ILLINOIS STATE BAR ASSOCIATION

MAY 2016 VOL 26 NO. 1

# The Challenge

The newsletter of the Illinois State Bar Association's Standing Committee on Racial and Ethnic Minorities and the Law

Chair's column
1

Editor's note
1

Mentoring in Law: Necessity & opportunity
2

*Batson* turns 30 but still has growing pains
4

The Indian Child Welfare Act: No clear Illinois guidance
8

Upcoming CLE programs
10

## Chair's column

BY ATHENA T. TAITE,

**As our 2015-2016 bar year comes to a close**, I thank you for supporting the Standing Committee on Racial and Ethnic Minorities (REM). I hope that you enjoyed the continuing legal education programs sponsored by the Committee. In September 2015, our CLE coordinator, Daniel R. Saeedi, presented The Hiring Process: An Applicant's Background and the Legal Issues Facing Employers. The program was an in-depth discussion with an EEOC attorney and a private practitioner. In November 2015, we co-sponsored the Symposium on Sexual Assaults on Campus, which took place over a period of two days. REM's incoming chair, Sharon Eiseman, has prepared a comprehensive summary of the program, which will appear in an upcoming newsletter. Please watch for the article, including its list of resources for students, survivors, researchers and volunteers. In January 2016, Daniel moderated a program on the expungement of criminal records. Our speakers addressed many topics, including how to service clients who need to clear their criminal record.

*Continued on next page*

## Editor's note

BY KHARA COLEMAN

**In this issue, THE CHALLENGE presents several articles** that we hope highlight issues of interest to REM section members.

Most lawyers are aware that finding a mentor is both important and necessary to a legal career, and mentoring opportunities are especially important for minority lawyers. But how do you do it? And how do you do it *right*? Ultimately, finding the right mentor may take some trial and error, for both mentors and mentees. We hope that this issue puts a few more resources on your radar.

Non litigators may not recognize the term "Batson challenge" or remember reading *Batson v. Kentucky*, 476 U.S. 79 (1986), in law school. But whether we use the term in practice or not, ultimately the case has had an undeniable impact on both the perceived and the actual administration of justice in American courts. We hope that this article provides an interesting reintroduction to the case and how it is used effectively in the courtroom.

Finally, many family law practitioners may work for years without encountering the Indian Child Welfare Act, which

*Continued on next page*

## Chair's column

CONTINUED FROM PAGE 1

The program, which can be accessed online through ISBA's website, is titled Getting Adult and Juvenile Criminal Records Expunged – the Legal Process in Illinois. If you missed any of our CLE programs this year, I encourage you to look for our excellent educational presentations at http://onlinecle.isba.org. A special thank you to Daniel for coordinating and hosting the CLE programs and to Yolaine Dauphin for having the energy and ability to bring many persons together to present well-attended and informative symposiums.

Expect more programming and additional newsletters in the 2016-2017 bar year. REM is committed to serving as a voice to the ISBA, the legal profession and the public on issues impacting racial and ethnic minorities. To that end, we follow and comment on legislation introduced in Springfield. I, along with Sharon and our Immediate Past Chair, Cory White, actively participate in activities of the Diversity Leadership Council. Please contact us if you would like to assist in furthering the Committee's goals.

Best,

Athena T. Taite, Chair, 2015-16
ISBA Standing Committee on Racial and Ethnic Minorities
ataite@iardc.org

## Editor's note

CONTINUED FROM PAGE 1

governs child custody proceedings and is intended to prevent Native American children from being removed from their families. An understanding of the workings and challenges of the ICWA would be useful to any attorney whose cases may involve custody or adoption disputes.

Don't forget to mark your calendars for the 4th Annual Minority Bar CLE Conference in June! ■

# Mentoring in Law: Necessity & opportunity

BY MICHAEL ALKARAKI

**Without Muddy Waters, Buddy Guy may never have left Baton Rouge,** let alone risen to prominence in Chicago, securing the city's place as the enduring home of modern blues. Referring to the late great Dean Smith, Michael Jordan has said, "Other than my parents, no one had a bigger influence on my life than Coach Smith," describing Smith as a "mentor," "teacher" and "second father" whom, "in teaching me the game of basketball, […] taught me about life." The power of these relationships is recognized as so great that whether and to what degree President Obama was mentored by certain persons along his path to the White House has been fodder (unfairly, in this author's humble opinion) for attacks by the President's political adversaries.

Countless articles extol the virtues and reciprocal benefits of mentoring. It's such a broad subject reaching virtually every aspect of personal experience that exploring it in the abstract is impractical. Focusing

The Challenge

Published at least four times per year. Annual subscription rates for ISBA members: $25.

To subscribe, visit www.isba.org or call 217-525-1760.

