Introduction:

This Indian Child Welfare Act (ICWA) training was developed as part of the University of Michigan School of Social Work’s Recruitment and Retention of Child Welfare Professionals federal training grant. This training scenario is loosely developed from a case handled several years ago by the University of Michigan School of Social Work’s Family Assessment Clinic. We have stylized the facts in order to raise as many ICWA issues as possible.

Overview of ICWA Training:

The Indian Child Welfare Act applies to relatively few child protection cases, although in some states or some regions within a state, it will apply to a much larger percentage of the child protection docket. Although the ICWA is applied relatively infrequently, when it does apply it is crucially important that it be applied properly and that professionals—both social work and legal—adhere closely to its provisions.

This training is designed to be interactive rather than using a lecture format. Much of the teaching and learning takes place when trainees share their knowledge and experiences. This helps the trainees to identify local experts and to build important relationships within the community. The trainer(s) fulfill more the role of a facilitator, albeit a knowledge one, leading discussions, ensuring that all the important points are made, and correcting misstatements of the law or its application. Thus, this is a more organic process than other professional trainings you may have attended, and no two trainings using this methodology are exactly the same.

A few words about incorrect information: your trainees will come to this training with varying levels of sophistication regarding the statute and its application in the local community. Some will be entirely inexperienced while others will have a great deal of knowledge both about the statute and about its application in their community. It is almost inevitable that at some point in either a small group or in the plenary group incorrect information will be provided by one of the trainees. As the trainer it is helpful if you do not immediately correct this misstatement of the law or application. Rather, you should see this as a prime teaching moment. When this happens, I usually ask the group whether anyone else has a different understanding. If another trainee chimes in with the correct answer, I make a demonstration of agreeing with that individual and then reinforce the point, typically by pointing to the law, BIA guideline, or state case law that makes the point.

This approach to training works best when lawyers, social workers and other professionals work together. Whether they are state children’s protective services
workers, tribal social workers, private agency foster care workers, lawyers in private practice, public defenders or states attorneys, it is important to mix and intermingle the roles and the professions to maximize the benefit of this training methodology.

Who should be the trainers? These materials are designed in such a way that the maximum benefit and optimal learning comes about when the training is led by a social work professional and a legal professional. There are at least two important benefits from having a training team made up of a social worker and a lawyer. First, and most obviously, lawyers and social workers have very different knowledge bases, each of which is crucial to the child protection enterprise. Secondly, by working cooperatively together and showing appropriate respect of the other, the trainers are able to model for trainees good interprofessional practice. Our project was fortunate to have three trainers—William Memberto is a social work with decades of child welfare experience and is the Director of Social Services for the Little River Band of Ottawa Indians. Likewise, James Keedy, an attorney with many years’ experience, is the Executive Director of Michigan Indian Legal Services and an expert in Indian Law. Frank Vande vort is Clinical Assistant Professor of Law at the University of Michigan Law School and an attorney with twenty years of child welfare experience.

Who should attend? This training is designed to benefit social worker professionals (tribal, state and private agency) and legal professionals (judges and lawyers) alike. We found that the training works best when there are 30-50 attendees with about one-third of those being legal professionals. We had difficulty getting lawyers and judges to attend, so it will be important that you strategize about how best to get lawyers and judges to attend the training.

Arranging the room is important in utilizing this training format. Because this training is designed to be both multidisciplinary and interactive it is best to arrange the room into tables of from six to eight trainees. It is also most beneficial to have a mix of professionals at each table, children’s protective services workers, tribal social workers, foster care workers and at least one attorney. This arrangement maximizes the interactive learning that takes place during the small group discussions.

