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## **15. ACCESS TO RECORDS FOR TRIBAL ENROLLMENT PURPOSES**

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**Disclaimer:** *A Practical Guide to the Indian Child Welfare Act* is intended to facilitate compliance with the letter and spirit of ICWA and is intended for educational and informational purposes only. It is not legal advice. You should consult competent legal counsel for legal advice, rather than rely on the *Practical Guide*.

### **25 U.S.C. § 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court**

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

### **25 U.S.C. § 1923. Effective Date**

None of these provisions of this . . . title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after . . . [the enactment of this Act], but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

### **25 U.S.C. § 1951. Information availability to and disclosure by Secretary**

#### **(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act**

Any State court entering a final decree or order in any Indian child adoptive placement after . . . [the enactment of this Act], shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show—

- (1) the name and tribal affiliation of the child;
  - (2) the names and addresses of the biological parents;
  - (3) the names and addresses of the adoptive parents; and
  - (4) the identity of any agency having files or information relating to such adoptive placement.
- Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

#### **(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment**

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

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**Disclaimer: The above provisions of the Indian Child Welfare Act are set forth to facilitate consideration of this particular topic. Additional federal, state or tribal law may be applicable. Independent research is necessary to make that determination.**



### Frequently Asked Questions

- 15.1 Does the ICWA afford access to adoption records?**
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#### **15.1 Does the ICWA afford access to adoption records?**

Two provisions of the Indian Child Welfare Act (ICWA) provide a means for an adopted Indian to obtain information relating to his or her adoption. Section 1917 provides for release, upon application, of certain information by the court that entered the final decree. Section 1951(b) provides for a similar release of information by the Secretary of the Interior. As indicated by the nominal number of cases addressing this issue, access to adoption records is routinely provided to Indian adoptees in order to establish tribal membership. In only a few cases have the courts limited direct access of adoptees to their adoption records. In those cases, however, the Indian adoptees still obtained the necessary information to establish their tribal membership. *See In re Mellinger*, 672 A.2d 197, 199 (N.J. Super. Ct. App. Div. 1996). *See also In re Rebecca*, 601 N.Y.S.2d 682, 683-84 (Sur. Ct. 1993). The *Practical Guide's* Resources Section contains a sample application.

#### **15.2 Who may request access to adoption information?**

Under § 1917, an "Indian individual who has reached the age eighteen and who was the subject of an adoptive placement" may apply to the court that rendered the final decree, while § 1951(b) allows the "adopted child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe" to request the adoption information.

#### **Practice Tip:**

Sections 1917 and 1951 superficially differ in the Indian adoptee's required age before they can apply or request assistance from a state court or the Secretary respectively. Section 1917 requires adoptees "who [have] reached the age of 18," while § 1951 requires an adoptee "over the age of eighteen," which can mean nineteen years of age or older. It is likely that there is no intended difference in the age requirements between the two sections and that an Indian adoptee who is eighteen years old or older can request assistance from the state court or Secretary.

#### **15.3 What type of information may be obtained under ICWA?**

The ICWA affords an adopted Indian child, who is eighteen or older, the right to access his or her adoption records to identify the biological parents' tribal affiliation so as to establish tribal membership in the tribe of a parent and to access "such other information as may be necessary to protect any rights flowing from the individual's tribal relationship." 25 U.S.C. § 1917. In only a couple of cases were courts reluctant to disclose entire adoption records because of the biological parents' purported privacy rights under state law. Thus, state courts may on occasion release certain records directly to a tribal enrollment administrator solely to determine membership eligibility with strict conditions that the information remains confidential. *In re Rebecca*, 601 N.Y.S.2d 682, 683-84 (Sur. Ct. 1993). *See also In re*

*Mellinger*, 672 A.2d 197, 199 (N.J. Super. Ct. App. Div. 1996) (providing the adoption records to a third party intermediary who contacted the natural family to determine if they wanted contact with the adoptee). The norm, however, is that courts routinely provide adoption records directly to the adoptee. These instances are not reported because the parties do not dispute the access to the records.

