A Practical Guide to the Indian Child Welfare Act

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Disclaimer

A *Practical Guide to the Indian Child Welfare Act* was developed and written by staff of the Native American Rights Fund, staff of the National Indian Law Library and a team of multi-disciplinary experts who have significant experience in dealing with the Indian Child Welfare Act (ICWA). The *Practical Guide*, available to the general public, 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*.

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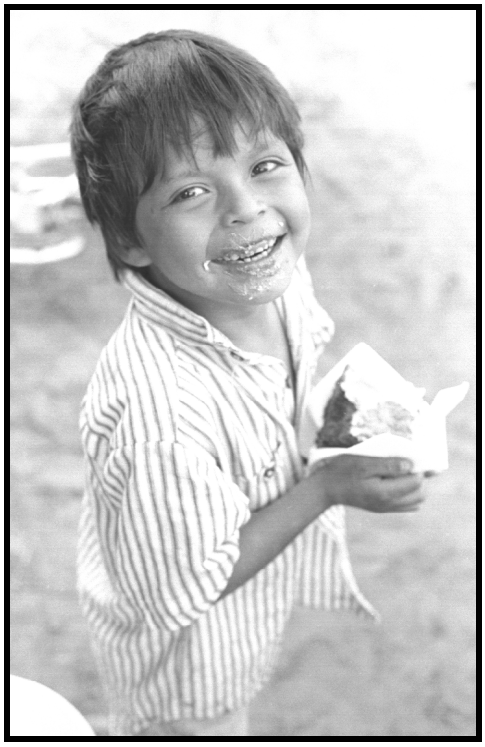
A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT



Access hundreds of full-text documents related to ICWA, including those referenced in this *Practical Guide,* at www.narf.org/icwa.

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ACKNOWLEDGMENTS

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We would also like to recognize the NARF attorneys and staff who contributed to the project.

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SCOPE OF THE PRACTICAL GUIDE

Frequency of Updates: Research was performed through June, 2007 for the Frequently Asked Questions, legal resources, bibliography and other resources. NARF plans to update the *Practical Guide* on a regular basis—at least once a year as time and funding allow. Updates will be incorporated into the website version and will also be made available for free downloading from the NARF website (www.narf.org/icwa).

Selection Policy and Process: The authors (Native American Rights Fund (NARF) and certain members of the Advisory Group) have endeavored to provide access to important and relevant federal and state judicial opinions, laws, regulations and other legal and non-legal information available on the ICWA.

Most of the primary legal information (legal opinions, laws, regulations) selected for the *Practical Guide* was found by performing research in the Westlaw legal databases. When relevant information was found in the Westlaw databases, we edited the documents to remove any copyrighted materials such as synopses, holdings and headnotes in cases and annotations in statutes before posting them to the website. We have excluded most unpublished/unreported cases. The major exceptions are cases from states that had no or very few reported decisions or when an author cited a case in the Frequently Asked Questions and Answers section. In a few instances, with permission from Westlaw, we provide copies of fully annotated cases and statutes. Other sources of information used to locate relevant information include ICWA guides, manuals and other print publications as well as suggestions from consultants and colleagues. During the research process, the NARF attorneys and staff used their judgment as to which legal documents should be included in the *Practical Guide*, and have included as many relevant primary legal sources as possible. However, the resources provided in this *Practical Guide* should not be considered an exhaustive list, should not be substituted for independent research and do not constitute legal advice.

WEBSITE VERSION

VISIT THE *PRACTICAL GUIDE* ON THE INTERNET!

The entire *Practical Guide to the Indian Child Welfare Act* along with links to hundreds of full-text documents is available on the NARF website. Please visit our website at www.narf.org/icwa to access these free full-text resources, as well as updates to the printed book.

INTRODUCTION

From the embryonic days of our Nation, Indian tribes have long struggled against the assimilationist policies instituted by the United States which sought to destroy tribal cultures by removing Native American children from their tribes and families. In a stark example of such policies, the purpose articulated in the charter of the first boarding school in the 1890s on the Navajo reservation was "to remove the Navajo child from the influence of his savage parents." The federal government continued its boarding school policy for over one hundred years. Countless lives give testimony to the harsh effects of that policy.

Later on, the federal government failed to protect Indian children from misguided and insensitive child welfare practices by state human service agencies, which resulted in the unwarranted removal of Indian children from their families and tribes. In fact, in the 1950s and 1960s, the federal government worked with non-Indian organizations, such as the Child Welfare League of America, to outright remove Indian children from their homes and place those children in non-Indian homes.

Statistical and anecdotal information show that Indian children who grow up in non-Indian settings become spiritual and cultural orphans. They do not entirely fit into the culture in which they are raised and yearn throughout their life for the family and tribal culture denied them as children. Many native children raised in non-Native homes experience identity problems, drug addiction, alcoholism, incarceration and, most disturbing, suicide.

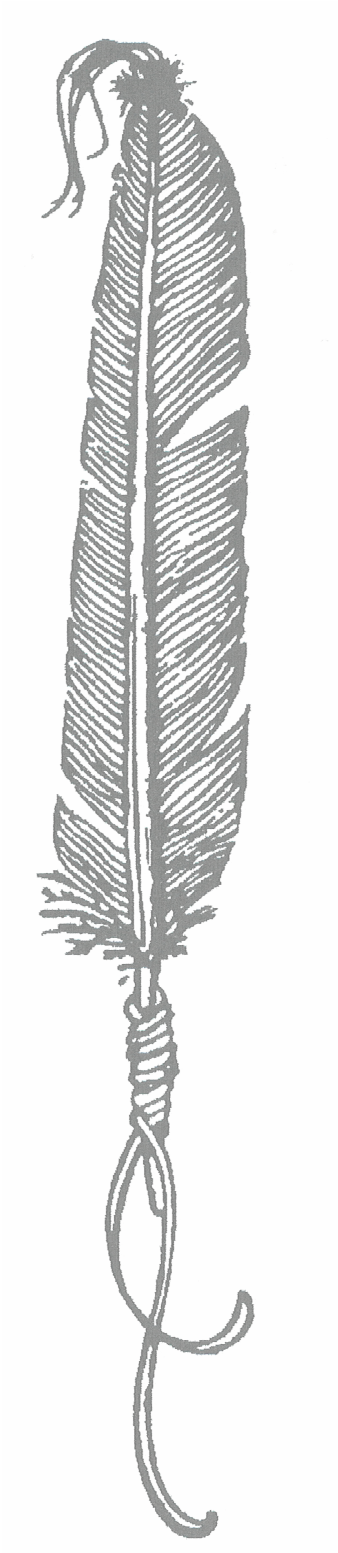
In the 1960s, the federal government embarked on a new federal Indian policy of tribal self-determination. This new policy fosters tribal existence and self governance by allowing tribes to operate programs once operated solely by the federal government. It also increased federal services and benefits available to tribes to enhance their capabilities. Thus, tribes are now working to fully regain control of their destiny and that of their children.

In view of this new policy and the problems facing tribes as a result of the loss of their children, the Indian Child Welfare Act (ICWA) was enacted in 1978. It established minimum federal jurisdictional, procedural and substantive standards aimed to achieve the dual purposes of protecting the right of an Indian child to live with an Indian family and to stabilize and foster continued tribal existence.

A Practical Guide to the Indian Child Welfare Act is intended to foster compliance with the letter and spirit of the ICWA.

FREQUENTLY ASKED QUESTIONS

FREQUENTLY ASKED QUESTIONS (FAQs)



1. APPLICATION

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. § 1903. Definitions

(1) "child custody proceeding" shall mean and include—

> (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
>
> (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
>
> (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.
>
> Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(4) "Indian child" means 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 . . . .

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.

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1.1 When does the ICWA apply?

Only two prerequisites must be satisfied for the Indian Child Welfare Act (ICWA) to apply. The first requirement is the presence of an Indian child as defined by § 1903(4). That section defines an Indian child as an "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 . . . ." The second requirement is that the child custody proceeding be one as defined by § 1903(1); that is, a "foster care placement"; "termination of parental rights"; "pre-adoptive placement"; or "adoptive placement."

Practice Tip:
Practitioners should review state law and intergovernmental agreements as they may expand the protection of the ICWA, such as by expanding the definition of an Indian child. MINN. STAT. § 257.0651 (1992); IOWA CODE § 232.7 (2003).

1.2 What are the exceptions to ICWA's application?

After defining those proceedings to which the ICWA does apply, the Act states: "[s]uch term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. § 1903(1). Thus, ICWA expressly provides for only two exceptions to its applicability: certain juvenile criminal proceedings based on a status crime, such as underage drinking which only a minor can commit, and divorce cases. There are no other exceptions.

Even so, a Montana court excluded an intra-family custody dispute finding that it was not a "child custody proceeding" because the "Act is not directed at disputes between Indian families regarding custody of Indian children; rather, its intent is to preserve Indian cultural values under circumstances in which an Indian child is placed in a foster home or other protective institution." *In re Bertelson*, 617 P.2d 121 (Mont. 1980). *See also In re Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991); *Comanche Nation v. Fox*, 128 S.W.3d 745 (Tex. App. 2004). Other courts have expressly rejected the *Bertelson* analysis as contrary to the express provision of the Act enumerating which proceedings are excluded; that is, certain juvenile crimes and divorce cases. All other proceedings involving the custody of an Indian child fall within the ambit of the Act. *Comanche Indian Tribe of Okla. v. Hovis* (*Hovis I*), 847 F. Supp. 871 (W.D. Okla. 1994); *D.J. v. P.C.*, 36 P.3d 663 (Alaska 2001); *J.W. v. R.J.*, 951 P.2d 1206 (Alaska 1998); *In re D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997); *In re Q.G.M.*, 808 P.2d 684 (Okla. 1991); *In re A.K.H.*, 502 N.W.2d 790 (Minn. Ct. App. 1993); *In re S.B.R.*, 719 P.2d 154 (Wash. Ct. App. 1986); *In re Jennifer A.*, 127 Cal. Rptr. 2d 54 (Ct. App. 2002); *In re Lindsay C.*, 280 Cal. Rptr. 194 (Ct. App. 1991); *In re Crystal K.*, 276 Cal. Rptr. 619 (Ct. App. 1990). Another court applied ICWA without deciding the intra-family issue because of the parties' implicit assumption that ICWA applied to the situation. *In re Anderson*, 31 P.3d 510 (Or. Ct. App. 2001).

Practice Tip:
Counsel should be aware that although a case may start as a delinquency proceeding, ICWA may apply to subsequent child placements (i.e. foster care) based upon a determination that a return to the child's home would be inappropriate.

1.3 What is the so-called Existing Indian Family exception (EIF)?

The Existing Indian Family exception (EIF) is a judicially-created exception to the ICWA that originated in *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982). In that case, the court held that the ICWA did not apply to "an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be." The court interpreted the ICWA as being only concerned with "removal of Indian children from an existing Indian family unit." *Id*. at 175. Although narrowly interpreted in subsequent cases, a Washington court required that in addition to an Indian child being removed from an Indian family, the child was to be returned to an existing Indian family unit or environment. *In re Crews*, 825 P.2d 305, 310 (Wash. 1992). The *Crews* decision appears to have been statutorily superseded. *See* WASH. REV. CODE §§ 26.10.034(1), 26.33.040(1), 13.34.040(3) (2004).

The EIF exception has been raised to a constitutional level by two appellate districts of California (Second and Fourth). *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996); *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Ct. App. 2001); *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679 (Ct. App. 1996). These cases hold that the child and his or her parents, and maybe even the extended family when involved, must have a significant social, political and cultural relationship to their tribal culture to uphold the constitutionality of the ICWA under federal law.

The EIF, however, has been implicitly and explicitly rejected by courts and legislatures in a number of states that have addressed the issue.