Training materials. Each trainee should receive a copy of the fact pattern with the questions that are to be addressed at each stage in the training, a copy of the ICWA, and a copy of the BIA Guidelines. Additionally, you may wish to provide copies of your state agency policy regarding handling ICWA cases, your state statute relating to the ICWA and other helpful materials (e.g., a list of helpful resources in your community, a contact list for the tribes in your state or region).
Training Agenda

8:30 – 9:00       Welcome; Introduction of Trainers; Introduction to Training

9:00 – 10:30      Stage I—CPS Report; In Home Services

10:30 -10:45      Break

10:45 – 12:00     Stage II—Preliminary Hearing

12:00 – 1:00      Lunch

1:00 – 2:15       Stage III—Pre-trial Hearing

2:15 – 3:30       Stage IV—Adjudication / Trial

3:30 – 3:45       Break

3:45 – 4:45       Stage V – Review Hearings / Permanency Planning

4:45 – 5:00       Wrap-up and Evaluation
Welcome; Introduction of Trainers; Introduction to Training

We spend the first few minutes of the training welcoming the trainees. In some instances we had a brief Native American ceremony. We introduce the trainers and provide basic information about the training facility and the training methodology, stressing that unlike many professional trainings they may have attended, this one will require them to work and work hard. We administer the pre-test to assess the trainees’ knowledge at the beginning of the training. This is used for evaluation purposes.

We tell the attendees that through the day we will follow a child welfare case from CPS referral to permanency planning. We will provide a brief orientation (via power point) to the stage of the proceeding, then they will spend some time working in small groups at their tables reading more detailed facts and then discussing and answering a series of questions. Finally, we will reconvene as a plenary group and revisit the questions, considering the perspectives of each group.

After explaining the training process, it is helpful to find out who the trainees are. We asked them to identify themselves by role and profession (e.g., “Who here is a children’s protective services worker?” and “Where are the lawyers?”). It is most often the case that trainees will sit with their colleagues or familiar faces. Typically we find that the tribal caseworkers in attendance sit together, the CPS workers sit at a separate table, the lawyers and judges congregate among themselves, too.

After we have identified who the attendees are by profession, we point out that this is typical, we tend to gather with those we work with, whom we know or whom we share professional experience. We then stress the importance of interprofessional interaction to the training and rearrange the room as necessary to ensure that each table has a mix of professionals and roles. While it has sometimes been difficult, we try to be sure that there is at least one tribal caseworker and one legal professional at each table.

When you have completed these introductory tasks, you may have a few minutes. We have found it useful to take a few minutes to talk about the history of child welfare practice in the Native American community, the history of unnecessary removal, the policy of assimilation and the boarding school. This tends to be very brief. If you do not have time for this discussion, it almost always comes up when someone in attendance asks, “Why do we have a special law for Indian children?” Also by way of introduction, it may be helpful to talk broadly about the goals of the ICWA, the role of tribes under the law and to distinguish it from other federal child welfare statutes (e.g., CAPTA, Title IV-E) by noting that unlike most federal child welfare legislation, ICWA is substantive law rather than a funding statute. That is, if the child at issue qualifies as an “Indian child” within the meaning of the statute, the law applies to each and every case, and it must be applied by the state courts.

Stage I – CPS Report; In Home Services
Having completed the introduction, you are now ready to launch into the substance of the training. We begin by walking through the power point presentation, which provides a very brief overview of the facts that develop during the first stage of the case. [INSERT A LINK TO THE STAGE I SET OF POWER POINTS HERE] This should take about 5 minutes. There is also a short (10 minute) video which shows the family on which this training case is loosely based, and which may help the training to seem more real to the trainees.

When these are complete, we instruct the attendees to begin by reading the first stage facts (about three-and-one-half pages) and then, in their small group, to discuss and try to come to agreement on answers to the first stage questions. There are seven (7), some of which have a couple sub questions. The fact pattern is fairly dense and so it is helpful for the trainers to circulate during this time to answer any questions that the attendees may have as they begin learning about Leeanne Dutton and her family.

It will take the attendees a few minutes to read the facts, and they typically go through the facts again after reading them to note what they believe to be the important points. As the group finishes reading and studying the facts, you should ask that they designate one of their members to play the role of Leeanne Dutton and then provide that individual with the special instructions. When their reading is complete, some groups will immediately begin a discussion of the first question while others will sit in an awkward silence or near silence, uncertain how to begin. If you have groups that seem unable to get started, it is most helpful if you prompt them with a question or an observation to help them begin. We have found that once they start talking with one another, they quickly begin having a rich discussion of the issues.