**OFFICE**
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

**EDITOR**
Khara Aisha Ashanti Coleman

**MANAGING EDITOR / PRODUCTION**
Katie Underwood
kunderwood@isba.org





Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

even on the relatively discreet issue of mentoring in the legal profession may still leave many nuances that present challenges to detailed discussion. Nonetheless, it's clear that, at its core, mentoring is about perspective and growth – in more basic terms, knowledge and improvement. When it comes to professional development, this generally means teaching and learning what to do, how to do it and, perhaps most importantly, why.

This is particularly significant in terms of addressing what appears to be a growing concern among legal employers – namely, that new lawyers are not "practice ready." More often than not, it's the case that new lawyers do in fact possess the skill set needed to hit the ground running, but simply lack the confidence and sense of direction that come largely through experience. An easy fix, some employers regrettably misperceive this as requiring substantial expense of time and resources. Fortunately, the organized bar is replete with resources and opportunities for both new and seasoned lawyers to communicate and share experience and lessons learned for the benefit of the profession at large. Some examples include the following:

## Illinois Statewide Lawyer-to-Lawyer Mentoring Program

Year-long mentoring program administered by "2Civility," the Illinois Supreme Court Commission on Professionalism's communication channel, with support from the Illinois State Bar Association and Chicago Bar Association, which pairs experienced lawyers with new bar admittees to provide guidance during first years of practice; Participants receive 6 MCLE credits, including 6 PMCLE credits, upon successful program completion. Details available at <www.2civility.org/programs/mentoring/>.

## Illinois State Bar Association Discussion Groups

Variety of discussion groups where ISBA members can ask questions and get answers; Includes Mentor-Mentee Discussion Group, General Discussion Groups and Section Discussion Groups dedicated to specific areas of substantive law; Details available at <www.isba.org/discussions>.

## Chicago Bar Association Group Mentoring Program

Groups new lawyers (5 years or fewer in practice) with more seasoned lawyers (8 years or more) to foster exchange of ideas, promote professional networking and tackle career challenges during a year-long program; Details available at <www.chicagobar.org/eDownloads/Group_Mentoring_Guide.pdf>.

I've been fortunate in my career not only to have had a series of great mentors, but also to have had opportunities to serve as a mentor in formal and less formal settings. In 2012, I participated in the pilot program for the Cook County Juvenile Justice Mentoring Initiative, a restorative justice effort which paired lawyers with non-violent probationary male youths in order to encourage personal and social development and reduce recidivism. The program was successful and, like some other mentors from the pilot program, I've continued to stay in contact with my mentee, whom I'm happy to report has avoided further legal problems and developed career aspirations. Now in its fourth year, the program has continued to operate in conjunction with the Circuit Court of Cook County, Juvenile Justice Division. For those interested, details for an upcoming informational meeting will be disseminated through various bar associations in the near future.

Last fall, I was honored to join the part-time faculty at my *alma mater,* Loyola University Chicago School of Law, as an adjunct professor of Advocacy, a core curriculum course focused on development of persuasive written and oral communication skills. The experience was valuable, not only from a practice skills perspective, but also in terms of providing opportunities to share experiences, exchange knowledge and build long-lasting relationships. My former students, of course, will soon be and, to a degree already are, my colleagues. I look forward to returning this August for my second year, improving as a teacher and watching my students' careers develop.

The importance of mentoring in legal education and the profession was among the topics on the agenda for a recent meeting of Loyola's Dean's Diversity Council, a group of administrators, professors, alumni, current students and student organization representatives formed to think creatively and implement plans to foster diversity within the law school and legal community. Similar to some other law schools, Loyola offers a number of formal mentoring programs aimed at bridging the gap and opening the lines of communication between students and alumni, including but not limited to the following:

### 1L-Alumni Mentoring Program

Pairs first year law students with alumni for a year-long program aimed at expanding academic experience beyond the classroom with a focus on practical insights ranging from guidance with course selection to job searches and professional development; Details at <www.lawalumni.luc.edu/s/1548/law/index.aspx?sid=1548&gid=3&pgid=629>.

### Circle of Advocates Mentor Program

Program for students who wish to pursue careers in advocacy that provides the opportunity to build relationships and receive guidance from some of the top litigators and judges in the Chicago legal community; Details at <www.luc.edu/law/centers/advocacy/mentors.html>.

### Student Organizations

Variety of law-school and community based mentoring programs accessible through student organizations including but not limited to the Asian-American Law Student Association, Black Law Student Association, Latino Law Student Association, Muslim Law Student Association, Loyola Pipeline Project, OUTLaw and the Women's Law Society; Details at <http://www.luc.edu/law/career/diversity.html>.

