



**TEXAS**  
Department of Family  
and Protective Services



# 2021 Texas ICWA Summit

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SUPREME COURT OF TEXAS PERMANENT JUDICIAL  
COMMISSION FOR CHILDREN, YOUTH AND FAMILIES

Slides were created for an event held on January 22, 2021

# Nuts and Bolts of ICWA

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# **The INDIAN CHILD WELFARE ACT**

1978

“Nuts and Bolts”

The great state of Texas

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UNM Native American Budget and Policy Institute

Sovereignty 360

2021

# Our children...

“These children are your young parents...”

- Hon. Matthew Padilla, Isleta Pueblo Traditional Judge

- *An indigenous world view*



# Statistics Found by the Supreme Court and Others

- There was a pattern of discrimination against American Indians and Alaska Natives.
- Estimated 25-30% of Native children had been removed from their families.
- The adoption rate for Indian children in 1971-72 was 8 times that of non-Indian children.
- Approximately 90% of the Indian placements were in non-Indian homes.
- American Indian children represented 2% of the children in foster care. (US HHS, Sept. 2003)

# Our children, Our sovereignty

- Removal of our children is well documented
- History furnishes an understanding of the present status of Indian children and families
- This understanding can assist in synthesizing a collaborative effort to prevent the further destruction of our families and communities
- This impact is still felt today
- The manner in which an ICWA case is handled has the potential to destroy an Indian child and strike a blow at Indian families and the tribal community.
- The *Holyfield* case and *Baby Girl V* case prove that we have to be ever vigilant about how our children are treated in judicial systems—both tribal and state!

# 43 years of ICWA:

- “...that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children...”

*See 25 U.S.C. 1901 (3) (1978)*



# ICWA:

- 43 years –and minimal compliance!

# The continued failure of the Act looms....

- Act has been in place since 1978----
- Today, there are numerous cases whereby ICWA placement preferences for foster care and adoptive cases have been ignored
- Often Native American families of forced assimilation and termination policies find themselves in a state judicial forum subjected to a state child welfare system mandated to follow ICWA.
- Once again, ICWA is ignored and Indian Children are placed outside their families. See *Kevin S, Holyfield, Baby Girl Veronica* and now *Brackeen*.

# Findings:

- that an alarmingly high percentage of Indian families are broken up
- by the removal, often unwarranted, of their children from them by nontribal public and
- private agencies and
- that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

# Our Children...

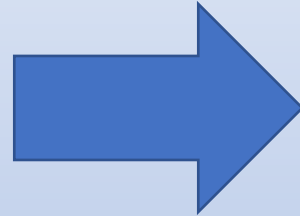


# More....

- that the States,
- exercising their recognized jurisdiction over Indian child custody proceedings
- through administrative and judicial bodies,
- have often failed to recognize the essential tribal relations of Indian people and
- the cultural and social standards prevailing in Indian communities and families.

# ICWA apply?

- YES



- Foster care
- Termination of parental rights
- Pre-adoption
- adoption

ICWA is designed to remedy legal and cultural mistakes that resulted in Indian children being placed out of home more often than necessary.

A SHIFT to:

- Judges who are familiar with Indian values & way of life
- Caseworkers who are required to look beyond the surface; the gold standard;
- Giving extended family the first option to provide care-tribal values
- Requiring a higher burden of proof for removal

# TITLE 1 SECTION 102, 25 U.S.C. 1915

## Priorities for Placement

### Absent good cause...

- **(a) Adoptive placement preferences**

- **PERMANENT PLACEMENT**

- 1<sup>st</sup> :** Extended Family
- 2<sup>nd</sup> :** Member of child's tribe
- 3<sup>rd</sup> :** Member of another Indian tribe
- 4<sup>th</sup> :** Other adoptive homes

- **(b) Foster care placement preferences**

- **FOSTER CARE**

- 1<sup>st</sup> :** Extended Family
- 2<sup>nd</sup> :** Foster home licensed by Tribe
- 3<sup>rd</sup> :** Indian foster home licensed by State
- 4<sup>th</sup> :** Institution approved by Tribe
- 5<sup>th</sup> :** Other foster homes licensed by State



# THE ICWA Court has an opportunity to reaffirm tribal Social and cultural standards

- The standards to be applied in meeting the preference requirements
- SHALL BE: the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or
- with which the parent or extended family members maintain social and cultural ties.