As noted previously, much of the learning in the format takes place through the interaction of tribal caseworkers with state and private agency workers with lawyers and judges. At this point, the trainer should do whatever is necessary to facilitate those discussions. So, you should circulate throughout the room listening to the conversations. Doing so will help you to identify interesting points of view or lines of argument that you will want to highlight later during the plenary discussion.

Invariably while you are walking around the room listening in on the conversation trainees will ask you a substantive question about the law. It is easiest, and tempting, to simply answer the question in a straightforward manner. You should resist doing so. Rather, it is best to refer the attendees to their fellow trainees. If, for instance, a caseworker asks you to answer a legal question, rather than provide the answer, turn to the lawyer or judge in the group and pose the question to her or him. In this way, the trainee asking the question will learn that there is an expert at the table. Similarly, if a legal professional asks a question about a caseworker’s handling of a case, it is best to suggest that she consult the caseworkers at the table. This helps the trainees to learn to learn from each other, demonstrates that there are experts in the local community (who may be able to be called upon after the training is concluded and the attendees are back to work on actual cases), and enhances rather than stifles the discussions.
Another helpful method of dealing with questions such as these is to refer the trainees to the training materials. For instance, you might ask, “Can you find anything in the law or the BIA Guidelines that addresses that question?” or simply, “What does the statute say about that question?” You can also guide them to the relevant sections of the statute. This helps the trainee to gain familiarity with the statute and relevant other materials. In short, rather than answer the questions directly, you want to teach the trainees how to find answers to their questions.

When the allotted time for the small group discussion has expired, the trainer will reconvene the plenary group. The trainer will begin working through the questions, soliciting answers to the question from different small groups. Where the law is clear or precise on a particular point (for example the requirements for notice being sent by registered mail with a return receipt (25 U.S.C. §1912(1)), you will want to make the point clear—by asking one of the groups to explain how notice is to be provided and what section of the law contains the requirement rather than yourself telling the trainees). If you have noticed that one of the small groups has an interesting perspective on a particular question, you will want to ask someone from the group to explain. Sometimes groups will have very different answers to a question, particularly questions that involve an element of judgment or discretion. You will want to highlight these differences by asking the different groups to relate and explain their answers to the others.

Here, again, it is possible that an individual or a group will provide a wrong answer. If this happens, rather than the trainer correcting the incorrect answer, you might ask the group “Did anyone find a different answer?” When the correct answer is given, you will want to emphasize it and explain why the incorrect answer is incorrect (e.g., perhaps the statutory provision cited applies to a different point in the proceeding).

Substantively, in this stage of the proceeding, CPS was contacted regarding Ms. Dutton’s children when two of the children are discovered by a neighbor wandering the street late at night. First the police then CPS are contacted. We begin in the first question by noting the definition of an “Indian child” contained in the statute and we point out where in the statute the definition can be found. We make clear that this is a legal term of art with a specific statutory definition. We distinguish an “Indian child” who is eligible for the procedural protections of the ICWA, from a Native American child who may not be eligible. Indeed, some children are fully Native American—that is, both parents are Native American—but for one reason or another they may not qualify as an “Indian child.”

In question 2, we ask the trainees to identify the state Department of Human Services policy which is applicable to the case (you will, of course, want to refer to your own state’s policies here). We then ask the trainees to identify how the policy is different from state or federal law.

Then, in question 3, we address cultural humility, what many refer to as cultural competency. Here we emphasize again that some Native American children will not meet
the definition of an “Indian child” but may have cultural needs that should be address in case planning.

Question 4 provides an opportunity to stress getting tribal authorities involved as early as possible in the case. This may benefit the children and family by bringing more resources to bear on their situation, helping to define roles, and generally smoothing relations. The second part of the question is practical, what are the precise steps necessary to contact the tribe, what form must be filled out to refer the matter, is a phone call sufficient, who at the tribe should be contacted? We provide a list of tribal contacts as a resource to trainees, and this is a good opportunity to refer the attendees to this document. The next three parts of question 4 encourage the trainees to think about what role is appropriate for themselves and the other professionals working on the case, and the best means of coordinating the provision of services to the family. Here you will want to emphasize that each tribe is different and will therefore have different resources available and different procedures. Again, we put a strong emphasis on getting the tribe involved early and working cooperatively to address the needs of the children and family.