Ultimately, mentoring in some form or another, whether formal or informal, face-to-face or virtual, brief or longer-term, professional or community-based, or otherwise, is inseparable from the

practice of law and is certain to occur. In that regard, all members of the bar are well served to be conscious of and deliberate in the manner that we participate in the experience. Renewed interest and recent initiatives of the Illinois Supreme Court, bar associations and law schools confirm that mentoring is not simply extra-curricular or peripheral to the practice, but essential to developing complete lawyers and advancing the professionalism of the organized bar. With a clearly articulated need, demonstrated benefits and a multitude of opportunities, those at every stage of their legal career should be encouraged to get involved. ■

---

Michael Alkaraki is a trial lawyer at Leahy & Hoste, LLC, where he represents plaintiffs in matters of serious personal injury, medical malpractice and wrongful death and an adjunct professor of Advocacy at Loyola University Chicago School of Law. He serves the ISBA as a member of the Assembly and Young Lawyers Division Council.

This article was originally published in the April 2016 issue of the ISBA's Young Lawyers Division newsletter.

# *Batson* turns 30 but still has growing pains

BY TOM SCHANZLE-HASKINS, UNITED STATES MAGISTRATE JUDGE

**In 1986, the United States Supreme Court** in *Batson v. Kentucky*, 476 U.S. 79 (1986), held that a prosecutor's exercise of race-based peremptory challenges to jurors violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The original holding of *Batson* has been substantially extended, however, the granting of a writ of certiorari in *Foster v. Chatman*, No. 14-8349, which is currently pending before the United States Supreme Court, indicates that the ruling of the Court in *Batson* still remains difficult to implement.

In her opinion in *McWinston v. Boatwright*, 649 F.3d 618 (7th Cir., 2011), Chief Judge Diane Wood succinctly reviewed the Supreme Court's efforts to eliminate discrimination in jury selection as follows:

> For more than 130 years, federal courts have held that discrimination in jury selection offends the Equal Protection Clause. See, e.g., *Smith v. Texas*, 311 U.S. 128, 130–32, 61 S.Ct. 164, 85 L.Ed. 84 (1940); *Norris v. Alabama*, 294 U.S. 587, 599, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Neal v. Delaware*, 103 U.S. 370, 397–98, 26 L.Ed. 567 (1881). Early cases focused on the systemic exclusion of racial minorities from juries through state statutes, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); later, attention turned to the race-based use of peremptory challenges by prosecutors. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). More recently, the constitutional prohibition on discrimination in jury selection has been extended beyond race to gender. Moreover, the fact that society as a whole has an interest in the integrity of the jury system has been acknowledged. The anti-discrimination principle is thus not just a privilege of the criminal defendant; it constrains prosecutors, criminal defense lawyers, and civil litigants alike. Intentional discrimination by any participant in the justice system undermines the rule of law and, by so doing, harms the parties, the people called for jury duty, and the public as a whole. See *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (applying *Batson* to gender-based peremptory strikes); *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (applying *Batson* to criminal defense counsel); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (applying *Batson* to civil litigants); *Powers v. Ohio*, 499 U.S. 400, 405–07, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (describing the harms of discrimination in juror selection); *Batson*, 476 U.S. at 86–88, 106 S.Ct. 1712. As this case illustrates, however, discrimination in the selection of jurors has not yet been eradicated.

While a litigant is not entitled to a jury composed of members of his or her race or gender, *Nehan v. J.B. Hunt Transportation, Inc.*, 179 Fed.Appx. 954 (7th Cir., 2006) (see also *U.S. v. Nururdin*, 8 F.3d 1187, 1189-90 (7th Cir., 1993), discrimination in the exercise of peremptory challenges when selecting jurors is unconstitutional.

## Expansion of the coverage of *Batson*

In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Supreme Court applied *Batson* to civil litigants as well as criminal defendants. In *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994), the Supreme Court held that gender, like race, is an unconstitutional basis for exercising peremptory challenges. In *Powers v. Ohio*, 499 U.S. 400, 402 (1991), the Supreme Court held that a litigant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the objecting party and the excluded

juror share the same race.

Courts have, however, declined to expand the application of *Batson* to apply to disparate impact as a basis for sustaining a *Batson* challenge. In rejecting a *Batson* challenge suggesting that the proffered explanation for the strike, bias against law enforcement, is not race-neutral because African-Americans are disproportionately affected by negative interactions with law enforcement, the Seventh Circuit recently noted that defendant must show discriminatory intent because disparate impact does not violate *Batson*. *U.S. v. J.B. Brown, Jr.*, 809 F.3d 371, 375-376 (7th Cir., 2016). See *Hernandez v. New York*, 500 U.S. 352, (1991)(plurality opinion).

