Native Village of Chignik v. State, Department of Health & Social Services, Office of Children's Services, ___ P.3d ___, 2022 WL 7823643 (Alaska Oct. 14, 2022)

- **Holdings:** Superior court did not err in deferring to two tribes' membership and eligibility-for-membership determinations and properly deemed one of two competing tribes as the child's tribe for ICWA purposes where the child, although eligible for membership in the second tribe, was not the biological child of a member of such tribe.
- **Summary:** The mother of the involved child (Trent) is a member of Native Village of Wales, a federally recognized Indian tribe. Shortly after his birth, the Office of Children's Services filed a child-in-need-of-assistance proceeding. Wales received notice of the proceeding and participated regularly in it, eventually requesting and being granted the case's transfer to tribal court in late 2020 after parental rights had been terminated. Meanwhile, early in the CINA proceeding, the child had been placed with a foster couple who desired to adopt him. The foster-couple father enrolled in the Native Village of Chignik Lagoon, another federally recognized tribe, in early 2021. The latter moved to intervene for the purpose of challenging the transfer order, claiming that it was entitled to transfer because it was the child's tribe on the ground that Trent was eligible for membership by virtue of the foster father's now-enrolled status. After issuing a stay of the transfer and holding an evidentiary hearing, the superior court "determined that Wales was Trent's tribe and ordered jurisdiction transferred to the Wales tribal court. Applying 25 C.F.R. § 23.109, the court found that Wales had 'more significant contacts' with Trent." The court further concluded that there was no good cause not to transfer jurisdiction and therefore ordered transfer to Wales tribal court. Chignik Lagoon appealed.

  The supreme court affirmed. It first addressed the question whether the superior court properly deferred to the two Villages' determination of membership and membership-eligibility. It found the answer in 25 C.F.R. § 23.108(b) that provides in part "'[t]he determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law.'" The court "read these words as having a plain meaning: A tribe has the last word in determining its tribal membership unless federal or tribal law provides that another entity—such as the state court or the Bureau of Indian Affairs (BIA)—should make that determination instead." It additionally observed that "[c]ourt decisions reflect the same rule of deference to the tribe's exercise of control over its own membership." To the extent that Chignik Lagoon argued the contrary, its position was thus rejected.

  Next, the supreme court held that the superior court properly deemed Wales the child's tribe, although on different grounds than the lower court. It agreed with Wales's contention that "'to meet [the] definition of Indian child under ICWA, it is not enough that Trent be eligible [for membership in a tribe]. He must also have a biological parent who is [a] member of Chignik Lagoon, which he certainly does not.'" The court reasoned that the subdefinition of "Indian child" relied upon by Chignik Lagoon required that the child be "eligible for membership in an Indian tribe and ... the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4)(b). In its view,

  > the subsection (b) definition, as reasonably interpreted, contemplates a single tribe. The BIA regulations aid in interpreting the ICWA statutes, and they define "Indian child" similarly: "any unmarried person who is under age 18 and either: (1) [i]s a

> member or citizen of an Indian Tribe; or (2) [i]s eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe." The agency comments to this regulation indicate both that the regulatory and statutory definitions are meant to be the same and that the child would have to be eligible for membership in the same tribe as the parent in order to meet the second "Indian child" definition[.]

Moreover, "[c]ase law from across the country, though not addressing this issue directly, is consistent with an interpretation requiring that the child's eligibility and the biological parent's membership involve the same tribe."

Finally, the court addressed whether the Chignik Lagoon possessed standing to challenge the post-termination transfer order. It resolved this issue in the negative. "[W]e do not believe that ICWA's policies are intended to protect the interests of a tribe whose relationship to the child depends on membership *eligibility* when neither parent is a member of the tribe and the child is a member of another tribe." Nevertheless, the court

> emphasize[d] that our holding on this question is prudential and limited to the facts of this case. Trent is a member of Wales and not of Chignik Lagoon; his biological parents have no connection to Chignik Lagoon; his foster father did not himself become a member of Chignik Lagoon until after the superior court had granted the transfer of jurisdiction to the Wales tribal court. It would seem anomalous to us if ICWA were interpreted as allowing one tribe to interfere in another tribe's child protective proceedings involving the second tribe's own member child. We conclude that Chignik Lagoon's interests, whatever they may be, are not sufficient to satisfy the adversity requirement.

Consequently, "[b]ecause we conclude that Chignik Lagoon does not have standing to challenge Wales's intervention or the transfer of post-termination CINA proceedings to the Wales tribal court, we do not reach the merits of those challenges."

- **Relevant (2022) Deskbook Sections:** 13:8 n.2; 13:9 n.2
- **Comment:** The standing determination, while entirely defensible, is odd because the decision spilled a great deal of ink in establishing that the superior court correctly ordered transfer—an order that only Chignik Lagoon challenged. The supreme court could have resolved the appeal by simply holding that Chignik Lagoon could not be the child's tribe (part two of its analysis) as a matter of law and accordingly had no protectible interest in the transfer determination.