~ www.tlpi.org ~December 2006; [http://nc.casaforchildren.org/files/public/community/programs/Tribal/0710\\_passports\\_for\\_native\\_children\\_0000.pdf](http://nc.casaforchildren.org/files/public/community/programs/Tribal/0710_passports_for_native_children_0000.pdf). (last accessed 8/29/2018)

<sup>xvi</sup> TTC 4.05.040.