# ICWA Expert: “There is only one child, and her name is children,” Donna Goldsmith

- Must identify “Indian child” early on in the proceeding
- INITIAL placement is critical –to follow ICWA placement preferences
- Or children are at risk in their later development
- Lack of self-identity; don’t belong in the Indian world or NI world
- Children are at risk: significant social problems such as high rates of suicide, substance abuse, depression, drop out of school, prison
- Adoptee, Sandy Whitehawk reaffirmed this in “Blood Memory”.
- *See Dawnland: Truth and Reconciliation [Maine/state/tribes]*

# Initial placement is essential:

- When a child is placed outside of the ICWA placement priority,
- the placement is usually within a non-Indian home,
- thus the child must endure the consequence of loss of
- family, community, culture and tradition.

- Donna Goldsmith, Esq. ICWA expert

## Why *initial* placement in Indian home?

- Let us learn from *Holyfield, Baby Girl, and Brackeen*
- *Holyfield*- twins bonded w/ NI parent;
- Child endures the consequence of identity, loss of family, community, culture, language and tradition;
- Now adoptees and adult children of foster care are making their way back home.....

# ACTIVE EFFORTS: moving from intervention to PREVENTION

Remedial services and rehabilitative programs; preventive measures

- Any party seeking foster care placement of, or termination of parental rights to an Indian child
- under State law,
- shall satisfy to the court
- that **active efforts** have been made to provide services and programs
- to *prevent* the breakup of the Indian family and
- that these efforts have proved unsuccessful.

# Active Efforts

**ACTIVE EFFORTS MUST BEGIN AT THE MOMENT OF THREAT TO REMOVE. THIS INCLUDES THE INVESTIGATION AND PROVISION OF FAMILY SERVICES AND ARE DONE IF THERE IS A REASON TO BELIEVE THE CHILD MAY BE AN INDIAN CHILD; UNTIL IT IS DETERMINED ON RECORD THAT THE CHILD IS NOT AN INDIAN CHILD.**

## **Affirmative Efforts**

Identifying goals for the family is the most important part. Goals Must be SMART: Specific, Measurable, Achievable, Relevant and Time Bound



## **Effective Efforts**

This is measured by the outcomes. What can be done differently? This is not working, let's try something new!

## **Valuable Efforts**

Are the goals going to assist in long term positive changes? More than a quick fix is needed and efforts must have long term benefits.



## **What are Active Efforts?**



## **Active Efforts**

Check Point: Am I truly being active in this family's life? Is there something more I can do to help them be successful?

## **Timely Efforts**

What is the time frame? Setting appropriate goals given time constraints and resources is imperative. Don't set your family or yourself up for failure.



## **Thorough Efforts**

Is there follow through. Are you checking in on them to ensure they have the supports they need to reach their goals. Continued cooperative trouble shooting.

# Moving toward EQUITY: Remedial Services and Rehabilitative Programs to Prevent Family Breakup



## Active Efforts

- Active & Early Participation and consultation with child's Tribe
- More Intensive than reasonable efforts
- X: Refer to services is reasonable
- Active - arrange for best fitting services

## Try:

- Circle process
- Native language
- Traditional values
- Extended family
- Dynamic community
- Initial placement
- Belonging and <3

# American justice is in crises:

- Interestingly America is looking at indigenous Native American processes such as Peacemaking, Sentencing Circles and other dispute resolution processes
- The Native American lens – is not “alternative” - CJ Yazzie



# Let us pause

STOP

Rethink some of our processes, systems ,  
practices

Are they replication models?