States rejecting the EIF exception by decision

Alabama: *S.H. v. Calhoun County Dep't of Human Res.*, 798 So. 2d 684 (Ala. Civ. App. 2001)
Alaska: *J.W. v. R.J.*, 951 P.2d 1206 (Alaska 1998); *In re T.N.F.*, 781 P.2d 973 (Alaska 1989); *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982)
(continued on next page)

Arizona: *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000)
California: four of six appellate districts: *In re Lindsay C.*, 280 Cal. Rptr. 194 (Ct. App. 1991) (1st Dist.); *In re Junious M.*, 193 Cal. Rptr. 40 (Ct. App. 1983) (certified for partial publication) (1st Dist.); *In re Crystal K.*, 276 Cal. Rptr. 619 (Ct. App. 1990) (3d Dist.); *In re Hannah S.*, 48 Cal. Rptr. 3d 605 (Ct. App. 2006) (3d Dist.); *In re Desiree F.*, 99 Cal. Rptr. 2d 688 (Ct. App. 2000) (5th Dist.); *In re Alicia S.*, 76 Cal. Rptr. 2d 121 (Ct. App. 1998) (5th Dist.); *In re Vincent M.*, 59 Cal. Rptr. 3d 321 (Ct. App. 2007) (6th Dist.)
Colorado: *In re N.B.*, No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007)
Idaho: *In re Baby Boy Doe* (*Baby Boy Doe I*), 849 P.2d 925 (Idaho 1993)
Illinois: *In re S.S.*, 657 N.E.2d 935 (Ill. 1995)
Indiana: *In re D.S.*, 577 N.E.2d 572 (Ind. 1991)
Iowa: *In re R.E.K.F.*, 698 N.W.2d 147 (Iowa 2005)
Michigan: *In re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996)
Montana: *In re Riffle* (*Riffle II*), 922 P.2d 510 (Mont. 1996)
New Jersey: *In re Child of Indian Heritage* (*Indian Child II*), 543 A.2d 925 (N.J. 1988)
New York: *In re Baby Boy C.*, 805 N.Y.S.2d 313 (App. Div. 2005)
North Carolina: *In re A.D.L.*, 612 S.E.2d 639 (N.C. Ct. App. 2005)
North Dakota: *In re A.B.*, 2003 ND 98, 663 N.W.2d 625
Oklahoma: *In re Baby Boy L.*, 2004 OK 93, 103 P.3d 1099
Oregon: *Quinn v. Walters* (*Quinn II*), 881 P.2d 795 (Or. Ct. App. 1994)
South Dakota: *In re Baade*, 462 N.W.2d 485 (S.D. 1990)
Texas: *In re W.D.H., III*, 43 S.W.3d 30 (Tex. App. 2001); *Doty-Jabbaar v. Dallas County Child Protective Servs.*, 19 S.W.3d 870 (Tex. App. 2000)
Utah: *In re D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997)

States upholding ICWA's constitutionality, including those rejecting the EIF exception

Arizona: *In re Pima County Juvenile Action No. S-903*, 635 P.2d 187 (Ariz. Ct. App. 1981)
California: *In re Vincent M.*, 59 Cal. Rptr. 3d 321 (Ct. App. 2007) (6th Dist.)
Colorado: *In re N.B.*, No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007)
Illinois: *In re Armell*, 550 N.E.2d 1060 (Ill. App. Ct. 1990

Maine: *In re Marcus S.*, 638 A.2d 1158 (Me. 1994)
Michigan: *In re Miller*, 451 N.W.2d 576 (Mich. Ct. App. 1990)
Montana: *In re Riffle* (*Riffle II*), 922 P.2d 510 (Mont. 1996)
North Dakota: *In re A.B.*, 2003 ND 98, 663 N.W.2d 625
Oklahoma: *In re Baby Boy L.*, 2004 OK 93, 103 P.3d 1099
Oregon: *In re Angus*, 655 P.2d 208 (Or. Ct. App. 1982)
South Dakota: *In re D.L.L.*, 291 N.W.2d 278 (S.D. 1980)

States rejecting the EIF exception by statute

California: CAL. WELF. & INST. CODE § 224(a)(1) (2006); CAL. R. CT. 5.664
Iowa: Iowa Indian Child Welfare Act, IOWA CODE § 232B.5(2) (2003)
Minnesota: Minnesota Indian Family Preservation Act, MINN. STAT. §§ 260.751, .755, .761, .765, .771 (1999)
Oklahoma: Oklahoma Indian Child Welfare Act, OKLA. STAT. tit. 10 §§ 40.1-.3 (1994)
Washington: WASH. REV. CODE §§ 26.10.034(1), 26.33.040(1), 13.34.040(3) (2004) (superseding *In re Crews*, 825 P.2d 305 (Wash. 1992))

States adopting the EIF exception by decision

California: two of six appellate districts: *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996) (2d Dist.); *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Ct. App. 2001) (2d Dist.); *In re Derek W.*, 86 Cal. Rptr. 2d 742 (Ct. App. 1999) (2d Dist.); *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679 (Ct. App. 1996) (4th Dist.)
Kansas: *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982)
Kentucky: *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996)
Louisiana: *Hampton v. J.A.L.*, 27-869 (La. App. 2 Cir. 7/6/95); 658 So. 2d 331
Missouri: *C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. Ct. App. 1992); *In re S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986)
Tennessee: *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997)
(continued on next page)

Washington: *In re Crews*, 825 P.2d 305 (Wash. 1992), *superseded by* WASH. REV. CODE §§ 26.10.034(1) 26.33.040(1), 13.34.040(3) (2004)

The EIF exception still has vitality in the two California appellate districts (Second and Fourth) that have adopted a constitutionally-based EIF exception and one division within the Second District that has adopted it as an interpretation of ICWA. The exception is followed in Kentucky, Missouri and Tennessee (an unreported decision) which have no federally recognized tribes. In Kansas and Louisiana, whose courts have refused to apply the EIF exception following the one decision upholding it, the validity of the exception may be in doubt. *In re S.M.H.*, 103 P.3d 976 (Kan. Ct. App. 2005); *In re J.J.G.*, 83 P.3d 1264 (Kan. Ct. App. 2004); *In re A.P.*, 961 P.2d 706 (Kan. Ct. App. 1998); *In re H.A.M.*, 961 P.2d 716 (Kan. Ct. App. 1998); *In re H.D.*, 729 P.2d 1234 (Kan. Ct. App. 1986); *Owens v. Willock*, 29-595 (La. App. 2 Cir. 2/26/97); 690 So. 2d 948.

At the Federal level, the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30 (1989), implicitly rejected the EIF exception when it interpreted the ICWA to apply to Indian children who were placed for adoption and who never physically lived in an Indian home or on an Indian reservation prior to being placed with non-Indian prospective adoptive parents. *Id.* at 54. The Court made a threshold determination that the ICWA applied to these children. *Id*. at 42. It found that the state court proceeding at issue was an "adoptive placement" as defined by § 1903(1)(iv) of the Act and that the children involved were "Indian children" as defined by § 1903(4) of the Act even though they had never lived in an Indian home or on an Indian reservation. The Court relied on the plain language of the ICWA in its application to the facts.

1.4 Who is an Indian child under the ICWA?

An Indian child is an "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 . . . ." 25 U.S.C. § 1903(4). A key link to this definition is the meaning of "Indian tribe."

1.5 What is an Indian tribe under ICWA?

"Indian tribe" is defined as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians including any Alaska Native village as defined in section 1602(c) of title 43." 25 U.S.C. § 1903(8). It means only federally recognized tribes. Canadian tribes, and other foreign Indian tribes, and non-federally recognized tribes are therefore excluded from its coverage.

From time to time, the Secretary of the Interior publishes a list of federally recognized tribes eligible for federal services and benefits. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,647 (Mar. 22, 2007) (notice). Most courts use this list to determine whether the Indian child's tribe, and thereby its children, are protected by the Act.

The Secretary, from time to time, will federally acknowledge an Indian tribe under the federal acknowledgment regulations contained at 25 C.F.R. Part 83 (2007). A newly-acknowledged tribe will not appear on the list of federally recognized tribes until the Secretary updates the list. If in doubt, a practitioner should contact the Office of Federal Acknowledgment (OFA), Bureau of Indian Affairs (BIA), Washington, D.C. Also, OFA keeps a list of non-federally acknowledged tribes which have filed a letter of intent to file a petition for federal acknowledgment or have filed a petition. The practitioner may want to consult this list to determine if claimed ancestry of the parent or child is to a non-federally recognized tribe.

In addition, Congress will from time to time reaffirm or restore government-to-government relations with a tribe whose relationship was terminated during the termination era of the 1950s when the United States severed its government-to-government relationship with a number of Indian tribes and thereby withdrew eligibility for federal services provided to Indians because of their status as Indians. Also, the Congress will at times federally acknowledge Indian tribes by legislation. *See, e.g.,* Federal Recognition of Mashantucket Pequot Tribe, 25 U.S.C. § 1758 (2000). The practitioner should contact the Assistant Secretary's Office of the Bureau of Indian Affairs, Washington, D.C.

Practice Tip:
Practitioners should review state law and intergovernmental agreements as they may expand the protection of the ICWA, such as by expanding the definition of an Indian tribe.

1.6 Who determines membership or eligibility for membership?

For ICWA purposes, the tribe or Alaskan Native village has the sole power to decide membership. *In re A.G.*, 2005 MT 81, 326 Mont. 403, 109 P.3d 756; *In re A.L.W.*, 32 P.3d 297 (Wash. Ct. App. 2001).

1.7 Who has the burden to prove an Indian child is involved?

The party seeking to establish the application of the ICWA has the initial burden to establish a prima facie case that an Indian child may be involved, although all parties and the court have a continuing obligation to inquire as to the status of the child. *See, e.g.,* COLO. REV. STAT. § 19-1-126 (2002); IOWA CODE § 232B.4 (2000). There is no one proof of membership, although courts generally agree that an Indian child's enrollment in an Indian tribe is conclusive proof of membership. Tribal enrollment however, is not the only means of establishing membership. *In re T.L.G.*, 108 P.3d 156 (Wash. Ct. App. 2005). Some tribes automatically include a person as a member if the person descended from a tribal member who was listed on the tribal rolls as of a specific date. *In re Arianna R.G.*, 2003 WI 11, 259 Wis. 2d 563, 657 N.W.2d 363. Thus, in some instances, courts have remanded for proper notice even where the parent offered no proof of membership and was not enrolled in a tribe. *In re Gerardo A.*, 14 Cal. Rptr. 3d 798 (Ct. App. 2004); *Dwayne P. v. Superior Court*, 126 Cal. Rptr. 2d 639 (Ct. App. 2002).

A tribe may determine that a child is not enrollable but later change its determination and enroll the child. *In re E.S.*, 964 P.2d 404 (Wash. Ct. App. 1998). Once membership, or eligibility for membership, is established, and the ICWA is applied and accepted as applicable by all the parties, a party may not later change its mind and take a contrary position on appeal. *In re R.L.*, 961 P.2d 606 (Colo. Ct. App. 1998); *In re N.S.*, 474 N.W.2d 96 (S.D. 1991).

1.8 What if the child's Indian heritage is uncertain?

One purpose of ICWA notice is to enable the tribe or BIA to investigate and determine whether the minor is an "Indian child." *In re Gerardo A.*, 14 Cal. Rptr. 3d 798 (Ct. App. 2004). Some information relating to Indian heritage must be provided to the court or entity seeking placement for notice to be sent to a tribe(s) or BIA area office. If the tribe's identity is unknown, notice must be sent to the BIA as agent for the Secretary of the Interior. *In re Antoinette S.*, 129 Cal. Rptr. 2d 15 (Ct. App. 2002). See also FAQ 4.11. An unsubstantiated belief a child has Indian heritage is not conclusive to establish such heritage. *See, e.g., In re Arianna R.G.*, 2003 WI 11, 259 Wis. 2d 563, 657 N.W.2d 363.

The BIA Guidelines are helpful in determining under what circumstances a court has "reason to know" that a child is an "Indian child" under the ICWA. The Guidelines describe the following circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian child:

> (1) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.
>
> (2) Any public- or state-licensed agency involved in child protection services or family support had discovered information which suggests that the child is an Indian child.
>
> (3) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.
>
> (4) The residence or domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.
>
> (5) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979) (guidelines for state courts).

1.9 What if more than one tribe has an interest in the Indian child?

In this situation, a court is called upon to determine which tribe has more significant contacts with the Indian child, although notice should be sent to each tribe regardless of the final determination. The BIA Guidelines are helpful in guiding a court to make its determination. The Guidelines list at least eight factors for a court to consider in determining which tribe has the most significant contacts for the purpose of designating the Indian child's tribe under the ICWA, especially for the purpose of transfer of jurisdiction. *See* Indian Child Custody Proceedings,

44 Fed. Reg. 67,584, 67,587 (Nov. 26, 1979) (guidelines for state courts).

For the tribe that has the lesser contacts, the Guidelines provide that it still could be granted a right of intervention without undermining the right of the tribe with greater contacts. The tribe with lesser contacts could also be afforded the ability to serve as a placement preference under § 1915 the Act.

