

American Indian Children and the Law

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Cases and Materials

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To David Fort, Thomson Fort, and their friends, who remind me on a daily basis of the awesome responsibility of being the parent and community member every kid deserves.

Annette Nickel, Elizabeth Eggert, Chrissi Nimmo, and all of the tribal in-house ICWA attorneys out there — this is for you. May you encounter lawyers and judges who learned ICWA in law school.

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Introduction

This casebook is the result of years of discussions with Native lawyers, law students, families, tribal leaders, and professors. Because Native children and families continue to be the subject of constant litigation and federal policy changes, this book changed dramatically in the years as it was being written. The actions of federal and state governments against Native children—removing them from their families, culture, language, and communities—has had far ranging implications for generations of families. This casebook discusses the consequences of those actions and the tribal responses to them.

From removing children to boarding, or residential, schools, where Native children lost their language, were subject to abuse, and lost models of traditional parenting before they were returned to their communities, to today's child welfare system, which is incapable of dealing with the poverty, mental health, and chemical dependency issues facing parents today, Native children have felt the brunt of federal and state actions. Today there is not one adult Native person does not have a story of removal—of a cousin, a sibling, a parent, pulled from a community and placed with strangers.

American Indian children make up a small percentage of the total population, and yet are disproportionately impacted by state and federal policies and laws. But Native families are also resilient. For centuries, Native nations worked ingeniously to maintain their culture, language, and families in the face of the full force of the federal government to erase them. And forty years ago, Congress heard years of testimony on this treatment of children and families, and passed one of the most important laws for Native children, and a model of treatment for all children. For perhaps the first time, Congress decided in one law to reverse an entire federal policy dedicated to the destruction of Native families and instead attempt to protect them. The Indian Child Welfare Act guaranteed the right of tribes to make decisions for their own children and families, and when they were unable to due to distance or capacity, that states ensure children stay with their families and communities and receive services to address two hundred years of colonialism.

Scholars write about settler-colonialism, and the historical impacts—but there should be no doubt that individual families continue to feel these very real impacts today. The eight chapters in this casebook attempt to situate those impacts through both primary and secondary sources, including biography, caselaw, articles, and legislative history.

Chapter One provides more detail and context to the history referenced in this introduction. The chapter gives a basic overview of settler-colonial history as it affected American Indian children in particular. It also brings that history into the present, and underscores how recently Congressional policy changed from the destruction to the preservation of American Indian families.

Chapter Two addresses the implications of inherent tribal jurisdiction over children and families. It discusses cases from both before and after the passage of the Indian Child Welfare Act, the effect of Public Law 280 on Indian child welfare, how the best interests of the child standard intersect with jurisdictional decisions, and the role of parental objection and choice in jurisdictional decisions. Finally, it ends with one of the most important modern federal cases in Indian child welfare, which takes on the issue of emergency jurisdiction and the due process rights of parents.

Chapter Three contains the bulk of the casebook—the state case law that has developed over nearly forty years of applying the Indian Child Welfare Act in state court. Regardless of the tribal involvement, when a state court has both an Indian child and a child custody proceeding as defined by the Act, the court must apply the provisions of the law. The provisions addressed in this chapter include notice to tribes, the tribal right of intervention, the heightened standards of proof, the qualified expert witness requirement, the active efforts to prevent the break-up of the Indian family, and the placement preferences for Indian children when they are placed in foster care or for adoption.

Chapter Four contains some of the most contentious materials in Indian child welfare—those surrounding voluntary or direct placement adoptions. The history of coercive removals of children for adoption, the Indian Adoption Project promoted by the Bureau of Indian Affairs, and the casual dismissal of parental rights led to the section of the Indian Child Welfare Act which is designed to provide heightened protections to parents in voluntary situations. However, the push and pull between the tribal interests in the child, the child's right to her identity and stability, and the parent's rights to put a child up for adoption (or the right to rescind that decision) lead to some of the most difficult and high profile cases.

Flowing from Chapter Four, Chapter Five discusses the constitutional issues involved in Indian child welfare, and Indian law generally, including citizenship determinations, federalism, and privacy concerns.

Chapter Six gives a basic overview of juvenile justice and how it applies to American Indian children. Criminal jurisdiction in Indian Country is often described as a maze, but when it applies to children, the intersectionality of children, citizenship, and the effects of settler colonialism is particularly confounding and heartbreaking.

Chapter Seven provides insights into tribal child welfare—how tribes make internal decisions in tribal court and in their tribal codes for children and families. Over and over tribes insist the best policy choice in this area is to allow tribes to make decisions on behalf of their children and families. This chapter shows some of the ways tribes are doing just that.

Finally, Chapter Eight broadens the scope of the question, and looks to other settler-colonial states and the policies for Indigenous children and families. Necessarily a brief overview, this chapter provides a jumping off point for those interested in learning more about the international context in Indigenous family law.

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