#### **15.4 What if an adopted Indian child does not know the court that entered the final adoption decree?**

Section 1951(a) requires state courts to provide information to the Secretary of the Interior concerning Indian adoptions. If an adoptee does not know the court that entered the final adoption decree, he or she can contact the Secretary through the Bureau of Indian Affairs (BIA). BIA offices are listed in this *Practical Guide's* Resources Section. As the federal agency charged with the responsibility to serve as the central registry, the BIA supposedly maintains the records of adopted Indian children since November of 1978. Although the BIA's registry may be extremely limited, in some instances, it may serve as a starting point for Indian adoptees who do not know the court that entered the final adoption decree. Alternatively, in some cases an adoptee may be successful in obtaining adoption records by contacting the adoption agency directly.

#### **15.5 What role does the Secretary of the Interior have regarding an Indian adoptee's access to his or her adoption records?**

Supposedly, under § 1951(a) the Secretary of the Interior serves as a central registry for adoption records of Indian children since November 8, 1978. However, the registry in most cases is extremely limited and often times is unhelpful. Although, state courts entering adoption decrees involving Indian children are required to provide to the Secretary of the Interior the Indian child's adoption records, it is routinely overlooked. In any event the registry, in accordance with § 1951, should include information that shows:

- (1) The name and tribal affiliation of the child;
- (2) The names and addresses of the biological parents;
- (3) The names and addresses of the adoptive parents; and

- (4) The identity of any agency having files or information relating to such adoptive placement.

Should the registry contain pertinent records and upon a request by an adult Indian adoptee, adoptive parent(s) or Indian tribe, the Secretary is required to disclose the information necessary to establish tribal membership. 25 U.S.C. § 1951(b). If the biological parent(s) indicate by affidavit to remain anonymous, the Secretary shall insure that the confidentiality of such information is maintained and such information is not subject to the Freedom of Information Act, 5 U.S.C. § 522 (2000). 25 U.S.C. § 1951(a). To accommodate the confidentiality request, the Secretary can then certify the child's parentage or other information necessary to satisfy a tribe's enrollment requirements and establish the Indian adoptee's membership in that tribe. 25 U.S.C. § 1951(b).

#### **15.6 Do §§ 1917 and 1951 apply to adoptions completed prior to the enactment of ICWA?**

Yes. The ICWA provides an adult Indian adoptee the right to access his or her records for adoptions completed before the ICWA's enactment on May 7, 1979. Indeed, § 1923 states, in part, that the ICWA applies to subsequent proceedings related to the adoption proceeding, including access to records of those proceedings under the Act. The Michigan Court of Appeals held that a petition to examine adoption records for the purpose of establishing an adoptee's Indian heritage is a "subsequent proceeding" to the original adoption proceeding. Adoption proceedings are Indian child custody proceedings under the Act and, therefore, are covered by the Act. *In re Hanson*, 470 N.W.2d 669, 671 (Mich. Ct. App. 1991). Likewise, the New York Family Court held that "§ 1923 extends provisions of the ICWA to both adoptions completed subsequent to the effective date of the ICWA and to subsequent proceedings in adoptions of Indian children which were completed prior to the effective date of the ICWA." *In re Linda J.W.*, 682 N.Y.S.2d 565, 567 (Fam. Ct. 1998). *See also* Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,595 (Nov. 26, 1979) (guidelines for state courts).

#### **15.7 Does ICWA mandate the release of adoption records to the adoptee to establish his or her Indian heritage?**

As previously noted, access to adoption records is routinely provided directly to Indian adoptees in order to establish tribal membership. In only a few cases have the courts limited direct access of

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adoptees to their adoption records. When direct access by the adoptee is denied it usually occurs because state courts are attempting to preserve state privacy laws in complying with the ICWA. For that reason, a few state courts have ordered the release of discrete information directly to a tribe's enrollment officer or an intermediary third party to determine if the adoptee is eligible for membership. *In re Rebecca*, 601 N.Y.S.2d 682, 683-84 (Sur. Ct. 1993). See also *In re Mellinger*, 672 A.2d 197, 199 (N.J. Super. Ct. App. Div. 1996) (providing the adoption records to a third party intermediary who contacted the natural family to determine if they wanted contact with the adoptee. The natural family did want contact and they were reunited with the adoptee). Alternatively, as the BIA Guidelines suggest, courts can order a BIA official to review and certify the Indian adoptee's heritage in order to satisfy a tribe's membership requirements. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,595 (Nov. 26, 1979) (guidelines for state courts).