In South Dakota, a state court determined jurisdiction by looking at the child's domicile and the tribe with whom the child had the most significant contacts. The state court found jurisdiction vested in the tribe on whose reservation the child was domiciled and with whom the child had the most contacts, and not the tribe in which the child was enrolled. *Cf. In re T.I.*, 2005 SD 125, 707 N.W.2d 826.

Practice Tip for tribal courts:
If the situation is not an emergency, two tribes that would have jurisdiction over a case, because the child is a tribal member or eligible for tribal membership in either tribe, should talk with each other about which tribal court should accept transfer jurisdiction under the Act to hear the case. At times, as for example in Alaska, a cooperative agreement can be worked out between the tribal courts to form a joint tribal court panel.

In emergencies, the tribal court that begins to handle a case should be recognized by the other tribal court to have priority jurisdiction until the tribal courts can sort out which court has primary jurisdiction.

**** Access to the full-text of opinions and additional materials is at 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.

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2. JURISDICTION

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. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise

exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

25 U.S.C. § 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

25 U.S.C. § 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

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.

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Frequently Asked Questions

2.1 Why is jurisdiction important?

Jurisdiction refers to the authority to adjudicate, or decide, a particular legal issue or matter. Congress found that in exercising jurisdiction over Indian children, state courts had failed to recognize the essential tribal relations of Indian people and the social and cultural standards in tribal communities, and thus harmed tribal interests. 25 U.S.C. § 1901(5). The Indian Child Welfare Act (ICWA) is designed to remedy this by creating presumptive jurisdiction in tribal courts. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

The ICWA establishes a dual jurisdictional scheme, tribes have exclusive jurisdiction over child custody matters when the Indian child resides or is domiciled on an Indian reservation, or when the child is a ward of the tribal court, unless another federal law provides otherwise (such as Public Law 280). 25 U.S.C. § 1911(a). Tribes also have jurisdiction over Indian children who reside or are domiciled off the reservation, but that jurisdiction is shared with the state court. 25 U.S.C. § 1911(b).

When a state court exercises jurisdiction over an Indian child custody proceeding, it must follow the ICWA's substantive and procedural rules, such as giving notice to the tribe and the Indian parents or custodians of the proceeding, applying higher burdens of proof when removing an Indian child for foster care or adoptive placement, and following specific placement guidelines that give preference to members of the Indian child's extended family and other Indian families.

2.2 When does a state have jurisdiction?

A state court has jurisdiction over a child custody proceeding involving an Indian child in four situations: (1) where the child is domiciled or resides off an Indian reservation, and is not a ward of the tribal court, 25 U.S.C. § 1911(b); (2) where the state has been granted jurisdiction on the reservation under Public Law 280, *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005); (3) through a tribal-state agreement in which the tribe allocates jurisdiction to the state; 25 U.S.C. § 1919(a); and (4) through limited emergency jurisdiction where a reservation-resident Indian child is temporarily off the reservation and the state has removed the child in an emergency situation to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922. This emergency jurisdiction terminates when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

2.3 When does a tribe have jurisdiction?

A tribe has jurisdiction over a child custody proceeding involving an Indian child in three situations: (1) where the child is domiciled or resides on an Indian reservation, 25 U.S.C. § 1911(a); (2) when the child is a ward of the tribal court, regardless of the child's domicile or residence, 25 U.S.C. § 1911(a); and (3) concurrent jurisdiction where the child is domiciled or resides off an Indian reservation and is not a ward of the tribe's court. 25 U.S.C. § 1911(b).

A tribe that became subject to state jurisdiction under Public Law 280 may reassume exclusive jurisdiction over Indian child custody proceedings by submitting an application to the Secretary of the Interior with a plan as to how the tribe will exercise its jurisdiction. 25 U.S.C. § 1918.

2.4 What is domicile under ICWA?

Domicile looks to the person's physical presence in a certain place along with the intent to remain in that place. Children typically are unable to form the requisite intent to establish a domicile, so the domicile of the child is determined by that of the parents.

Domicile is important in child custody proceedings because it may affect the jurisdiction of the court. The term is not defined in the ICWA, so the United States Supreme Court found that the meaning of "domicile" in the ICWA is a matter of federal, not state, law because Congress intended a uniform, nationwide application. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44-47 (1989).

A child born in wedlock takes the parents' domicile. A child born out of wedlock takes the domicile of his or her mother. *Holyfield*, 490 U.S. at 43-48. If a child has no parents, such as when the parents have died, then the child takes the domicile of the person who stands *in loco parentis*, such as a

guardian or custodian. *In re S.S.*, 657 N.E.2d 935 (Ill. 1995). The domicile of a child who is a ward of the tribal court is the reservation. *In re D.L.L.*, 291 N.W.2d 278 (S.D. 1980); H.R. REP. NO. 95-1386, at 21 (2d Sess. 1978).

2.5 What is exclusive jurisdiction?

Exclusive jurisdiction exists when only one sovereign has the authority to adjudicate a certain issue or matter. Under the ICWA, tribal courts have jurisdiction, exclusive of the state courts, over cases involving an Indian child who resides or is domiciled on an Indian reservation or who is a ward of the tribal court. State courts do not have any authority in the disposition of these matters. 25 U.S.C. § 1911(a).

There are three exceptions to this general rule. The first exception involves the tribal court's extra-territorial jurisdiction over an off-reservation Indian child based on the child's membership. *John v. Baker*, 982 P.2d 738 (Alaska 1999).

Under the second exception, the state has authority to remove an Indian child who is a reservation-resident and is temporarily off the reservation in an emergency situation to prevent imminent harm to the child. In these situations, the state must expeditiously transfer the child to the jurisdiction of the tribe or restore the child to his or her parents as soon as possible. 25 U.S.C. § 1922.

The third exception relates to tribes located in Public Law 280 states, such as Alaska and California, which share concurrent jurisdiction with state courts over Indian child custody proceedings when the Indian child resides on the reservation. 25 U.S.C. § 1911(a); *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005).

Practice Tip:
Arguments have been made that grants of jurisdiction to states under Public Law 280 do not extend to involuntary public child welfare proceedings initiated by state agencies, as states did not receive civil/regulatory jurisdiction under Public Law 280. *State ex rel. Dep't Human Servs. v. Whitebreast*, 409 N.W.2d 460 (Iowa 1987); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That argument was rejected in *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005), but such arguments may still be made in Public Law 280 states outside the Ninth Circuit. *See* 78 Wis. Op. Att'y Gen. 122 (1989).

The ICWA allows tribes to reassume exclusive jurisdiction from a state in a Public Law 280 state. The tribe must submit a petition to the Secretary of the Interior along with a plan about how the tribe will exercise its jurisdiction. 25 U.S.C. § 1918(a).

Practitioners are encouraged to determine whether a specific tribal statute affects the jurisdiction of the Indian tribe at issue in the particular ICWA proceeding.

See also FAQ 2.12 below for further discussion of Public Law 280.

2.6 What is concurrent jurisdiction under ICWA?

Concurrent jurisdiction exists when two sovereigns have the potential authority to adjudicate the same legal issue or matter. Under the ICWA, § 1911(b) establishes concurrent "but presumptively tribal" jurisdiction over an Indian child who resides off a reservation. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). The ICWA requires the state court to transfer the child custody proceeding in these situations to the tribal court upon a petition of the tribe, "absent good cause to the contrary" or objection from the child's parent. 25 U.S.C. § 1911(b).

A state also has concurrent jurisdiction over an Indian child who resides on a reservation in a state that has been granted jurisdiction under Public Law 280. 25 U.S.C. § 1911(a). See FAQ 2.12 below for a further discussion of Public Law 280.

2.7 What is a "ward" of a tribal court?

The ICWA does not provide a definition of "ward." The general legal definition of the term means a person, especially a child or a legally incompetent person, placed by the court under the care of a guardian.

Cases decided under the ICWA find that a wardship status is established when a tribe exercises authority over a child. This official action can be done in several ways: by an order of the tribal court in a child custody proceeding, *In re M.R.D.B.*, 787 P.2d 1219 (Mont. 1990); or in a guardianship proceeding, *In re D.L.L.*, 291 N.W.2d 278 (S.D. 1980); or by a Resolution passed by the governing body of the tribe, such as a Tribal Council, where a tribe operates without a formal court system. *In re J.M.*, 718 P.2d 150 (Alaska 1986).

Practice Tip:
From a practice perspective, the word "ward" should be included in the tribal order, judgment or decree. However, courts reviewing tribal actions have found wardship status established by looking at the intent of the order and the nature of the court's order, especially when the order indicates that the court will retain jurisdiction over the matter until a certain date or event. *In re M.R.D.B.*, 787 P.2d 1219, 1222 (Mont. 1990); *Powell v. Crisp*, No. E1999-02539-COA-R3-CV, 2000 WL 1545064 (Tenn. Ct. App. 2000).

Once a child is made a ward of the tribal court, the tribe generally has exclusive jurisdiction, regardless of the child's residence or domicile. 25 U.S.C. § 1911(a); *M.R.D.B.*, 787 P.2d at 1222; *D.L.L.*, 291 N.W.2d 278.

2.8 Who determines jurisdiction?

As noted above, jurisdiction over Indian child custody matters is statutorily defined under the ICWA. Nonetheless, many factual issues implicate jurisdiction, such as whether the child is an Indian and whether the child is domiciled on an Indian reservation. These issues may be decided in tribal, federal and state courts, and ultimately the Supreme Court of the United States. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *In re Halloway*, 732 P.2d 962 (Utah 1986).

2.9 Does a tribe have transfer jurisdiction under ICWA over children who are eligible for membership?

Yes. The ICWA defines an Indian child as a child who is a member of an Indian tribe, or a child who is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4).

A tribe's determination that a child is a member of, or is eligible for membership in, a tribe is conclusive evidence that a child is an Indian child within the meaning of the ICWA. *See also*, Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts). Neither enrollment nor blood quantum is required as long as the child is recognized as a member of the tribe or as eligible for membership. *In re Riffle* (*Riffle II*), 922 P.2d 510, 513 (Mont. 1996).

Practice Tip:
The ICWA's definition of "Indian child" is more expansive than most tribal laws, and thus expands tribal jurisdiction over a broader category of Indian children, for example, children who are eligible for enrollment but who have not yet been formally enrolled or recognized. Tribes and practitioners should review tribal constitutions and codes to ensure that tribal law is consistent with ICWA. If a tribal law more narrowly defines the tribe's jurisdiction than provided under ICWA, it is likely that a court would hold that ICWA preempts the more limited tribal law.

2.10 How does jurisdiction differ from service/financial responsibility?

Jurisdiction and service responsibility are distinct legal concepts. Jurisdiction refers to the authority of a government to adjudicate or decide a particular legal matter in its court, while service responsibility refers to the particular government which is responsible for providing services to the children and families involved in a particular child welfare proceeding.

American Indian and Alaskan Native people are citizens of their tribe, the United States, and the state in which they reside. This status entitles them to services provided by the state for which they and other citizens of the state are eligible, even if the tribe exercises jurisdiction in a particular case. *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir. 1993), *limited by Blessing v. Freestone*, 520 U.S. 329 (1997) (standing under § 1983 limited). In child welfare situations, most of the services provided to children and families will be federally funded in part, with a non-federal match required from the state. Most federal funding sources, such as Title IV-E Foster Care and Adoption Assistance, have requirements tied to the receipt of these funds that prohibit states from discriminating upon the basis of race or political subdivision within the state.

How jurisdiction and service responsibility are applied, however, can vary from state to state. In some areas, state agencies routinely participate in tribal court child custody proceedings as the entity with primary service responsibility, while the tribe exercises jurisdictional authority over the case. In other areas, tribes may have both jurisdiction and service responsibility; or the tribe may not have jurisdiction, but retain some level of service responsibility. Gaining an understanding of how

jurisdiction and service responsibility work in any particular situation is critical to being able to successfully coordinate services and receive proper authority to make decisions affecting American Indian and Alaskan Native children and families.