## Procedure for use of *Batson* challenges

Under *Batson*, discriminatory peremptory challenges are evaluated using a three-part test. First, the opponent of the strike must make a prima facie showing that the striking party exercised the challenge because of a discriminatory reason. Second, the striking party must proceed to articulate a race or gender-neutral reason for the challenge. After the race or gender-neutral reason is stated by the striking party, the Court must determine whether the opponent of the strike has carried his burden of proving purposeful discrimination. The ultimate burden of persuasion regarding race or gender-based motivation rests with and never shifts from the opponent of the strike. *Alverio v. Sam's Warehouse Club, Inc.*, 253 F.3d 933, 939-940 (7th Cir., 2001).

*Batson* is not self-executing. It is the duty of the party challenging the opponent's peremptory challenge to make a *Batson* objection. The Court should wait for an objection before intervening in the process of jury selection to set aside a peremptory challenge. *Doe v. Burnham*, 6 F.3d 476, 478 (7th Cir., 1993).

The Court of Appeals cannot reverse a trial court's finding that a proffered, race-neutral reason for a strike was credible unless the District Court's finding is clearly erroneous, even if the Court of Appeals finds the reason dubious. While the striking party's explanation "need not rise to the level justifying exercise of a challenge for cause", it must be "clear and reasonably specific" and "related to the particular case to be tried". *Dunham v. Frank's Nursery & Crafts, Inc.*, 967 F.2d 1121, 1124 (7th Cir., 1992).

## Problems with application of *Batson* rules

As noted above, a reviewing court gives deference to the finding of the District Court in determining whether a *Batson* violation occurred and will reverse only if the findings of the trial court are clearly erroneous. The Seventh Circuit has noted that ordinarily this deference is accorded because the trial court generally conducts the *Batson* inquiry contemporaneously with the voir dire procedure and is in the best position to witness statements of the party challenging the juror and to assess the credibility of the party exercising the challenge when they justify the exercise of their peremptory challenge under the *Batson* procedures. *Holder v. Welborn*, 60 F.3d 383, 388 (7th Cir., 1995).

The Court in *Holder*, however, conducted a de novo review because *Batson* was decided during the pendency of Holder's appeal and the *Batson* hearing was held in a habeas corpus proceeding years after the original impanelment of the jury. In *Holder*, the Court held that a prosecutor's concern that an African-American juror would harbor feelings of selective prosecution against the prosecutor's office based on the fact that the murder charges against a white suspect in the shooting death of the African-American juror's brother were dropped within two years of Holder's trial was a race-neutral justification for the exercise of a peremptory strike. In finding there was no *Batson* violation, the Court reviewed the Supreme Court's Opinion in *Batson* and noted that the Equal Protection Clause only forbids the prosecutor to challenge potential jurors solely (emphasis in original) on account of their race. *Holder v. Welborn*, Id. at 388.

The Seventh Circuit affirmed the District Court's denial of Holder's petition for habeas relief. In *Holder*, Judge Cudahy dissented. He asserted that "It is no answer, contrary to the majority's opinion, to suggest that *Batson* only prohibits strikes occurring 'solely' on the basis of race", and suggested that the case be remanded to the trial court to determine whether or not there were mixed motives in which race played an impermissible role for striking the African-American juror. *Holder v. Welborn*, *Id*. at 391.

The difficulty in applying the "sole motive" test to *Batson* challenges is illustrated by the holding of the Seventh Circuit Court in *Pettiford v. Durm*, 175 F.3d 1020, unpublished opinion (7th Cir., 1999). The Court in *Pettiford* dealt with the application of *Batson* during the trial of a civil rights complaint filed under 42 U.S.C. §1983. In that case, the plaintiff asserted that the defense had used a peremptory challenge to strike an African-American juror for racial reasons. The following is the colloquy regarding the contention that the juror was impermissibly struck on the basis of race:

> THE COURT: The record needs to reflect that there is one African-American on this jury remaining and the defendants have just struck that defendant-or that juror and they need to articulate a rational reason for that, a race neutral reason for that strike.
>
> MR. BYRON [defendants' attorney]: The reason we are striking is because we believe that she might be biased with regard to race.
>
> THE COURT: It has to be a different reason than that. Got to have an articulable reason that has to do with something other than race.
>
> MR. BYRON: I need to go back and look at our card.
>
> THE COURT: Wait a minute, just a second. Unless the plaintiff doesn't care.
>
> MR. HENDREN [plaintiff's attorney]: Your Honor, we-
>
> THE COURT: You do care?
>
> MR. HENDREN: Yes, sir.
>
> THE COURT: Okay.

(Counsel conferred outside record)

(At the bench)

THE COURT: All right, Mr. Byron.

MR. BYRON: Yes. Number one, she's not working; and number two, she has been a claims rep and has litigation experience.

THE COURT: Do you have any comment you want to make?

MR. HENDREN: Yes, your Honor. I think they already stated the reason on the record for striking her was because of her race, and these are [pretextual] reasons, neither one of which would impugn her ability to fairly judge the evidence in the case.