Are they effective? Do we keep doing more  
of the same expecting different results?

Is there room for options? Change?

# 5 Principles...

- **We have been facing the wrong way** – draw upon tribal values, traditions and law in a contemporary context;
- We must understand the **impact of federal policy** on Native peoples;
- We must understand the **significance of oral tradition** – it is the glue that has kept us together;
- **Re-educate the educated** – pause and rethink how we are working with our children, families, and communities.
- **Work towards Collaboration, Cooperation and Consensus** – Unity is an everyday action in Indian country and remember Sovereignty begins at home. Everyone will have to help with the heavy lifting.

It is timely to think out of the box and into the circle!

The government-to-government relationship is essential:

- Tribal-State
  - Tribal-Federal – State
  - Tribe- to -Tribe
  - State- to –State
- 
- Our common ground is “the best interest of the child”!

# Government-to government; tribe-to tribe; tribe to state: Peacemaker model OPTION

- Indigenous courts/ such as Peacemaker models—provide a consensus forum for children/juvenile cases;
- Consensus model---continuing relationship
- Native language—custom and tradition
- SHIFTING to solutions and Healing
- Moving to wellness
- Yes, the ICWA Court in Albuquerque, New Mexico.

# ICWA Courts: Gold standard Courts

Sheldon Spotted Elk, Esq. and Tribal Appellate Justice

- “Agents of change”
- The number of children in foster care has steadily risen
- Indian children enter care at nearly three times the rate of Latino and White youth
- ICWA: state/federal/tribal – government to government
- ICWA courts developed through out the country are providing opportunities for CHANGE
- OPTION of Peacemaking –shifting from an adversarial mindset to one of healing and unity

# ICWA COURTS:

- Judicial leadership
- ICWA data collection
- Stakeholder collaboration
- Gold Standard Lawyering/Social working- child at the heart of the circle
  - Proximity and cultural humility
- ICWA training
  - Sheldon Spotted Elk, Esq., Casey Family Programs

# “Take aways to ponder...” from SSE and Judge Thorne

- Increase weekly visitation with parents - better likelihood for reunification

- Judge Thorne

- ICWA Baseline Measures

- The tribe being present shortens the time to permanency by 125 days
- Enhanced ICWA application: Parent's attorney at hearing, tribe being present, finding of ICWA early notice;
- ICWA court: extended family and tribe present

# Again, government-to-government:

- Developing a resource pool of foster/adoptive homes off reservation - is critical for *INITIAL* placement of the I. child
- The state and tribe must work collaboratively on this
- Tribes in collaboration with the state must actively participate
- States must provide timely notice; Tribes must timely respond to ICWA notice
- Compliance requires us all to work in the spirit of *mutual respect, communication and cooperation*. COMITY.



# Our children and Tribal Responsibility and advocacy: Transfer Jurisdiction

- “The Tribal courts and our indigenous concepts of justice shall be the guardians of our children, our communities and our tribal sovereignty.”
  - Hon. Rae Nell Vaughn, former Chief Justice MBCI
- ICWA—there must be an effort to go the "extra mile".
- ICWA requires advocacy and understanding of the relationship between the tribe and state;
- We are saddened when an Indian child is once again moved—multiple times from foster home to foster home or runs away.

# § 1919. *Agreements between States and Indian tribes*

## Subject coverage

- States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and
- jurisdiction over child custody proceedings,
- including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and
- agreements which provide for concurrent jurisdiction between States and Indian tribes.

# Current Initiatives:

- Tribal /State Judicial Symposiums: NM, California, Ms., Tex.
- National Council of Juvenile and Family Court Judges: Resolution in Support of Tribal Courts -2011- Judge Romero
- Judicial and Social Worker Consortiums
- Tribal/State Judicial Leadership Gatherings –NAICJA/NABPI
- Peacemaking Colloquiums, (National /International: Indigenous Peacemaking I -NARF/NABPI/Kids Matter/Pegasus
- Cousins: Restorative Justice/Transformative Justice
- Conference of Chief Justices: resolution: “To Encourage Greater Collaboration Between State Courts and Tribal Courts to Protect Native American Children” Michigan has extended to NM....