2.11 Can jurisdiction be transferred between tribes?

Yes. A tribe may transfer a case to another tribe according to its own law and judicial procedures. Where two tribes assert an interest in a child custody proceeding in state court involving a child who is enrolled or eligible for enrollment in both tribes, one tribe may defer jurisdiction to the other tribe. *See, e.g., In re T.I.*, 2005 SD 125, 707 N.W.2d 826.

2.12 What effect do Public Law 280 and other similar laws have on the ICWA?

Public Law 280 grants certain states concurrent jurisdiction over child custody proceedings in cases that otherwise would fall within the exclusive jurisdiction of the tribe. Public Law 280 states include: Alaska, California, Minnesota (except the Red Lake Nation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation).

Some tribes have become subject to Public Law 280 through land claim settlement and recognition acts. For example, the Passamoquoddy and Pennobscot Tribes of Maine are subject to a specific statutory provision concerning their jurisdiction over child custody proceedings arising on their respective reservations. The State of Maine has exclusive jurisdiction on those reservations until the tribes assume exclusive jurisdiction from it. 25 U.S.C. § 1727.

Practice Tip:
Practitioners are encouraged to determine whether a specific state law or tribal statute affects the jurisdiction of the Indian tribe at issue in the particular ICWA proceeding, as states and tribes have altered their jurisdictional prerogatives under the ICWA in a number of ways. Tribes in Public Law 280 states are permitted under the ICWA to reassume exclusive jurisdiction from the state. 25 U.S.C. § 1918(a). The tribe must submit a petition to the Secretary of the Interior along with a plan about how the tribe will exercise its jurisdiction. Therefore, in Public Law 280 states, the practitioner should check state laws and federal regulations to determine whether the tribe has reassumed its exclusive jurisdiction from the state.

In addition, in many Public Law 280 states, both mandatory and optional states, Indian tribes exercise exclusive jurisdiction over their reservation-domiciled children through agreements with the state, such as in Oregon and Washington, or through state laws, such as in Minnesota, without having gone through the reassumption process. 25 U.S.C. § 1919.

The grant of jurisdiction to the states under Public Law 280 does not deprive tribal courts of concurrent jurisdiction. *Native Village of Venetie I.R.A. Council v. Alaska* (*Venetie II*), 944 F.2d 548, 559-62 (9th Cir. 1991); *Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians*, 2000 WI 79, ¶¶ 31-32, 236 Wis. 2d 384, 402, 612 N.W.2d 709, 717; *In re M.A.*, 40 Cal. Rptr. 3d 439, 441-43 (Ct. App. 2006); *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005).

Arguments have been made that grants of jurisdiction to states under Public Law 280 do not extend to involuntary public child welfare proceedings initiated by state agencies, as states did not receive civil/regulatory jurisdiction under Public Law 280. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *State ex rel. Dep't of Human Servs. v. Whitebreast*, 409 N.W.2d 460 (Iowa 1987). That argument was rejected in *Mann II*, 415 F.3d 1038, but such arguments may still be made in Public Law 280 states outside the Ninth Circuit. *See* 78 Wis. Op. Att'y Gen. 122 (1989).

2.13 Can tribes decline to accept a transfer of jurisdiction?

Yes. The ICWA permits a tribal court to decline jurisdiction by refusing to accept the transfer of jurisdiction from a state court. 25 U.S.C. § 1911(b).

**** Access to the full-text of opinions and additional materials is at 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.

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Montana
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3. WHO HAS RIGHTS UNDER THE ACT

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. § 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means 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) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) “parent” means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) “reservation” means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) “Secretary” means the Secretary of the Interior; and

(12) “tribal court” means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceedings involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

25 U.S.C. § 1912. Pending court proceedings

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

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

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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 U.S.C. § 1913. Parental rights; voluntary termination

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud of duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 U.S.C. § 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or pre-adoptive placements; criteria; preferences

Any child accepted for foster care or pre-adoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or pre-adoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

25 U.S.C. § 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

25 U.S.C. § 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petition in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

25 U.S.C. § 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

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.

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Frequently Asked Questions

3.1 What rights do Indian children have under the ICWA?

The Indian Child Welfare Act (ICWA) protects the familial and tribal interests of any child who is under eighteen and is a tribal member, or is eligible for membership in a tribe and has a biological parent who is a tribal member. 25 U.S.C. § 1903(4). One way in which Congress has attempted to protect Indian children under the Act is by recognizing the authority of tribal courts to handle any child custody cases involving their membership or those eligible for membership. The tribe maintains such jurisdiction to resolve these cases even in instances where the child is living off the reservation or in a Public Law 280 state. ("Public Law 280" is used as a shorthand for any state that acquired jurisdiction over child custody proceedings pursuant to any federal law). 25 U.S.C. § 1911(a).

Practice Tip:
Practitioners should review state law and/or intergovernmental agreements as they may expand the protection of the ICWA such as by expanding the definition of an Indian child. MINN. STAT. § 257.0651 (1992); IOWA CODE § 232.7 (2003).

Both ICWA and many state laws require that when a child is removed involuntarily from its parents' custody, he or she must be given court-appointed counsel. 25 U.S.C. § 1912(b). The child, along with his court-appointed counsel, has the right to examine all documents filed with the court that may determine the continuation of an involuntary foster care placement or eventual termination of parental rights. 25 U.S.C. § 1912(c). ICWA requires that the party seeking to remove the child from its parents must engage in active efforts to provide the family with remedial services and rehabilitative programs designed to prevent the break up of the Indian family. 25 U.S.C. § 1912(d). ICWA preserves the child's right to remain with his/her parent unless and until it is proven that the parent's continued custody is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(f). In instances where the child's parents or guardians voluntarily consented to foster care placement, the child must be returned to its parents' custody if that voluntary consent is subsequently withdrawn. 25 U.S.C. § 1913(b).

Within two years of the court's entry of a final adoption decree, the child must be returned to parental custody if the court agrees that the parental consent to adoption was obtained by fraud or that the consent was given under duress. 25 U.S.C. § 1913(c). However, in instances where consent was obtained by fraud or under duress and at least two years have elapsed since the final decree of adoption became effective, the child must remain with his/her adoptive parents, unless state law provides a longer period for challenging an adoption based on fraud or duress or other grounds. 25 U.S.C. § 1913 (d).

In the absence of good cause to the contrary, ICWA provides that the child should be placed with an extended family member or, if a suitable extended family member is not available, with another member of his or her tribe or another Indian family. 25 U.S.C. § 1915(a). ICWA states that the court, where appropriate, should consider the child's foster care or adoptive placement preferences. 25 U.S.C. § 1915(c).

If an adoption is set aside, or the adoptive parents consent to the termination of their parental parents, the child has the right to be returned to the custody of the natural parent. The parent must petition for custody and be approved by the court. (The court must grant the petition unless the parents' custody of

the child is likely to result in serious emotional or physical damage to the child). 25 U.S.C. § 1916(a).

ICWA protects children from improper removal from their parents' custody. If a petitioner in a state child custody proceeding improperly removes a child or improperly retains custody of the child after a visit or other temporary relinquishment of custody, the child has the right to be returned to its parents' custody. The court must return the child to its parents' custody unless the parents' custody would subject the child to a substantial and immediate danger or threat of such danger. 25 U.S.C. § 1920.

Where a parent has lost custody of a child due to an emergency, the child should be immediately returned to parental custody when removal is no longer necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922.

3.2 What are the rights of natural parents of Indian children under the ICWA (applies to the natural mother and to any natural father who has acknowledged or established paternity)?

Where an Indian child is not a reservation resident, the child's natural parents have the right to petition a state court to transfer jurisdiction of a voluntary or involuntary foster care placement or termination of parental rights proceeding to the tribe's court. 25 U.S.C. § 1911(b). Further, where an Indian child is not a reservation resident, his parents may object to the transfer of a foster care placement or termination of parental rights proceeding to the tribal court. *Id*.

Courts must provide natural parents with notice of any involuntary foster care placement or termination of parental rights proceeding as well as appoint counsel for indigent natural parents in such cases. 25 U.S.C. § 1912(a)-(b). ICWA provides natural parents with the right to examine all documents filed with the court which may influence any decision regarding involuntary foster care placement or termination of parental rights. 25 U.S.C. § 1912(c).

ICWA requires that any party seeking an involuntary foster care placement or termination of parental rights must satisfy the court that it has engaged in active efforts to provide the child's natural parents with remedial services and rehabilitative programs that are designed to prevent the break up of the Indian family and must also prove to the court that these efforts were unsuccessful. 25 U.S.C. § 1912(e)-(f).

Natural parents have the right to retain custody of their child unless and until it is proven in an involuntary child custody proceeding that the parent's continued custody is likely to result in serious emotional or physical damage to the child. *Id*.

Where the consent to foster care placement or termination of parental rights is voluntary, the judge is required to explain the terms and consequences of the consent in a language that the natural parent understands. 25 U.S.C. § 1913(a). The judge should further make it clear that the parent has the right to withdraw consent to a foster care placement at any time and to have the child returned to parental custody, as well as the right to withdraw consent to a termination of parental rights or adoption at any time before entry of a final decree of termination or adoption, as the case may be, and to have the child returned to parental custody. 25 U.S.C. § 1913(b)-(c).

Natural parents maintain the right, within two years following a final decree of adoption (or longer if state law permits), to withdraw their consent to any adoption, upon the grounds that the consent was obtained by fraud or duress, and to have the child returned to parental custody if a court agrees that the consent was obtained in this way. 25 U.S.C. § 1913(d).

Natural parents may petition a court of competent jurisdiction under § 1914 to invalidate a state court ordered foster care placement or termination of parental rights, regardless of whether the underlying proceeding was voluntary or involuntary, on the grounds that such action violates any provision of §§ 1911, 1912, or 1913 of the Act.

Where appropriate, the adoptive or foster care placement of the natural parents should be considered. 25 U.S.C. § 1915(c). Where a natural parent desires anonymity, the court is required to place the child in strict accordance with the preferences but, whenever possible, to do so in a manner that protects the natural parents' request for anonymity. *Id*. But, where a tribe has established an order of preference different from the ICWA order, the court must place the child in accordance with that order regardless of parental preferences or requests for anonymity if those preferences and requests cannot be accommodated in applying the tribe's preference order. *Id*.

Natural parents may petition for and must be granted the return of custody of a child who has been adopted where the adoption has been vacated or set

aside, or where the adoptive parents have voluntarily consented to the termination of their parental parents, unless the parent's custody of the child is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1916(a).

In any case where a petitioner in a state child custody proceeding has improperly removed the child from the parent's custody or has improperly retained custody after a visit or other temporary relinquishment of custody, the child should be immediately returned to his natural parents, unless returning the child to the parent's custody would subject the child to a substantial and immediate danger or threat of such danger. 25 U.S.C. § 1920.

Natural parents have the right to the immediate return of the custody of their child who has been removed from their custody due to an emergency when such removal is no longer necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922.

3.3 What are the rights of Indian custodians under the ICWA?

An Indian custodian is any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody and control has been transferred by the parent of such child. 25 U.S.C. § 1903(6).

When an Indian child is not a reservation resident, an Indian custodian may petition a state court to transfer jurisdiction of a voluntary or involuntary foster care placement or termination of parental rights proceeding to the tribe's court. 25 U.S.C. § 1911(b). Indian custodians have the right to intervene in a state court voluntary or involuntary foster care placement or termination of parental rights proceeding. 25 U.S.C. § 1911(c). Further, ICWA requires the courts to provide Indian custodians with notice of any involuntary foster care placement or termination of parental rights proceeding. In such cases, custodians have the right to court-appointed counsel if the Indian custodian is indigent. 25 U.S.C. § 1912(a)-(b). Indian custodians may examine all documents filed with the court which may affect any decision regarding involuntary foster care placement or termination of parental rights. 25 U.S.C. § 1912(c).

ICWA requires that any party seeking involuntary foster care placement or termination of parental rights must engage in active efforts to provide the Indian custodian with remedial services and rehabilitative programs designed to prevent the break up of the family. The custodian may retain custody of an Indian child unless and until it is proven that the custodian's continued custody is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(d).

In cases of voluntary consent to foster care placement or termination of parental rights, a judge must explain the terms and consequences of the consent in a language that the Indian custodian understands, and the custodian maintains the right to withdraw consent to a foster care placement at any time, at which point the child must be returned to the Indian custodian's custody. 25 U.S.C. § 1913(a)-(b).