THE COURT: Well, an articulable reason is an articulable reason, and it doesn't have to be much. And the fact that there is a history with an insurance company is enough statement to make, and so I'm going to excuse her. Thank you.

From this colloquy, it clearly appears that a motivating reason for striking the juror was the juror's race. However, the Seventh Circuit, relying upon the holding in *Holder*, found there was no *Batson* violation where both racially discriminatory and race-neutral reasons are given for the strike. The Seventh Circuit in *Pettiford* ruled that, so long as a juror is not struck *solely* (emphasis added) on account of race, no equal protection issues arise.

Although *Holder* has not specifically been reversed by the Seventh Circuit, its current vitality appears to be questionable. In *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008), the Supreme Court evaluated a *Batson* challenge in a Louisiana death penalty case. In *Snyder*, the prosecutor had used peremptory strikes to eliminate African-American prospective jurors. One of the jurors struck by the prosecutor was an African-American college student. The prosecutor gave two allegedly race-neutral reasons for striking the juror. The first was that the juror looked nervous. The second reason was that the student was concerned his jury service or sequestration could interfere with his student-teaching obligations needed for his college course. The Court, however, contacted the Dean of the juror's college who indicated he would work with juror to make up lost teaching time if he missed student teaching due to the trial. The prosecutor's reason for excluding the student was that the student may have been inclined to find the defendant guilty of a lesser included offense to obviate the need for a death penalty phase of the trial in order to return to his student teaching. The Court found this reasoning "highly speculative and unlikely" in light of the offer of the college dean to work with the student to make up missed student teaching time and the short duration of the trial which was known to the prosecutor. *Snyder*, *Id*. at 128 S.Ct. 1204-1205. In reaching this conclusion, Justice Alito commented:

> In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. (citation omitted) We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context.

*Snyder*, *Id*. at 128 S.Ct. 1212.

If the Seventh Circuit holding in *Holder* is viewed under the substantial or motivating factor test discussed above, it could create a question as to whether a racial reason for a peremptory challenge is a "substantial or motivating factor" as opposed to the "sole factor" under the test used by the *Pettiford* court.

## *Batson* returns to the Supreme Court

The petition for writ of certiorari in *Foster v. Chatman*, No. 14-8349, was filed on January 30, 2015. The U.S. Supreme Court granted the petition for a writ of *certiorari* on May 26, 2015. The Court heard oral argument on November 2, 2015 and will issue an opinion in 2016.

*Foster v. Chatman* provides a look into the pretextual exercise of peremptory challenges and how they may have been used by prosecutors. Timothy Foster is an African-American man who has been on death row for the past 28 years in Georgia. He claims that the prosecutors at his trial violated *Batson* by striking four African-American prospective jurors during jury selection. Foster was tried, convicted, and sentenced to death by an all-white jury.

At trial, Foster objected to the use of four peremptory challenges by the prosecutors. The prosecutors gave seemingly race-neutral reasons for their peremptory challenges and the trial judge and reviewing courts agreed that the race-neutral reasons were sufficient. Foster, however, was able to obtain the prosecutors' notes years later through the Georgia Open Records Act. The notes revealed that the prosecutors were working from a jury list that was color coded by race, juror cards that indicated race, and a list of "definite no's" that included all the prospective African-American jurors. Foster argues that the notes reveal the prosecutors were taking race into account at every step of jury selection in violation of the Supreme Court's holding in *Batson*.

At oral argument in the *Foster* case, the Court asked counsel for Foster to first address whether the case should be remanded to the Georgia Supreme Court to require that court to accept the review of the writ of certiorari, which they had denied. The Court then went on to hear arguments on the merits of the case. The questioning of Justice Sotomayor indicates a willingness to apply the substantial and motivating factor test discussed by Justice Alito in *Snyder*. This could implicate a change in holdings such as the Seventh Circuit's decision in *Holder* which permits a peremptory challenge if it was not "solely" motivated by race.

The following colloquy between counsel for petitioner illustrates the Court's interest in examining the reliance on one legitimate reason for striking a juror when other reasons are present:

JUSTICE SOTOMAYOR: -- I have found some circuit courts who

have a rule on appeal or on habeas which is if they can find one legitimate reason for striking a juror --

MR. BRIGHT*(counsel for petitioner Foster)*: Yes.

JUSTICE SOTOMAYOR: -- that's enough to defeat a Batson challenge. Do you believe that's an appropriate rule? Are you suggesting a different approach to the question?

MR. BRIGHT: Well, it can't -- I -- I would suggest it -- it can't possibly be. Because this Court said in Justice Alito's opinion in Snyder v. Louisiana that where the peremptory strike was shown to have been motivated in substantial part by race, that it could not be sustained. And -- excuse me -- I -- I would suggest to you, it shouldn't even really say substantial. Because if this Court, as it said so many times, is engaged in unceasing efforts to end race discrimination in the criminal courts, then a strike that -- strikes motivated by race cannot be tolerable.