### **Practice Tip:**

Although the BIA Guidelines suggest that courts can order a BIA official to review and certify an Indian adoptee's heritage in order to satisfy a tribe's membership requirement, it is questionable for a court to preclude a tribe, as a sovereign government, from directly obtaining the necessary information needed to determine tribal membership.

### **15.8 Does ICWA afford a tribe any rights to the Indian adoptee's biological parents' information?**

Yes. In accordance with § 1951(b) an Indian tribe can request the Secretary of the Interior to disclose necessary information in its central registry to establish an adopted Indian child's enrollment or to determine "any rights or benefits associated with that membership." 25 U.S.C. § 1951(b). If the biological parent(s) filed an affidavit with the adoption court to remain anonymous, a BIA administrator on behalf of the Secretary of the Interior, can review and certify the necessary information to satisfy a tribe's membership requirements while the biological parents' information remains confidential.

### **Practice Tip:**

Although the BIA Guidelines suggest that courts can order a BIA official to review and certify an Indian adoptee's heritage in order to satisfy a tribe's

membership requirement, it is questionable for a court to preclude a tribe, as a sovereign government, from directly obtaining the necessary information needed to determine tribal membership.

### **15.9 What steps can an adoptee take to gain access to the adoption records, if state law prohibits the disclosure of the identity of the biological parent?**

Generally, ICWA as federal law preempts conflicting state laws. Although state law may limit access to adoption records to protect the privacy rights of the parties involved, many states provide an adult adoptee with the opportunity to petition the court to show "good cause" to open the record. State courts have found that ICWA's policy to protect rights flowing from the individual's tribal relationship establishes "good cause" to preempt restricted-access provisions of state law. *In re Mellinger*, 672 A.2d 197, 199 (N.J. Super. Ct. App. Div. 1996); *In re Rebecca*, 601 N.Y.S.2d 682, 683-84 (Sur. Ct. 1993). The access to these records, however, has in a few cases been limited to only the information necessary to establish tribal membership. In these cases, such information has been directly released in confidence to the tribal enrollment officer or, in one case, a third party beneficiary in order to certify that the adoptee qualifies for tribal membership. *Mellinger*, 672 A.2d at 199; *Rebecca*, 601 N.Y.S.2d at 683-84. The BIA Guidelines also allow for information to be sent to a BIA administrator.

### **Practice Tip:**

Because the information needed to establish tribal membership varies significantly between tribes, the information can include parental names, grandparent names, birthplace, residence, blood quantum and other types of information for one tribe but can be very limited for others.

### **Practice Tip:**

A practitioner, in a petition to access adoption records, should consider including a clause detailing that an Indian adoptee's right to information as may be necessary to protect any rights flowing from the individual's tribal relationship as afforded by ICWA, serves as "good cause" to open records as a matter of law.

**\*\* Access to the full-text of opinions and additional materials is at [www.narf.org/icwa](http://www.narf.org/icwa) \*\***

**The following list is representative of cases that discuss the topic. The list is not exhaustive. The practitioner should conduct independent research.**

**STATE CASES**

**California**

*In re Krystle D.*, 37 Cal. Rptr. 2d 132 (Ct. App. 1994)

**Michigan**

*In re Hanson*, 470 N.W.2d 669 (Mich. Ct. App. 1991)

**New Jersey**

*In re Mellinger*, 672 A.2d 197 (N.J. Super. Ct. App. Div. 1996).

**New York**

*In re Rebecca*, 601 N.Y.S.2d 682 (Sur. Ct. 1993).

*In re Linda J.W.*, 682 N.Y.S.2d 565 (Fam. Ct. 1998).