In question 5, we address the “active efforts” requirement and distinguish it from the more generally required “reasonable efforts.” We use concrete examples to illustrate the differences in these two somewhat vague and subjective legal standards. We point out that one person’s “reasonable effort” may seem unreasonable—too much or too little—to another, and that one person’s judgment about what constitutes “active efforts” may not seem active enough to the next.

Notice to the parents and tribe is arguably the ICWA’s most important procedural requirement. We stress it early and often, and question 6 provides this opportunity. We also want to get the trainees thinking about notifying not just the most apparent tribal authorities but all the tribes that may be entitled to notice.

**Stage II – Preliminary Hearing**

[INSERT A LINK TO THE STAGE II SET OF POWER POINTS HERE]

In Stage two, the family receives in-home services based upon a treatment plan that has been developed by Ms. Dutton and the various case workers. Ultimately, those services prove unavailing and a petition is filed with the state court requesting that it assert control of the children and make appropriate placement decisions.

Because the facts of this—and any—case are constantly shifting, question 1 asks again whether the ICWA applies to any or all of the children, i.e., which, if any, qualify as an “Indian child” within the meaning of the statute.

Question 2 is a classic subjective child welfare question. Trainees will almost invariably have very different views as to whether the “active efforts” requirement has been met. Here you will want to bring out as many viewpoints as time permits. If someone says “Yes, the statutory requirement has been met,” ask them to defend this statement. “Why? How?” If someone indicates their belief that the “active efforts” requirement was not met,
ask what other services should have been or could have been offered. This affords an excellent opportunity to talk about what resources are available in local communities; sometimes there is a new program worth talking about. The second part of the question asks a more narrowly focused legal question, whether the court properly issued an order. This will depend largely on state law.

Question 3 asks about the legal standard and evidentiary requirements included in the ICWA and how these differ from state law. Here is an opportunity to discuss the requirements of 25 USC § 1912(e): In an ICWA case, the court must find by clear and convincing evidence “that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” This finding must be based, at least in part, on testimony provided by a “qualified expert witness.” We discuss who qualifies under this standard as an expert, considering both legal definitions that may be contained in case law and practical issues with obtaining such testimony.

Question 4, again, addresses notice to the tribes. Often in Stage I it will be pointed out that since the children are not being removed the legal requirement of tribal notification has not yet been triggered (another opportunity to distinguish legal requirement from best social work practice). At this stage, however, the notification requirement becomes mandatory.

To answer question 5, trainees must look to the placement criteria set out in 25 USC § 1915(b). After drawing the trainees’ attention to the specific statutory provision, we review the substantive placement priorities. We discuss the importance of tribal officials in assisting with this determination.

Question 6 addresses the application of Title IV-E and the Multiethnic Placement Act as amended by the Interethnic Adoption Provisions (MEPA-IEP) to ICWA eligible cases. Title IV-E provides federal funding for ICWA eligible cases while the MEPA-IEP specifically excepts from its application cases that fall under the ICWA, and thus the placement hierarchy contained in 25 USC § 1915(b) applies. It may be helpful for trainees to indicate that ICWA operates as an exception to the MEPA-IEP’s general requirement that race, color or national origin not be consider when making placement decisions. Additionally, it may be helpful to emphasize that the federal government sees one’s designation as an “Indian” as a political rather than a racial or cultural classification. That is, we emphasize that tribes are sovereigns just as if the child were from, say, Canada or Mexico.

Stage III – Pre-Trial
[INSERT A LINK TO THE STAGE III SET OF POWER POINTS HERE]
In this stage, the mother’s tribe seeks to intervene into the state court proceedings and we learn more about the children’s fathers. Question 1 asks about the effect of the court’s ruling granting intervention to the tribe. This question provides an opportunity to discuss the tribal right of intervention contained in 25 USC § 1911(c). We parse this provision of the statute somewhat to make clear both that, one, the tribe has a right to intervene, so the
state court has no authority to deny the motion, and two, the tribe may intervene at any
time. We indicate and may illustrate that each tribe may have different policies and
practices regarding intervention, some may intervene in every case as early as possible,
some may intervene only later in the proceedings, some may choose not to intervene,
either generally or in a specific case.