And, of course, as -- as pointed out here in the -- in the amici, this is a serious problem, not just in this case, but in other cases where people come to court with their canned reasons and just read them off. That happened in this case, where one of the reasons that was given was just taken verbatim out of a -- two of the reasons given were taken verbatim out of a reported case. So you don't have the reason for the lawyer in this case. He said my personal preference. It wasn't his personal preference. It was the personal preference of some U.S. attorney in Mississippi who gave that reason, and then it was upheld on appeal by -- by the Fifth Circuit.

It will be of interest to see what the Court does with this opportunity to revisit *Batson*. A recent and well researched article, "Foster v. Chatman: A Watershed Moment for Batson and the Peremptory Challenge?"[1] by Nancy S. Marder, Professor of Law and Director of Justice John Paul Stephens Jury Center, IIT Chicago-Kent College of Law, outlines, in detail, options open to the Supreme Court in reviewing *Foster v. Chatman*.

Professor Marder notes, in her abstract to the lengthy and well-reasoned article, that the Court could either take a minimalist approach in which it could simply find a *Batson* violation, or could tweak the *Batson* test in different ways, such as giving more weight to discriminatory effects of practices or by devising a stronger remedy. In the view of Professor Marder, the only remedy that is adequate to the task is the one that Justice Marshall suggested in his *Batson* concurrence thirty years ago, the elimination of the peremptory challenge.

Thus, though the *Batson* holding has been in effect for thirty years, the Courts and commentators still grapple with how to best implement it in the trial court. ■

---

1. Marder, Nancy S., *Foster v. Chatman*: A Watershed Moment for *Batson* and the Peremptory Challenge? (2015). Available at SSRN: <http://ssrn.com/abstract=2681390> or <http://dx.doi.org/10.2139/ssrn.2681390>.

This article was originally published in the April 2016 issue of the ISBA's Federal Civil Practice newsletter.

# The Indian Child Welfare Act: No clear Illinois guidance

BY LISA GIESE AND LINDSAY JURGENSEN

**The Indian Child Welfare Act (ICWA), a federal law enacted in 1978** that governs child custody proceedings, can be and is often utilized as a tool for parents to circumvent unfavorable state custody laws. ICWA allows Native American tribal governments, rather than any applicable state government or agency, to determine child-related issues pertaining to children of Native American descent. It effectively removes a state's jurisdiction to resolve child custody issues including, adoptions, guardianships, removal, and termination of parental rights, among other things.

ICWA was designed to preserve the Native American culture and family unit by preventing Native American children from being wrongfully removed from their families. At the time the law was passed, a significant amount of Native American children were being placed in non-Native American homes, and the law sought to preserve the Native American culture. As a central concept driving the passage of the law, Congress believed that the state law standard of "best interests of the child," used in family law proceedings, was equally as important as preserving the integrity and stability of Native American tribal nations and cultures by keeping children with their families. Further, Congress determined that the best interests of a non-Native American child were not necessarily identical to the best interests of a Native American child.

In many cases, persons of very distant Native American descent attempt to use ICWA for personal gain to circumvent state custody laws, rather than for its intended purpose. However, Congress did not intend the ICWA to authorize gamesmanship on the part of a tribe – e.g. to authorize a temporary and nonjurisdictional citizenship upon a nonconsenting person in order to invoke ICWA protections.[1]

In order for ICWA to apply in a given situation, a court must determine whether jurisdiction is proper. To do that, it must determine whether the child at issue is an "Indian child" as defined by ICWA, prior to its application. Section 1903(4) defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 5 U.S. Code § 1903(4).

The problem arises when a party to a child custody proceeding asserts that a child is or is not an "Indian child." It can be difficult to determine whether the child is, in fact, a member of an Indian tribe or eligible for membership in a tribe and the biological child of a member of a tribe, as each tribe has its own membership requirements. In some tribes, a child could be eligible for membership even if the child is several generations removed from the initial Native American lineage. For example, a person can be eligible for membership in the Cherokee Nation by tracing his or her bloodline to someone listed on the Dawes Rolls, created by Congress in 1893, regardless of the number of years or generations that have lapsed since then.