ICWA allows Indian custodians to petition a court of competent jurisdiction under § 1914 to invalidate a state court ordered foster care placement or termination of parental rights, regardless of whether the underlying proceeding was voluntary or involuntary, on the grounds that such action violates any provision of §§ 1911, 1912 or 1913 of the Act..

If the custodian involved in the proceedings is a prior Indian custodian, that individual may petition for and must be granted the return of custody of a child who has been adopted if the adoption has been vacated or set aside, or the adoptive parents have voluntarily consented to the termination of their parental parents, unless the Indian custodian's custody of the child is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1916(a).

ICWA requires the return of a child where any petitioner in a state child custody proceeding has improperly removed the child from the Indian custodian's custody or has improperly retained custody after a visit or other temporary relinquishment of custody, *unless* returning the child to the Indian custodian's custody would subject the child to a substantial and immediate danger or threat of such danger. 25 U.S.C. § 1920.

Further, a child who has been removed from an Indian custodian's custody due to an emergency must be immediately returned to the custodian when such removal is no longer necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922.

3.4 What are the rights of extended family of Indian children under the ICWA?

Extended family of Indian children have the right to a first preference as a placement for that child in a foster or adoptive home, absent good cause to the contrary. 25 U.S.C. § 1915(a)-(b). Unless the tribe otherwise defines the term "extended family member," this includes the Indian as well as non-Indian extended family of Indian children with the understanding that this preference seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society. 25 U.S.C. § 1903(2); H.R. REP. NO. 95-1386, at 23 (1978).

Extended family members qualify for the foster care or adoptive placement of an Indian child based on the social and cultural standards for qualification of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. 25 U.S.C. § 1915(d).

ICWA allows extended family members to intervene in a foster care placement or adoption proceeding to protect their right to preferential consideration in the placement of an Indian child. *E.A. v. State*, 46 P.3d 986 (Alaska 2002).

3.5 What are the rights of tribal members who are not extended family under the ICWA?

If an Indian child is not to be placed with an extended family member, other members of the child's tribe have the right to a preference as a placement for the child in an adoptive home absent good cause to the contrary. 25 U.S.C. § 1915(a). Similarly, if an Indian child is not to be placed with an extended family member and if the tribal members are licensed or approved as a foster home by the tribe, those tribal members have the right to a preference as a placement for the child in a foster home. 25 U.S.C. § 1915(b). On an equal basis, this right also extends to non-Indian families licensed or approved as a foster home by the child's tribe. 25 U.S.C. § 1915(b)(ii).

ICWA provides that members of the child's tribe qualify for the foster care or adoptive placement of an Indian child based on the social and cultural standards for qualification of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. 25 U.S.C. § 1915(d).

3.6 What are the rights of Indian families who are not extended family and are not members of the child's tribe under the ICWA?

If an Indian child is not to be placed with an extended family member or a tribal member, an Indian family who is not extended family or comprised of members of the child's tribe has the right to a preference as a placement for an Indian child in an adoptive home, absent good cause to the contrary. 25 U.S.C. § 1915(a). Similarly, if the child is not to be placed with an extended family member or in a foster home licensed or approved by the child's tribe, an unrelated Indian family has the right to a preference, as a placement for an Indian child in a foster home if the family is licensed or approved by an authorized non-Indian licensing authority. 25 U.S.C. § 1915(b)(iii).

ICWA provides that Indian families qualify for the foster care or adoptive placement of an Indian child based on the social and cultural standards for qualification of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. 25 U.S.C. § 1915(d).

3.7 What are the rights of tribes under the ICWA?

ICWA recognizes the right of tribes to hear and determine child custody proceedings in a manner established by tribal code or custom or administrative action. 25 U.S.C. § 1903(12). This includes foster care, termination of parental rights and adoption proceedings, including adoptions where termination of parental rights has not occurred. 25 U.S.C. § 1903(1) and (12).

Tribes maintain the right to exercise exclusive jurisdiction over child custody proceedings involving Indian children resident or domiciled on the reservation. 25 U.S.C. § 1911(a). Exceptions exist in Public Law 280 states, where tribes subject to that law and the state may have concurrent jurisdiction over child custody proceedings arising therein. Tribes also have the right to exercise exclusive jurisdiction over children who are wards of the tribal court, regardless of whether the children are located on or off of an Indian reservation or within or without a Public Law 280 state. 25 U.S.C. § 1911(a).

In a non-Public Law 280 state, tribes have exclusive jurisdiction over reservation resident or domiciled Indian children who are off-reservation when removed from a parent's custody or placed in

an off-reservation placement due to an emergency, unless the child is returned to the parent's custody after the emergency ends. 25 U.S.C. § 1922.

ICWA requires every state and every other Indian tribe to give full faith and credit to the tribe's laws and court orders applicable to foster care, termination of parental rights and adoption proceedings. 25 U.S.C. § 1911(d).

When an Indian child is not a reservation resident, ICWA gives tribes the right to petition a state court to transfer jurisdiction of a voluntary or involuntary foster care placement or termination of parental rights proceeding to the tribe's court. 25 U.S.C. § 1911(b). The tribe also has the right to decline to exercise jurisdiction over a state child custody proceeding where a parent or an Indian custodian has requested the state court to transfer jurisdiction to the tribe. *Id.*

Tribes may intervene in a state court voluntary or involuntary foster care placement or termination of parental rights proceeding. 25 U.S.C. § 1911(c). ICWA explicitly requires the courts to provide notice to the tribe of an involuntary foster care placement or termination of parental rights proceeding and due process may require notice in voluntary proceedings. 25 U.S.C. § 1912(a). In some jurisdictions, notice has been required in voluntary proceedings either by judicial decision, statute, state regulation, court rule or tribal/sate agreement. Further, if the tribe is a party to the proceedings, the tribe has the right to examine all documents filed with the court which may affect involuntary foster care placement or termination of parental rights. 25 U.S.C. § 1912(c).

Tribes in an ICWA proceeding have the right to petition a court of competent jurisdiction under § 1914 to invalidate a state court ordered foster care placement or termination of parental rights, regardless of whether the underlying proceeding was voluntary or involuntary, on the grounds that such action violates any provision of §§ 1911, 1912 or 1913 of the Act.

Tribes may alter the order of preference for the placement of children in foster or adoptive homes. 25 U.S.C. § 1915(c). State courts and agencies are then required to follow the tribe's order of preference. *Id.* ICWA states that tribes may define who is an "extended family member" for purposes of the foster care and adoptive placement preferences. 25 U.S.C. § 1903(2). Each state, upon the tribe's request, is required to provide a record of each adoptive or foster care placement evidencing the efforts of the state to comply. 25 U.S.C. § 1915(e). For purposes of qualifying for assistance under a federally assisted program, such as Titles IV-B and XX of the Social Security Act, tribally licensed or approved foster or adoptive homes are deemed equivalent to state licensed or approved foster or adoptive homes or institutions. 25 U.S.C. § 1931(b).

In Public Law 280 states, tribes may petition the Secretary of the Interior to reassume whatever jurisdiction over child custody proceedings a state may have acquired pursuant to Public Law 280. 25 U.S.C. § 1918. ICWA also allows tribes to enter into agreements with states governing the care and custody of Indian children and the general or case-by-case exercise of jurisdiction over child custody proceedings. 25 U.S.C. § 1919.

Tribes have the right to request and receive from the Secretary of the Interior any information that would assist the tribe in determining whether to grant tribal membership to an Indian child or in determining any rights or benefits associated with that membership. 25 U.S.C. § 1951(b).

3.8 What are the rights of adoptive parents of Indian children under the ICWA?

Adoptive parents have the same rights as natural parents of Indian children, possibly including the right to request and receive any information that the Secretary of the Interior may have that would assist the tribe in determining whether to grant tribal membership to an Indian child or in determining any rights or benefits associated with that membership. However, non-Indian adoptive parents have less rights than natural parents should their adoptive children ever be removed from their home or placed for adoption since such parents are not included within the definition of "parent" under the Act. The rights of adoptive parents extend to individuals who have adopted an Indian child pursuant to tribal law or custom as well as under state law.

3.9 What are the rights of foster parents of Indian children under the ICWA?

Foster parents of Indian children have the right to request and receive any information the Secretary of the Interior may have that would assist the tribe in determining whether to grant tribal membership to an Indian child or in determining any rights or benefits associated with that membership. 25 U.S.C. §§ 1903(9), 1951(b).

3.10 What are the rights of Indian children who have been adopted under the ICWA?

Children adopted in accordance with ICWA maintain the same rights as Indian children who have not been adopted. 25 U.S.C. § 1903(4). Additionally, adopted children have the right to petition, after reaching the age of eighteen, the court which entered the final decree of adoption, for information on the tribal affiliation of the child's biological parents and for any other information necessary to protect any rights flowing from the individual's tribal relationship. 25 U.S.C. § 1917. This can include the names and last known addresses of the individual's biological parents. S. REP. NO. 95-597, at 18 (1977).

Further, after reaching the age of eighteen, adopted children have the right to request and receive from the Secretary of the Interior such information as the Secretary may have that would assist the tribe in determining whether to grant tribal membership to an Indian child or in determining any rights or benefits associated with that membership. 25 U.S.C. § 1951(b).

**** Access to the full-text of opinions and additional materials is at 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.

FEDERAL CASES

Circuit Courts of Appeals
Native Village of Venetie I.R.A. Council v. Alaska, 155 F.3d 1150 (9th Cir. 1998)

District Courts
Doe v. Mann (*Mann I*), 285 F. Supp. 2d 1229 (N.D. Cal. 2003)
Navajo Nation v. Superior Court, 47 F. Supp. 2d 1233 (E.D. Wash. 1999)

STATE CASES

Alabama
S.A. v. E.J.P., 571 So. 2d 1187 (Ala. Civ. App. 1990)
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Alaska
A.B.M. v. M.H., 651 P.2d 1170 (Alaska 1982)
In re Bernard A., 77 P.3d 4 (Alaska 2003)
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E.A. v. State, 623 P.2d 1210 (Alaska 1981)
Gilbert M. v. State, 139 P.3d 581 (Alaska 2006)
In re N.P.S., 868 P.2d 934 (Alaska 1994)
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Arizona
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In re Maricopa County Juvenile Action No. JD-6982, 922 P.2d 319 (Ariz. Ct. App. 1996)
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California
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In re Daniel M., 1 Cal. Rptr. 3d 897 (Ct. App. 2003)
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Michigan
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Montana
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New Mexico
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North Carolina
In re Bluebird, 411 S.E.2d 820 (N.C. Ct. App. 1992)

Oregon
Carson v. Carson, 13 P.3d 523 (Or. Ct. App. 2000)
In re Charles, 810 P.2d 393 (Or. Ct. App. 1991)
In re Charles, 688 P.2d 1354 (Or. Ct. App. 1984)
In re Charloe, 640 P.2d 608 (Or. 1982)
In re Kirk, 11 P.3d 701 (Or. Ct. App. 2000)
In re Shuey, 850 P.2d 378 (Or. Ct. App. 1993)

Washington
In re E.C., 115 Wash. App. 1032 (Wash. Ct. App. 2003)

4. NOTICE

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. § 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a state court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

Disclaimer: The above provision of the Indian Child Welfare Act is 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.

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Frequently Asked Questions

4.1 What is notice?

In general, notice informs a person of a proceeding in which his or her interests may be affected. It may also provide information about his or her rights in the proceeding. *See generally* BLACK'S LAW DICTIONARY (4th ed. 1968).

4.2 In what types of proceedings is notice explicitly required?

At a minimum, § 1912(a) of the Indian Child Welfare Act (ICWA) requires notice "[i]n any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved" and the foster care placement of the child, or the termination of parental rights to the child is sought. See also FAQ 16.13, Placement.

4.3 Who must be notified?

At a minimum, at the commencement of the action the parents and Indian custodian, if any, of an Indian child, and the Indian child's tribe must be given notice. 25 U.S.C. § 1912(a). While the statute says "parent or Indian custodian," the Bureau of Indian Affairs (BIA) Guidelines point out the desirability, and in most cases the need, to give notice to both parents and custodians. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,589 (Nov. 26, 1979) (guidelines for state courts). Case law and certain state laws also support notice to extended family members in some circumstances. *In re M.E.M.*, 635 P.2d 1313 (Mont. 1981); IOWA CODE § 232B.5 (2003); *cf.* COLO. REV. STAT. § 19-1-126 (2002).