# The ICWA [COURT] PROMISE:

- “It is time for leadership and vision from the bench to fulfill the ICWA promise.
- Since no child enters or leaves the child welfare system without a judge’s order,
- it is imperative for judges to not only have a solid working knowledge of the Indian Child Welfare Act,
- but an understanding of why we have the Indian Child Welfare Act.
- It is extremely important to learn from the past in order to build a very different future in working with Native children, families and tribes.”

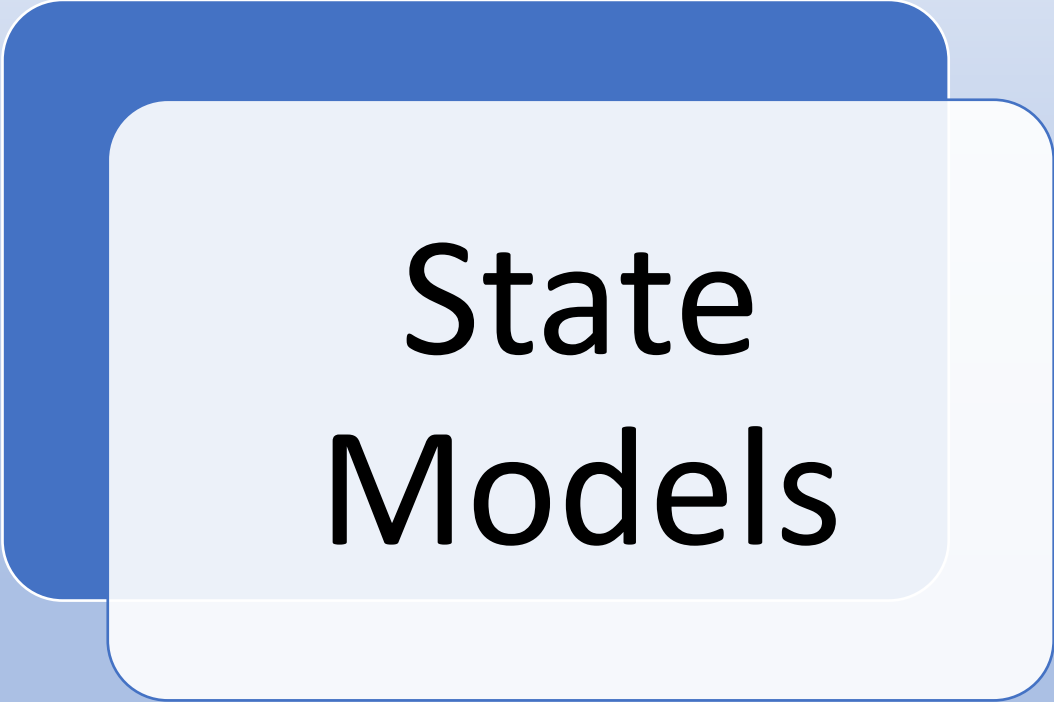
- Gina Jackson, Model Court Liaison, NCJFCJ (2012)

# Peacemaking:

Keeping the child at the heart of the circle <3



**Tribal  
Models**



**State  
Models**

# Iti kana ikbi

- Mississippi Band of Choctaw
- The peacemaker
- The peacemaking process
- Is established by tribal ordinance as a separate court

Choctaw	Native American	American
Chahta okla	Community	Individualism
Ittibachaffa	Cooperation	Competition
Ittihal <u>a</u> llih	Relatedness	Autonomy