Even if a Court finds that the child involved in the litigation is an "Indian child," as defined by ICWA, there are additional jurisdictional requirements that must be met in order for the law to apply. State courts are consistently faced with litigants asserting ICWA jurisdiction as a "trump card" to circumvent state laws. In a 2013 United States Supreme Court case, *Adoptive Couple v. Baby Girl*, a biological father filed suit to stay the adoption of his daughter, after he had previously consented to relinquish his parental rights to the biological mother.[2] After receiving the biological father's consent, the biological mother placed the child for adoption. When the adoptive couple began adoption proceedings, however, the biological father asserted ICWA should govern the case, alleging that he was part of the Cherokee tribe.[3] The Court noted that ICWA was enacted to prevent unwarranted removal of Indian children from their Indian parents and families, and an Indian parent who forfeits custody of the child and has never had continued custody of the child in an Indian family cannot avail himself to the protections afforded under ICWA.[4]

In the opinion, Justice Alito stated as follows:

> The Indian Child Welfare Act … would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context. Nor do § 1915(a)'s rebuttable adoption preferences apply when no alternative party has formally sought to adopt the child.[5]

State courts have been divided on the

appropriate use of a judicially created exception called the "Existing Indian Family Exception," which allows courts to decline to apply ICWA if the Native American family of the child has not had a considerable relationship with their tribe.[6] This exception allows the state court to retain jurisdiction, even if a child is an "Indian child," if a court finds that there was never an "existing family."[7] Certain courts have applied the Existing Indian Family Exception based on premise that it supports the legislative intent of Congress. ICWA's primary purpose is to preserve Native American families, so it stands to reason that if no Indian "family" exists, ICWA should not apply.

This situation arose in a Washington case, *In re Adoption of Crews*, in which a mother voluntarily consented to the adoption of her child, then days later requested the return of her child.[8] Month into the litigation, the Choctaw Nation of Oklahoma confirmed that the child was eligible for enrollment with the tribe and ICWA, then, governed the litigation.[9] In a deposition, the mother testified that she had only researched her heritage to reinstate her parental rights in the adoption proceedings.[10] The state court dismissed the mother's petition to invalidate the termination of her parental rights because it determined that the child was not an "Indian child" under ICWA because the "Certificate of Degree of Indian Blood" had been issued to the mother.[11] On appeal, the appellate court affirmed that the child did not become an "Indian child" until after the court approved termination of the mother's rights.[12]

The *Crews* court noted that the mother and the Choctaw Nation were asking the court to apply ICWA when the child "has never been a part of an existing Indian family unit or any other Indian community."[13] Furthermore, the mother failed to allege that if she regained custody that the child would grow up in an Indian environment. In fact, the mother showed "no substantive interest in her Indian heritage in the past and has given no indication this will change in the future."[14] The *Crews* court found that the child was never a part of an existing Indian family unit or other Indian community.[15] The court ruled that applying ICWA would not further ICWA's purposes and it declined to apply it, despite the child being an Indian child.[16] In fact, it stated, "ICWA is not applicable when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation."[17]

Illinois courts have not conclusively ruled on the application of the Existing Indian Family Exception, and so no mandatory authority exists on the issue. However, in the case of *In re: Adoption of S.S. & R.S.*, Justice Heiple noted in his concurrence as follows:

> [T]here is no existing Indian family and the children have never been part of an Indian cultural setting or lived on a reservation, there is no justification for applying the ICWA. It is this rationale that constitutes the existing Indian family exception and Illinois should join the majority of jurisdictions that have adopted the exception and refused to apply the ICWA where children are not part of an existing Indian family.[18]

Additionally, in the case of *In re: Cari B.*, Justice Hutchinson's stated, in dicta, that, "[W]e also believe that under appropriate circumstances a court may find that no Indian family exists for the ICWA to protect."[19]

ICWA was created to protect Native American children and the breakdown of their families, cultures, and societies. However, the jurisdictional and legal protections it offers in child custody proceedings that state laws do not, allow certain litigants to use ICWA as a "trump card" to avoid unfavorable state laws. While certain courts have determined that ICWA cannot apply, even in situations in which an "Indian child" is at issue, Illinois has not addressed the question. However, two recent Illinois opinions, *In re: Adoption of S.S. & R.S* and *In re: Cari B*, provide persuasive authority that the Exception should be routinely applied in Illinois. It is crucial for Native American families, attorneys, and courts to understand the nuances of ICWA and its applicability in order to navigate child custody proceedings involving children of Native American descent. ■

---

1. See *Neilson v. Ketchum*, 640 F.3d 1117, 1123 (10th Dist. 2011).
2. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558-2559 (2013).
3. *Id.*
4. *Id.*
5. *Id.* at 2565.
6. Shawn L. Murphy, *The Supreme Court's Revitalization of the Dying "Existing Indian Family Exception*, 46 McGeorge L.R. 629, 636 (2014).
7. *Id.*
8. *In re Adoption of Crews*, 118 Wn. 2d 561, 563, 825 P.2d 305, 307 (Wash. 1992).
9. *Id.*
10. *Id.* at 565, 308.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 568, 309.
15. *Id.* at 569, 310.
16. *Id.* at 569, 310.
17. *Id.*
18. *In re: Adoption of S.S. & R.S.*, 167 Ill. 2d 250, 265 (1995).
19. *In re: Cari B*, 327 Ill. App. 3d 743 (2d Dist. 2002).