Notice must be given to each tribe in which the child is a member or is eligible for membership. 25 U.S.C. § 1912(a); *In re Desiree F.*, 99 Cal. Rptr. 2d 688 (Ct. App. 2000). The BIA is required to publish annually in the Federal Register a list of tribal entities recognized as eligible to receive services from the BIA. The list is provided at the BIA's website, which also has addresses for federally recognized tribes and a listing of designated tribal agents. If the website is not accessible, then BIA's central office in Washington, D.C. should be contacted. The regulations require that copies of these notices be sent to the Secretary and the appropriate Area Director. 25 C.F.R. § 23.11(a) (2007).

4.4 Why is notice required under the Act?

Due process requires that before a person's rights can be affected in a court proceeding, they be given notice and an opportunity to be heard. Parents have "a fundamental liberty interest," in the "care, custody, and management" of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). An "Indian custodian" as defined in § 1903(6) has the right to notice because she stands in the shoes of the parent. Indian tribes have "an interest in the child which is distinct from, but on a parity with the interest of the parents." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989) (quoting from *In re Halloway*, 732 P.2d 962, 969-70 (Utah 1986)). Notice may also be required to any interested party who has a protectable interest under the act, such as an extended family member. *In re M.E.M.*, 635 P.2d 1313 (Mont. 1981).

4.5 If other applicable federal or state law, provides a more stringent requirement for notice than the ICWA, which standard controls?

Section 1921 specifically provides that "where State or Federal law applicable to a child custody proceeding . . . provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter," that standard shall be applied. As an example, where Michigan law contained a more stringent requirement than ICWA to ensure that inquiry and notification are performed, that standard applied. *In re Elliott*, 554 N.W.2d 32, 38 (Mich. Ct. App. 1996). *Cherokee Nation v. Nomura*, 2007 OK 40, 160 P.3d 967 holds that § 1921 also makes more stringent state requirements for notice to tribes applicable.

4.6 What purpose does notice to the tribe serve?

Notice enables a tribe or the BIA to investigate and determine whether the minor is an Indian child. Notice also ensures that the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies. Specifically, a tribe has the right to intervene in a state court proceeding pursuant to § 1911(c) and may have the right to obtain jurisdiction over the proceeding by transfer to its tribal court pursuant to § 1911(b). *In re Kahlen W.*, 285 Cal. Rptr. 507 (Ct. App. 1991) (certified for partial publication). Without notice, these important rights granted by the Act would be meaningless. *Id.*;

Cherokee Nation v. Nomura, 2007 OK 40, 160 P.3d 967. Notice to the tribe also gives the tribe the opportunity to ensure compliance with the placement preferences of § 1915. *Cf. In re Baby Boy C.*, 805 N.Y.S.2d 313 (App. Div. 2005).

4.7 Who is responsible for compliance with notice requirements?

The burden of providing notice is on "the party seeking the foster care placement of, or termination of parental rights to, an Indian child . . . ." 25 U.S.C. § 1912(a); *In re E.S.*, 964 P.2d 404, 409 (Wash. Ct. App. 1998). This is often a state agency such as a department of social services. *In re Desiree F.*, 99 Cal. Rptr. 2d 688 (Ct. App. 2000). Some courts have found that the duty also extends to the courts. *In re J.T.*, 693 A.2d 283, 288 (Vt. 1997); *In re H.A.M.*, 961 P.2d 716 (Kan. Ct. App. 1998) (holding trial court required to notify); *In re Levi U.*, 92 Cal. Rptr. 2d 648 (Ct. App. 2000).

4.8 How is compliance with the notice requirement shown?

The BIA Guidelines provide that the "original or a copy of each notice sent" under the Act shall be filed with the court together with any return receipts or other proof of service. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,588 (Nov. 26, 1979) (guidelines for state courts). *See In re E.S.*, 964 P.2d 404 (Wash. Ct. App. 1998).

4.9 How should notice be served?

Section 1912(a) provides that notice shall be sent by "registered mail, with return receipt requested." The regulations governing the ICWA differ from the language of the statute as to the form of service. The regulations specify certified mail, return receipt requested. 25 C.F.R. § 23.11(a), (d) (2007) (or personal service on the appropriate Area Director). Registered mail is a stricter standard than certified mail. Under § 1921, the higher standard of protection should apply, so notice should be sent registered mail, return receipt requested. In addition, state law may well require personal service and that would be required by § 1921.

4.10 What should be included in the notice?

The Act requires notice of the pending proceedings and the right of intervention of the parents, Indian custodian, and the Indian child's tribe. 25 U.S.C. § 1912(a). The Guidelines specify what information should be included in the notice. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,588 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts). The regulations concerning notice under ICWA, contained at 25 C.F.R. § 23.11 (2007) provide for detailed information which does not in all respects match the Guidelines. The regulations provide for the same information to be given to the Secretary as to parents, Indian custodians or tribes.

Practice Tip:
The practitioner should note that the regulations and BIA Guidelines are not the same in all respects, and are encouraged to include all of the information specified in both the regulations and BIA Guidelines. A model form is included in the appendix but state law should be consulted as to additional notice requirements. See also 25 C.F.R. § 23.11(d)(3) (2007) for additional information to include if known. It is also helpful to contact the tribe and inquire as to what information is useful.

4.11 Where must notice be sent when the identity or location of the Indian child's parents or Indian custodian and tribe are unknown?

Section 1912(a) requires that notice in such circumstances is to be given to the Secretary of the Interior "in like manner," i.e., registered mail, return receipt requested. The regulations specify that this is to be done by sending notice by "certified mail, return receipt requested" to the appropriate Area Director or by personal service on the Area Director. 25 C.F.R. § 23.11(b), (d) (2007). The regulations contain a list of the Area Directors and their designated geographical areas. 25 C.F.R. 23.11(c)(1)-(12). To conform to both the Act and the regulations, the notice should be sent to both the Secretary and the appropriate Area Director and should contain the information specified in the regulations. In addition, the statute requires service by registered mail, not certified mail. Since registered mail is the higher standard, that should govern. 25 U.S.C. § 1921.

Practice Tip:
This notice is not a substitute for contacting all tribes that have a potential affiliation with the child.

4.12 When should notice be provided?

While § 1912(a) does not specify a time for service of notice, it does require notice of a pending child custody proceeding, "where the court knows or has

reason to know that an Indian child is involved." 25 U.S.C. § 1912(a). It further provides that "no foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the Tribe or the Secretary." *Id.* In addition, the parent, or Indian custodian or the tribe, "shall, upon request, be granted up to twenty additional days to prepare for such a proceeding." *Id.* Good practice dictates that notice be given as soon as possible so that interested persons and entities can protect their rights. Delay in giving notice could allow inequities to develop. For example, parties should not be able to successfully argue that there is good cause not to transfer a proceeding to tribal court because the proceedings are at an advanced stage when that situation resulted from a failure to give prompt notice. *See* BIA Guidelines, "Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions . . . ." Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,590 (Nov. 26, 1979) (guidelines for state courts).

4.13 What might give the court "reason to know that an Indian child is involved"?

The BIA Guidelines list the most common circumstances giving rise to a reasonable belief that a child may be Indian.

> (i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.
>
> (ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.
>
> (iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.
>
> (iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.
>
> (v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979) (guidelines for state courts).

4.14 Must notice be sent to newly recognized tribes?

Yes. Notice must be given to tribes which have been federally recognized by the United States. Since 1978, the Department of the Interior has been implementing a process by which a government-to-government relationship is established with previously unrecognized tribes.

4.15 If the child might be eligible for enrollment in more than one tribe, must notice be sent to all tribes?

Yes. Notice to one tribe does not protect the interests of a tribe not given notice, so all tribes in which the minor may be eligible for enrollment must be notified. *In re Desiree F.*, 99 Cal. Rptr. 2d 688 (Ct. App. 2000).

4.16 Is notice required in a voluntary proceeding involving a foster care placement of, or termination of parental rights to, an Indian child?

The only explicit requirement of notice is that in § 1912(a), relating to involuntary proceedings. *Cherokee Nation v. Nomura*, 2007 OK 40, 160 P.3d 967, while dealing with a state statute requiring notice in voluntary proceedings also noted that the purposes of the federal act cannot be met without notice to the tribe in voluntary proceedings. *But see Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999), *aff'd on other grounds sub nom. Navajo Nation v. Norris*, 331 F.3d 1041 (9th Cir. 2003); *Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159 (Alaska 1989) (no notice to tribe required of proceeding for voluntary termination of parental rights). In addition, the BIA Guidelines indicate that notice is not required in voluntary proceedings. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979) (guidelines for state courts).

The better practice is to provide such notice. Indian tribes and extended family members have substantial rights under the ICWA even in voluntary proceedings. See also FAQ 17, Voluntary Proceedings. A practitioner who does not provide notice runs the risk that a tribe will learn about the proceeding at a later date and object at that time, perhaps arguing that the child was a resident of or

domiciled on the reservation or is a ward of the tribal court and that jurisdiction was exclusively in the tribal court. Providing notice to a tribe will also allow the tribe to identify if there are good tribal or family placements available for a child and will lessen the risk of a child being transferred to a new placement after an extended time in an initial placement—an event that can be difficult for all concerned. For these reasons, several states have enacted more stringent requirements and require notice be given to tribes in both voluntary and involuntary Indian child custody proceedings. *See, e.g.,* IOWA CODE § 232B.5(8) (2003) (providing notice to tribes in voluntary proceedings); MINN. STAT. § 260.761(3) (1999) (providing notice to tribes in voluntary adoptive and pre-adoptive proceedings); OKLA. STAT. tit. 10, § 40.4 (2006) (providing notice to tribes in voluntary proceedings). See also FAQ 17.4, Voluntary Proceedings and FAQ 18.11, Adoption.

Practice Tip:
The decisions that have ruled against notice in voluntary proceedings have not fully considered the due process issues pertaining to such notice. Parents have a liberty interest in the care, custody, and management of their children which is protected by the due process clause of the United States Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). The protection of a tribe's interest in any Indian children "is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989) (quoting from *In re Halloway*, 732 P.2d 962, 969-70 (Utah 1986) (noting findings of Congress as to the importance of children to tribes' continued existence, and prerogatives of tribes under the ICWA and concluding they "must be seen as a means of protecting . . . the interests . . . of the tribes themselves"). Once a right has been recognized, the process that is due before it can be adversely affected is a consideration separate from, and not governed by, the source of the right. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Thus, the failure of Congress to specifically provide for notice in voluntary proceedings, may not obviate the need for notice in such proceedings. For notice to be required, it is sufficient that the person or entity whose rights may be adversely affected may become a party, they need not actually be a party. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 488 (1988). While the precise notice required in involuntary proceedings would not necessarily be required in voluntary proceedings, notice reasonably calculated to provide actual notice under the circumstances may be required. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). That requires mailing where the entity is reasonably ascertainable as is the case with tribes. *Id.*

4.17 Must notice be given to tribes in Public Law 280 states?

Yes. Tribes have the same rights to notice under the ICWA in Public Law 280 states. *In re C.R.H.*, 29 P.3d 849 (Alaska 2001) (holding whatever effect Public Law 280 had on a tribe's jurisdiction, § 1911(b) authorizes transfers and transfer jurisdiction under § 1911(b) is the same in Public Law 280 states as in non-Public Law 280 states). This is consistent with the "longstanding position of the Office of the Solicitor that a tribe in a Public Law 280 state does not have to submit a petition under § 1918 of the ICWA to reassume transfer jurisdiction under § 1911(b)." Memorandum from Robert McCarthy, Field Solicitor, United States Department of the Interior, to Pacific Regional Director, Bureau of Indian Affairs (July 28, 2005) (on file with the Native American Rights Fund) (available on the web site version); *In re M.A.*, 40 Cal. Rptr. 3d 439, 441-43 (Ct. App. 2006) (holding tribes in Public Law 280 states retain concurrent jurisdiction); *Native Village of Tanana v. Alaska*, No. 3AN-04-12194 (Alaska Super. Ct. May 25, 2007) (same). Tribes also have the right to intervene under § 1911(c) and to see that placement preferences are followed under § 1915.