The second part of the question asks about the effect of the court granting the motion to
intervene, which is to make the tribe a party to the case just as the state, the parent and
the child (under Michigan law) are parties. As a party, the tribe is entitled to notice and to
participate fully in the proceedings.

Question 2 addresses notice more fully, looking specifically at whom, how and where it
must be sent. We talk about notifying the tribe if the child’s tribal affiliation is known,
and the Secretary of the Interior if the child’s tribal affiliation is unclear. Included in the
materials should be the address of the regional office of the Bureau of Indian Affairs. We
address what form notifications are made available to caseworkers, lawyers and courts,
either by state agencies or state courts. We also include the specifics that 25 USC §1912
and the BIA Guidelines, B.5. We discuss which entity—the petitioning state agency or
the state court—has the duty to prepare and send the notice.

Question 3 revisits, given the accumulations of information, which of the children fall
within the definition of an “Indian child.”

Question 4 addresses the “active effort” requirement contained in 25 USC § 1912(d)
aimed at preventing the breakup of the family. We review the differences between “active
efforts” and “reasonable efforts” in the foster care context (as opposed to the in-home
context before removal which was discussed earlier). A number of jurisdictions have
adopted a rule that does not require active efforts if making such efforts and providing
such services would be futile, See, e.g., Letitia v Superior Court of Orange County, 81
Cal. App. 4th 1009; 97 Cal Rptr 2d 303 (Calif 2000); E.A. v Alaska Division of Family
and Youth Services, 46 P3d 986 (Alaska 2002); In re K.D., 155 P 3d 634 (Colo App
2007).; Wilson W. v Alaska Office of Children’s Services, 185 P3d 94 (Alaska 2008),
and we discuss this point.

In question 5 we address the children’s placement. We begin with a discussion of the
placement options and the strengths and weaknesses of each. Most trainees agree the
children should be placed with the biological aunt. However, under the state law the
mother and her biological sister have no legal relationship in the wake of their parents’
rights having been terminated and them having been adopted into different families. The
aunt is also not a licensed foster parent. These circumstances may present a barrier to
placement under state law. Here we discuss whether placement is legally appropriate
under 25 USC § 1915(b) because the “aunt” is an “extended family member” within the
meaning of 25 USC § 1903. We stress that whether an individual qualifies as an
“extended family member” is to be determined by tribal law or custom and, therefore,
may be different for different tribes.
Stage IV – Adjudication / Trial and Disposition

[INSERT A LINK TO THE STAGE IV SET OF POWER POINTS HERE]

In this segment, DeeDee’s father’s tribe, the Pottawatomie tribe, has moved to intervene into the proceedings. The first question asks how the trial court should rule on this motion. For the same reasons the court had to grant the NMB tribe’s motion earlier, it must grant the Pottawatomie tribe’s request now. We note that there may be more than one tribe that becomes a party to the case.

In answering question 2, we review the notice requirement as it applies to the Secretary of the Interior, including all the specifics that must be contained in that notice. The second part of the question addresses the time requirements contained in 25 USC § 1912(a). We note that the case cannot proceed until 25 days after the Secretary of the Interior has received notice---15 days for the Secretary and 10 days for the tribe and Indian custodian. We also point out that if requested, the parent, Indian custodian or tribe is entitled to a 20 day continuation of the proceeding.

Question 3 asks about the standard of evidence necessary for a state court to adjudicate each child a ward of the court. For Adam, Brittney and DeeDee this standard is clear and convincing evidence that the child will likely experience serious emotional or physical harm if placement with the parent is continued as provided in 25 USC § 1912(e), while the standard for Charlie is governed by state law. We point out that this higher standard to assume jurisdiction of an “Indian child” is the same standard the constitution requires to terminate the parental rights of a non-Indian child. Santosky v Kramer, 455 US 745 (1982).

In question 4 we address the requirement that the state present testimony of a “qualified expert witness.”