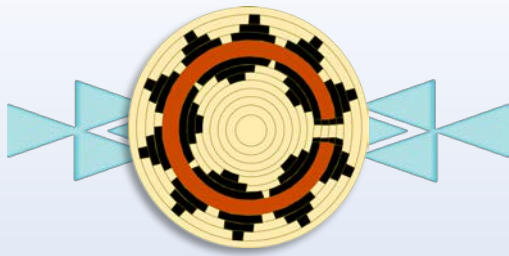
# Teachings of the seven grandfathers:

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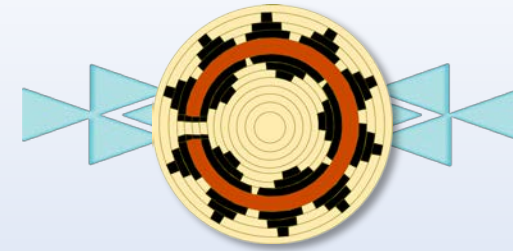
- *To cherish knowledge is to know **wisdom**;  
To know **love** is to know peace;  
To honour all of Creation is to have **respect**;  
**Bravery** is to face the foe with integrity;  
**Honesty** in facing a situation is to be brave;  
**Humility** is to know your self as a sacred part of Creation;  
**Truth** is to know all of these things*

The Basket:





# Peace Circle



## Process

- State the **purpose** of the session
- Open with prayer or moment of silence, set the sacred space
- R 1- Introductions
  - Even though people may know each other, it is important to understand each person's role and hear the voices of the participants
- R2 – clarification of position and facts
- R3-Q & A for clarification
- Questions are allowed after everyone has an opportunity to speak
- **R4-Solutions round**
- Recess to let parties come up with own solution
- **Closure**
- Outcome expected
- Memorializing the agreement
- Safety and wellness
- Consensus Agreement/ order
- Close with prayer or moment of silence
- Have all participants affirm each other's participation

## Rules

- Be tough on the issue but gentle on the person
- **Rule of Respect**
- Respect for self, elders and others
- AGREE TO DISAGREE WITH RESPECT
- Speaking (CONFIDENTIAL)
- Speak with care and respect
- Only one person talks at a time
- Use the talking tool (basket, etc.)
- Silence and pauses are ok
- Listening
- Listen well and with respect
- Listen to learn
- Listening is MORE important than talking
- Consensus
- Consensus is critical
- Build off of one another's ideas
- Discussion, apology, and forgiveness
- Passing is ok





# Washtenaw County Peacemaking Court

- 2013 Peacemaking state court
- Support of Michigan Supreme court; Training from NA
- A resiliency-based court
- 2016: **94%** cases resulted in an agreement from both parties
- **82%** agreed or strongly agreed that the result of PM circle were fair as compared to what might have occurred in a court setting
- **91%** agreed or strongly agreed that after hearing everyone talk, the participant had a better understanding of the other person's perspective
- **94%** agreed or strongly agreed that they would recommend peacemaking to others

# Collectively...Consensus...Comity

- These indigenous courts bring solutions and... resolution and demonstrate that working in partnership creates new relationships built on mutual respect, resulting in better compliance with ICWA

- CDF-The Sacred Trust 2012







# Finding common ground as we work the gold standard in the ICWA Courts

- “This forum [Tribal Judicial] was an example of how,
- with open minds and good will, parallel judicial systems can learn from each other----discovering new approaches to serving and avenues for cooperation.”
  - Hon. William Thorne (Pomo)
  - Utah State Court of Appeals
  - [Speaker at the Alabama-Coushatta Tribe of Texas’s First Tribal-State Judicial symposium (2011)]
- Delgado said the same thing....



ca Zamora

Cynthia O'Keefe

**“...OUR CHILDREN ARE PRECIOUS”**



-Jo Ann Battise, Senior Peacemaker  
Alabama-Coushatta Tribe of Texas





# Sovereignty begins at home....

- Cheryl Demmert Fairbanks

# Thank you!

- “Gunalchesh.”\*  
\*A Tlingit thank you.
- “ l. gu.aa y’ax x’wan”
- “Yee gu. aa y’ax x’wan”