4.18 What are the effects of failure to give notice to a tribe or tribes with an interest in the proceeding?

Some courts hold that failure to give proper notice renders the proceedings null and void. *In re H.D.*, 729 P.2d 1234, 1241 (Kan. Ct. App. 1986); *In re H.A.M.*, 961 P.2d 716, 720 (Kan. Ct. App. 1998); *In re Desiree F.*, 99 Cal. Rptr. 2d 688 (Ct. App. 2000). Some appellate courts have remanded to correct the deficiency, leaving it to the lower court to determine whether the error so prejudiced the proceeding as to require its invalidation. *See, e.g., In re M.S.S.*, 936 P.2d 36 (Wash. Ct. App. 1997) (holding proper notice not given to the BIA or the tribe so remanded with instructions that only if the lack of notice prejudiced the proceedings was the termination proceeding invalid). *See also In re I.E.M.*, 592 N.W.2d 751, 757-58 (Mich. Ct. App. 1999). This approach places the onerous burden on tribes to persuade the lower courts to invalidate an existing decision, and is contrary to § 1914 of the Act, which

provides for the invalidation of the proceedings when notice is not provided.

Due process also may be violated by a failure to give proper notice under state law. *In re L.A.M.*, 727 P.2d 1057 (Alaska 1986); *Smith v. Tisdal*, 484 N.E.2d 42, 43-44 (Ind. Ct. App. 1985) (relying on state grounds alone).

4.19 Can defects in notice be waived by the tribe?

Possibly. If notice is received, but not in the form required, and the tribe appears at the hearing, that may waive the argument of lack of proper notice. *In Re Krystle D.*, 37 Cal. Rptr. 2d 132 (Ct. App. 1994); *In re J.J.G.*, 83 P.3d 1264 (Kan. Ct. App. 2004) (substantial compliance and tribe already participating in related proceedings through its attorney).

4.20 Can a parent or Indian custodian waive the tribe's right to notice?

No. Since the rights of the tribe and child are distinct from those of the parent, the parent cannot waive the tribe's right to notice. *In re Kahlen W.*, 285 Cal. Rptr. 507 (Ct. App. 1991) (certified for partial publication). *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52-53 (1989).

4.21 May defective notice be raised for the first time on appeal?

Yes. In *In re L.A.M.*, 727 P.2d 1057, 1059 (Alaska 1986), the Supreme Court of Alaska ruled that a claim of defective notice implicates a due process right which is so fundamental that justice required the Court to consider the claim. *See also In re H.D.*, 729 P.2d 1234 (Kan. Ct. App. 1986). *But cf. In re Pedro N.*, 41 Cal. Rptr. 2d 819, 823 (Ct. App. 1995) (appeal from a recent order may not challenge prior order for which appeal time has passed).

**** Access to the full-text of opinions and additional materials is at 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.

FEDERAL CASES

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Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

Circuit Courts of Appeal
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District Courts
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In re Antoinette S., 129 Cal. Rptr. 2d 15 (Ct. App. 2002)
In re Asia L., 132 Cal. Rptr. 3d 733 (Ct. App. 2003)
In re Brooke C., 25 Cal. Rptr. 3d 590 (Ct. App. 2005)
In re C.D., 1 Cal. Rptr. 3d 578 (Ct. App. 2003) (certified for partial publication)
In re Christopher I., 131 Cal. Rptr. 2d 122 (Ct. App. 2003)
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In re Glorianna K., 24 Cal. Rptr. 3d 582 (Ct. App. 2005)
In re H.A., 128 Cal. Rptr. 2d 12 (Ct. App. 2002)
In re I.G., 35 Cal. Rptr. 3d 427 (Ct. App. 2005) (certified for partial publication)
In re Jaclyn S., 58 Cal. Rptr. 3d 321 (Ct. App. 2007) (certified for partial publication)
In re Jasmine G., 26 Cal. Rptr. 3d 394 (Ct. App. 2005)
In re Jeffrey A., 127 Cal. Rptr. 2d 314 (Ct. App. 2002)
In re Jennifer A., 127 Cal. Rptr. 2d 54 (Ct. App. 2002)
In re Jonathan D., 111 Cal. Rptr. 2d 628 (Ct. App. 2001)
In re Jonathon S., 28 Cal. Rptr. 3d 495 (Ct. App. 2005) (certified for partial publication)

In re Joseph P., 45 Cal. Rptr. 3d 591 (Ct. App. 2006)
In re Junious M., 193 Cal. Rptr. 40 (Ct. App. 1983) (certified for partial publication)
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In re R.R.R., 763 P.2d 94 (Okla. 1988)

Oregon
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South Dakota
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Tennessee
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5. INTERVENTION

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25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

25 U.S.C. § 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention . . . .

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.

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Frequently Asked Questions

_____

5.1 What is intervention?

Intervention is a procedure that allows a third person not part of a suit, but who claims to have a legal interest in the suit, the opportunity to participate in a legal proceeding to protect the claimed interest. BLACK'S LAW DICTIONARY (6th ed. 1990).

5.2 What is intervention under ICWA and does it differ from intervention under state law?

The Indian Child Welfare Act (ICWA) § 1911(c) expressly grants an Indian custodian and an Indian child's tribe the legal right to intervene in a foster care placement or a termination of parental rights proceeding. This right is mandatory and can be exercised at any point in such proceeding. *See In re Baby Girl A.*, 282 Cal. Rptr. 105 (Ct. App. 1991) (certified for partial publication).

Practice Tip: A party may be permitted to intervene in a pre-adoptive or adoptive proceeding under state intervention law, but there is no mandatory right to do so under ICWA. *See In re J.R.S.*, 690 P.2d 10 (Alaska 1984).

5.3 Why is intervention important?

Legislative history shows that state child welfare systems were ignorant of Indian culture and childrearing practices and, therefore, were more likely than not to make ill-informed decisions regarding termination, removal and placement of Indian children. *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the Subcomm. on Indian Affairs & Pub. Lands of the H. Comm. on Interior & Insular Affairs*, 95th Cong. 191-92 (1978). *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34-35 (1989). Intervention is a procedure that allows Indian custodians, Indian parents and tribes to participate in foster care or termination proceedings to educate state courts of tribal cultural and social standards, thereby, allowing a court to make a more informed decision and adhere to the spirit and intent of the act. Tribal participation also ensures that state courts not only protect the best interest of the child as defined by ICWA but also protect the continued existence and integrity of Indian tribes. With regard to intervention rights of Indian custodians, it is necessary because foster care placements and/or termination of parental rights proceedings may forever alter the custodial rights of the Indian custodian and Congress believed it important that Indian custodians be treated similarly as parents in child custody proceedings.

5.4 Who can intervene under ICWA and state law?

Section 1911(c) grants Indian custodians and the Indian child's tribe, and § 1912(a) grants Indian parents, the right to notice and to intervene in foster care placement and termination of parental rights proceedings. Also, any tribe that can demonstrate a connection with the Indian child may be allowed to intervene under state intervention procedures, but it is not mandated by the Act. *See* Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,587 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts).

5.5 What is *de facto* parent intervention?

De facto parent intervention is a judicially-created state procedural rule used in child custody and dependency cases, which allows an individual who is not the child's parent or legal custodian, but who has assumed the daily role of a *de facto* parent over substantial time, to intervene as a party to the case. At least one state, California, has applied the rule to an ICWA proceeding. In *In re Brandon M.*, 63 Cal. Rptr. 2d 671 (Ct. App. 1997), a non-Indian step-father of an Indian child petitioned the court to grant him *de facto* parental status to allow him to intervene in the ICWA proceeding and to have the Indian child placed in his custody. The mother challenged the petition, arguing that § 1915(b) of the ICWA only allows foster or pre-adoptive placement with the child's extended family. The court gave little weight to the seemingly unambiguous language of the Act and viewed the doctrine as adding minimally to the list of extended family members eligible for placement under § 1915(b). The court determined that there was no conflict between the application of the state rule and ICWA and furthermore, the ICWA did not preempt state law. The court held that the step-father was allowed to intervene under the state law *de facto* parent doctrine in the ICWA proceeding.

Practice Tip:
Courts may allow a party to intervene under state rules of civil procedure, either by right or permissively.

5.6 Do grandparents have a right to intervene under ICWA and/or state laws?

No. Under ICWA grandparents have no right to intervene unless they are the child's Indian custodians. Their only recourse is to seek intervention under state law.

5.7 Is an attorney required to intervene in an Indian child proceeding?

No. The Act is silent on whether an attorney is required to intervene. An attorney can be helpful in an ICWA proceeding, but they are not mandated by the Act. The Oregon Court of Appeals held that due to economic and procedural barriers, requiring a tribe to obtain legal counsel effectively burdens the intervention rights of the tribe and "essentially den[ies] that right in many cases." *In re Shuey*, 850 P.2d 378 (Or. Ct. App. 1993). The court resoned that "[t]he state's interest in requiring attorney representation is not as substantial as the tribal interests in ICWA proceedings." *Id*. at 381. If it is economically feasible, an attorney versed in the ICWA should be consulted.

5.8 When can the right of intervention be exercised?

An Indian custodian or tribe can assert their right to intervene *at any time* during a foster care placement or termination of parental rights proceeding. 25 U.S.C. § 1911(c). There are no mandatory time lines preventing formal intervention and intervention can even occur on appeal. *See In re J.J.*, 454 N.W.2d 317, 331 (S.D. 1990).

5.9 In what types of child custody proceedings may an Indian custodian or an Indian child's tribe intervene as provided under ICWA?

Pursuant to § 1911(c) an Indian custodian or an Indian child's tribe may intervene in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child. The mandatory intervention right, however, does not extend to a preadoptive or adoptive placement proceeding, but may be permitted under state law. *See In re J.R.S.*, 690 P.2d 10, 15 (Alaska 1984).

5.10 How does one intervene?

An Indian custodian, parent or an Indian child's tribe intervenes in a case by filing a written motion with the court or by a verbal request made in open court. In the event a verbal request is made and subsequently granted, the tribe or court should reduce the order to writing.

5.11 Can there be an objection to intervention? What if either parent objects?

Yes. A party to the case can object to an Indian custodian or tribe's requested intervention. The court will hold a hearing to determine whether the Indian custodian or tribe has a right to intervene. ICWA grants the tribe an explicit right to intervene and is not subject to or limited by a parent or Indian custodian's objection. 25 U.S.C. § 1911(c).

5.12 After intervention, what are the options, rights and responsibilities of the intervenor?

After a tribe, an Indian custodian or parent intervenes, the intervenor becomes a party to the case and is entitled to notice and service of all motions and filings. Furthermore, an intervenor is also permitted to view and access the previous court records and filings. The intervenor then may request a transfer, monitor and participate in the proceedings, or withdraw from the case.

Practice Tip:
The tribe may decide whether it wishes to intervene in a state court proceeding if it lacks the resources to participate in hearings. Some tribes feel that intervening in a state court case may harm their interests because they are submitting themselves to state laws and jurisdiction. In addition, a party that intervenes has legal obligations to cooperate with discovery requests (where the other parts obtain information from the tribe) and to file legal documents to support its position and oppose positions that are contrary to its wishes. Overall, the best position is to intervene to assure that the tribe's voice is heard, but tribes must be vigilant when they intervene to make sure that they adhere to court rules and procedures so they do not waive any rights they may have.

5.13 How does intervention relate to transfer? Do you have to do both?

The subject of tribal transfer of a state court proceeding is a federal right stemming from the ICWA. A tribe does not have to become a party to the state court proceedings and if any state law requires such, it is preempted by the ICWA. At the minimum, an official tribal representative may appear especially for the sole purpose of requesting transfer.

If an Indian custodian or a tribe chooses to intervene to monitor the state proceeding, they are not required to request a transfer of the case to tribal court.

Practice Tip:
It is possible, in a case where the state court has made a determination that the child involved is an Indian child and made a determination of which tribe is the Indian child's tribe without intervention by that tribe, for the tribe to seek a transfer of jurisdiction without formally intervening. Some tribes may opt to do so because they are concerned about submitting themselves to the jurisdiction of a state court should their transfer motion be denied. ICWA does not technically require intervention before a transfer of jurisdiction is sought by the tribe, but some state laws may require the transfer request be made only by a party to the case. Certainly, intervention by the tribe is not required prior to a transfer of jurisdiction to a tribal court made upon motion of the parents or Indian custodian.