Question 5 raises the issue of DeeDee’s domicile / residence. The general rule is that a child is domiciled in the place where his or her parent is domiciled, in this case the Pottawatomie reservation. See Mississippi Band of Choctaw Indians v Holyfield, 490 US 30 (1989). This raises the issue of the role of state courts in making orders regarding Indian children who are domiciled on the reservation but who are temporarily off the reservation under 25 USC § 1922. Given that whatever imminent danger DeeDee may have been in when removed, that danger has clearly passed, and the child should be returned to the reservation in Wisconsin. This raises an issue of the application of the ICWA in the interstate context, which is usually governed by the Interstate Compact on the Placement of Children (ICPC). There is little if any law on the interaction of these two statutes, however, the fact that Congress has plenary authority over matters relating to Indian tribes and has provided for immediate return would seem to trump the ICPC, a uniform state law. The second part of the question raises the question of DeeDee’s contact with her siblings if she is moved. These issues are trumped by the statute’s clear provision that the child should be returned to the care of her father on his reservation.

Question 6 simply asks the trainees to think about how the changing facts and placement may impact the treatment planning for the case.
Stage V – Review Hearings / Permanency Planning Hearing

This stage has a longer set of facts than in the previous few segments of the training and will require some extra time for participants to read and digest. Question 1 addresses the placement of DeeDee back with her father and raises the question of whether her case should be transferred to the tribal court, assuming there is a tribal court, pursuant to 25 USC § 1911(b). We talk about some of the logistical problems with the state court maintaining the case when the child is placed in a different state. The second part of the question addresses what happens, assuming a request to transfer is made, if a parent objects. This raises the question of how “absent objection by either parent” language contained in 1911(b) is to be interpreted. On its face, the statute could be interpreted as providing a state court authority to transfer the case at the request of the Pottawatomie tribe even over an objection by the mother, Ms. Dutton. However, the BIA Guidelines provide that a parent’s veto power is absolute, depriving the state court of the power to transfer over parental objection. See BIA Guidelines B.2. The third part of the question asks on what basis the state’s attorney or the child’s attorney could object, which provides a means of discussing what may—and may not—constitute good cause for not transferring.

Question 2 asks about the authority of the Blackfeet tribe to transfer the case as it relates to Adam and Brittney. Of course, these children are not enrolled, so they don’t meet the definition of an “Indian child” contained in the statute. However, if they are enrolled the tribe could request transfer, however, the lateness of the request may constitute good cause not to transfer the case. See BIA Guidelines C.1 and supporting Commentary (requiring that the request to transfer be made promptly and noting that a late transfer of the case may be disruptive).

Question 3 asks where the children would be placed if the case were transferred to the Blackfeet tribal court. This question is intended to make clear that the answer to these questions would need to be determined by the tribal court. Also, that each tribal court may have a different approach to the case and that the resolution of this question will be somewhat idiosyncratic.

Question 4 opens up a discussion about the legal standard to terminate the parental rights of the parent of an “Indian child.” In addition to meeting state statutory requirements, terminating the rights of the parent of an “Indian child” requires proof beyond a reasonable doubt that “the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” 25 USC § 1912(f). We make the point that this is a difficult standard to meet, and that it is the highest standard known to the law. Moreover, we point out the need for testimony by a qualified expert witness.

Question 5 asks about the hierarchy for adoptive placement. We draw the trainees’ attention to list of preferences set out in 25 USC § 1915(a) and discuss its implications.
Wrap-Up

The primary purpose of the wrap-up is to administer the post-test. We use the pre- and post-test as well as the evaluation forms to assess the effectiveness of the training. We thank the participants for a long day of hard work and send them on their way.

Conclusion

Since this training is designed to be organic, participants may raise questions not addressed by our prepared questions (e.g., what about adoption in the private context?). This is to be encouraged and we answer those questions whenever possible. The key is to try to answer those questions quickly and get back to the questions you have decided to address.

The trainer may wish to emphasize additional or different matters. Indeed, we often look for or take the opportunity to discuss state case law developments or agency practices. The trainer may wish to adapt the facts of this case to emphasize the law of their own jurisdiction or different parts of the ICWA itself. We encourage you to do so.