This article was originally published in the March 2016 issue of the ISBA's Child Law newsletter.

# Upcoming CLE programs

TO REGISTER, GO TO WWW.ISBA.ORG/CLE OR CALL THE ISBA REGISTRAR AT 800-252-8908 OR 217-525-1760.

## June

**Thursday, 06/02/16- Webinar—** Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

**Thursday, 06/02/16- Teleseminar—** Choice of Entity in Real Estate. Presented by the ISBA. 12-1 pm.

**Thursday, 06/02/16- Webcast—** Developments in Illinois Insurance Law – 2015 in Review and a Look Forward. Presented by Insurance Law. 9:00 am – 11:15 am.

**Thursday, 06/02/16 and Friday, 06/03/16—CRO**—Education for Attorneys Appointed to Represent Children. Presented by Bench and Bar. Thursday: 1:00 pm – 5:15 pm; Reception: 5:15-6:15 pm. Friday: 9:00 am - 4:30 pm.

**Monday, 06/06/16- Teleseminar**—2016 Estate Planning Update. Presented by the ISBA. 12-1 pm.

**Tuesday, 06/07/16- Webinar—**Starting a New Law Firm - What You Need to Know. Practice Toolbox Series presented by the ISBA. 12-1 pm.

**Wednesday, 06/08- Friday, 06/10—CRO**—Advanced Mediation/Arbitration. MASTER SERIES—WILL NOT BE ARCHIVED. Presented by the ISBA and ADR. 8:30 am – 5:45 pm each day.

**Tuesday, 06/14/16- Teleseminar—** Successor Liability in Transactions. Presented by the ISBA. 12-1 pm.

**Thursday, 06/16/16- Webinar—** Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

**Thursday and Friday, 6/16/16 and 6/17/16—ANNUAL MEETING—**Solo and Small Firm Practice Institute. A Closer Look: Transforming Your Practice with Technology – Spring 2016. Presented by the ISBA. 12:30 – 4:45 pm Thursday. 8:15 am- 5:00 pm Friday.

**Friday, 6/17/16—ANNUAL MEETING**—Solo and Small Firm Practice Institute. A Closer Look: Establishing Your New Solo/Small Firm Practice – Spring 2016. Presented by the ISBA. 8:15 am - 5:00 pm.

**Friday, 06/17/16- Annual Meeting**—Build Your Best Firm: Tips On Hiring And Firing Employees. Presented by LOME. 8:00 a.m. – 9:00 a.m.

**Friday, 06/17/16- Annual Meeting**—Think Fast: Improving Your Communication Skills Through Improv. Presented by YLD. 5:00 p.m. – 6:00 p.m.

**Tuesday, 06/21/16- Webinar—** Promoting Your Firm with the Power of Social Media. Practice Toolbox Series presented by the ISBA. 12-1 pm.

**Wednesday, 06/22/16- CRO and Live Webcast—**Gain The Edge!® Negotiation Strategies For Lawyers. Master Series presented by the ISBA – WILL NOT BE IN ARCHIVES. 9:00 am – 4:30 pm.

**Thursday, 06/23/16- Webcast—**How to Deal with Units of Local Government. Presented by Local Government. 9:00 am – 11:00 am.

**Thursday, 06/23/16- Friday, 06/24/16—CRO—**The 4th Annual Minority Bar CLE Conference. Thursday: 12:15 pm – 5:00 pm; Reception 5:15-6:15 pm. Friday: 9:00 am – 1:15 pm.

**Thursday, 06/23/16- Webinar—** Introduction to Boolean (Keyword) Searches for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

**Friday, 06/24/16- Teleseminar**—Ethics and Social Media: Current Developments. Presented by the ISBA. 12-1 pm.

**Tuesday, 06/28/16- Teleseminar**—Estate Planning for Real Estate, Part 1. Presented by the ISBA. 12-1 pm.

**Wednesday, 06/29/16- Teleseminar**—Estate Planning for Real Estate, Part 2. Presented by the ISBA. 12-1 pm.

**Thursday, 06/30/16- Teleseminar LIVE REPLAY**—Ethics & Digital Communications. Presented by the ISBA. 12-1 pm.

## July

**Thursday, 07/07/16- Teleseminar—** What Business Lawyers Need to Know About Licenses, Part 1. Presented by the ISBA. 12-1 pm.

**Thursday, 07/07/16- Webinar—** Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

**Friday, 07/08/16- Teleseminar—**What Business Lawyers Need to Know About Licenses, Part 2. Presented by the ISBA. 12-1 pm.

**Tuesday, 07/12/16- Teleseminar—** Income Tax Issues for Estate Planners, Part 1. Presented by the ISBA. 12-1 pm.

**Wednesday, 07/13/16- Teleseminar—** Income Tax Issues for Estate Planners, Part 2. Presented by the ISBA. 12-1 pm. ■