5.14 Is notice required to inform an Indian custodian or an Indian child's tribe of their right to intervene?

Yes. Section 1912(a) requires notice be given to an Indian parent, Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right to intervene. *See also In re Kahlen W.*, 285 Cal. Rptr. 507 (Ct. App. 1991) (certified for partial publication). See also FAQ 4.16, Notice in Voluntary Proceedings.

**** Access to the full-text of opinions and additional materials is at 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.

FEDERAL CASES

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Alaska
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In re J.M., 718 P.2d 150 (Alaska 1986)
In re J.R.S., 690 P.2d 10 (Alaska 1984)

Arizona
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Iowa
In re J.W., 498 N.W.2d 417 (Iowa Ct. App. 1993)

Kansas
In re A.P., 961 P.2d 706 (Kan. Ct. App. 1998)

Minnesota
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Montana
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In re M.E.M., 725 P.2d 212 (Mont. 1986)
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In re Sengstock, 477 N.W.2d 310 (Wis. Ct. App. 1991)

6. EMERGENCY REMOVAL

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25 U.S.C. § 1922. Emergency removal or placement of child; termination; appropriate action.

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Disclaimer: The above provision of the Indian Child Welfare Act is 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.

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Frequently Asked Questions

6.1 What does § 1922 generally cover?

This is a section of limited applicability that applies to Indian children that reside or are domiciled on a reservation, but are temporarily located off and are in imminent physical damage or harm.

6.2 How does an Indian child's domicile or residency affect a state court's jurisdiction in regards to emergency removal proceedings?

Generally, tribes retain exclusive jurisdiction over child custody matters when the Indian child resides or is domiciled on an Indian reservation. 25 U.S.C. § 1911(a). There may be times, however, when an Indian child is temporarily located off the reservation and in danger. Because the Tribe may not have immediate physical contact with the child a state may act to protect the child and § 1922 provides for that eventuality by allowing the state to assert temporary jurisdiction. See also FAQ 2, Jurisdiction.

6.3 What are the requirements that provide a state court with temporary jurisdiction over emergency removal proceedings?

For a state court to assert temporary jurisdiction under § 1922 over an Indian child subject to exclusive tribal jurisdiction, the child must be temporarily located off the reservation and in imminent danger of physical damage or harm.

Additionally some states impose statutory requirements mandating that the state court's emergency removal order include an affidavit containing information regarding: (1) the names, tribal affiliation(s), and addresses of the Indian child, the parents of the Indian child and Indian custodians, if any; (2) a specific and detailed account of the circumstances that lead the agency responsible for the removal of the child to take that action; and (3) statements of the specific actions that have been taken to assist the parents or Indian custodians so that the child may safely be returned to their custody as recommended by the BIA Guidelines. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,589 (Nov. 26, 1979) (guidelines for state courts).

6.4 Can a state court exercise emergency removal jurisdiction over an Indian child who is domiciled on or a resident of a reservation, while the child is on the reservation?

A state court can only exercise emergency removal jurisdiction over an Indian child who is domiciled on or resident of a reservation while the child is on the reservation, if the state was granted jurisdiction under Public Law 280, or other federal law and exclusive jurisdiction was not subsequently reassumed by the tribe under § 1918, or if such state action has been agreed to by the tribe and state under an ICWA agreement pursuant to § 1919. *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005).

Practice Tip:
ICWA practitioners should note that other federal laws at times may limit a specific tribe's jurisdiction. For example the Passamoquoddy and Pennobscot Tribes of Maine are subject to a specific statutory provision concerning their jurisdiction over child custody proceedings, including emergency proceedings, arising on their respective reservations. The State of Maine has exclusive jurisdiction on those reservations until the tribes assume exclusive jurisdiction from the State. 25 U.S.C. § 1727 (2000). Practitioners are encouraged to determine whether a specific statute affects the jurisdiction of the Indian tribe at issue in your ICWA proceeding.

6.5 Does a state's emergency removal authority extend to non-reservation Indian children?

Yes. A state may assert emergency removal jurisdiction under inherent state authority but must take immediate steps to comply with the ICWA.

6.6 When does a state emergency removal or placement involving a resident or domiciled reservation Indian child terminate?

Pursuant to § 1922, the emergency removal terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child or as soon as the tribe exercises jurisdiction over the case, whichever is earlier. Imminent physical danger to the child is a narrower standard than the ICWA standard for foster care placement. *In re Charles*, 810 P.2d 393 (Or. Ct. App. 1991).

Emergency removals or placements are to be as short as possible. Section 1922 mandates the state authority, official or agency to either initiate a child custody proceeding subject to the provisions of the ICWA, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Practice Tip:
If it is confirmed that the child is subject to exclusive tribal jurisdiction, then the tribal court is the only court of competent jurisdiction.

6.7 Does § 1922 apply to tribal emergency removal or placement proceedings?

No. Tribes retain inherent authority to exercise jurisdiction over their children in emergency situations.

6.8 Must a parent or Indian custodian be notified of an emergency removal action?

Yes.

Practice Tip:
Notice requirements pertaining to emergency removals are often found in intergovernmental agreements between tribes and states under § 1919 and may also be part of tribal and state practices.

6.9 Must a tribe be notified of emergency removal action?

Yes. Section 1922 does not relieve a state from the duty to notify a tribe of an emergency removal action. Because of the parents' due process rights (incorporated into state law) the hearing may need to be held less than ten days after notice to the tribe. Nothing prevents the tribe from intervening in the proceeding under § 1911(c) during this period.

Practice Tip:
Notice requirements pertaining to emergency removals are often found in intergovernmental agreements between tribes and states under § 1919 and may also be part of tribal and state practices.

6.10 Do the placement preferences set forth in ICWA apply in emergency removal proceedings?

Courts are split on when the placement preferences apply in emergency removal proceedings. Some courts require application of the placement preference immediately. *In re Desiree F.*, 99 Cal. Rptr. 2d 688, 700 (Ct. App. 2000). Others allow a temporary deviation from the placement preferences in emergencies. *In re S.B.*, 30 Cal. Rptr. 3d 726 (Ct. App. 2005) (certified for partial publication). *See also In re Charles*, 688 P.2d 1354 (Or. Ct. App. 1984). Even so, a party should follow the ICWA requirements when possible in an emergency removal proceeding and move the child to a preferred placement.

Practice Tip:
State workers should always attempt to locate a relative for an emergency placement. Contacting tribes and Indian organizations that assist with placements may identify such placements. See also FAQ 16, Placement.

6.11 Is expert witness testimony required in an emergency removal of an Indian child?

It is unlikely that the testimony of a qualified expert witness is required at an "emergency removal" hearing within the meaning of § 1922. *In re J.A.S.*, 488 N.W.2d 332 (Minn. Ct. App. 1992). Expert witness testimony, however, may be required under state law.

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A.H. v. State, 779 P.2d 1229 (Alaska 1989)
D.E.D. v. State, 704 P.2d 774 (Alaska 1985)

California
In re Desiree F., 99 Cal. Rptr. 2d 688 (Ct. App. 2000)
In re S.B., 30 Cal. Rptr. 3d 726 (Ct. App. 2005) (certified for partial publication)

Iowa
In re J.W., 498 N.W.2d 417 (Iowa Ct. App. 1993)

Minnesota
In re J.A.S., 488 N.W.2d 332 (Minn. Ct. App. 1992)
In re R.I., 402 N.W.2d 173 (Minn. Ct. App. 1987)

Oregon
In re Charles, 810 P.2d 393 (Or. Ct. App. 1991)
In re Charles, 688 P.2d 1354 (Or. Ct. App. 1984)

7. TRANSFER

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25 U.S.C. § 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not included the unwed father where paternity has not been acknowledged or established;

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

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.

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Frequently Asked Questions

7.1 What is a transfer under the ICWA?

A transfer is the change of jurisdiction of certain Indian Child Welfare Act (ICWA) proceedings from state court to tribal court under § 1911(b). Transfer to the tribal court means that the tribal court makes decisions about the child's status and placement, and not the state court. Transfer is distinct from intervention and does not automatically occur when a tribe intervenes. Nor does transfer mean that physical and legal custody of the child must change.

7.2 What proceedings are subject to transfer from state court to tribal court?

Section 1911(b) provides for transfer from state court to tribal court of "any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe . . . ." The reference in § 1911(b) to "an Indian child not domiciled or residing within the reservation of the Indian child's tribe" refers to situations where jurisdiction is not exclusively in the tribes under § 1911(a). Where the child is a ward of the tribal court the tribe has exclusive jurisdiction and such cases do not fall under § 1911(b).

Practice Tip:
Many tribes wait until termination of parental rights appears imminent, or has taken place, to seek transfer of jurisdiction. While ICWA allows for the transfer of jurisdiction to tribal court at any point in the proceeding, state courts often view this delay negatively, which could jeopardize the tribes' ability to obtain transfer. Tribes should always immediately consider intervening and reserving the right to seek transfer of jurisdiction at a later time.

7.3 Who can petition for a transfer?

Pursuant to § 1911(b), a petition to transfer can be made by "either parent or the Indian custodian or the Indian child's tribe . . . ." Thus, even a parent who is not a member of the tribe may petition for a transfer to the tribe. *In re Shawnda G.*, 2001 WI App 194, 247 Wis. 2d 158, 634 N.W.2d 140.

7.4 What is a tribal court for purposes of the ICWA?

Section 1903(12) defines "tribal court" as "a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings." Thus, a tribal council can be a tribal court under the definition. *In re J.M.*, 718 P.2d 150, 154 (Alaska 1986). The term "tribal court" should be interpreted flexibly given the underlying philosophy of the ICWA that a tribal forum generally should decide issues related to Indian children. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

7.5 Does the transfer provision apply to proceedings over which the tribe has exclusive jurisdiction?

Section 1911(b) provides for transfer in those instances in which state and tribal courts have concurrent jurisdiction. Yet some courts treat transfer as available, indeed mandatory, for cases where jurisdiction is exclusively in the tribal court. *In re S.W.*, 2002 OK CIV APP 26, ¶ 26, 41 P.3d 1003, 1009 n.9 ("In contrast, transfer under Section 1911(a) is mandatory because exclusive jurisdiction there rests with the Tribal Court."); *In re Pima*

County Juvenile Action No. S-903, 635 P.2d 187 (Ariz. Ct. App. 1981) (transfering where jurisdiction exclusive to tribe under § 1911(a)). However, if there is no jurisdiction in the state court, a question arises as to whether dismissal rather than transfer should be required. *In re M.R.D.B.*, 787 P.2d 1219 (Mont. 1990) (holding motion to dismiss should be granted where exclusive tribal jurisdiction existed under § 1911(a)); *In re Baby Child*, 700 P.2d 198, 200-01 (N.M. Ct. App. 1985) (holding trial court should have granted motion to dismiss where child domiciled on reservation); *In re Halloway*, 732 P.2d 962 (Utah 1986) (holding Navajo motion to dismiss erroneously denied where Nation had exclusive jurisdiction under § 1911(a)).

ICWA itself provides for limited state jurisdiction in emergencies involving Indian children residing on or domiciled on the reservation, but temporarily located off the reservation. 25 U.S.C. § 1922.

7.6 Who can object to a transfer?

Any party can object to a transfer, but only a parent can veto a transfer. Section 1911(b) provides that either parent may object to a petition to transfer. Section 1903(9) defines parent as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child . . . ." Thus, in the case of an adopted child, only an Indian adoptive parent can veto the transfer.

7.7 What is the effect of a parental objection to a transfer under the ICWA?

In an action where the state and tribal courts have concurrent jurisdiction, an objection by a parent prevents the tribe from obtaining jurisdiction. *In re Maricopa County Juvenile Action No. JD-6982*, 922 P.2d 319, 323 (Ariz. Ct. App. 1996).

Practice Tip:
It is possible that a state court can still transfer a state court proceeding to tribal court under state law as a matter of forum non conveniens.

7.8 May a request for transfer be made orally?

There is no requirement that the request be made in writing and the Bureau of Indian Affairs (BIA) Guidelines provide for oral requests. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,590 (Nov. 26, 1979) (guidelines for state courts); *In re Shawnda G.*, 2001 WI App 194, ¶ 14, 247 Wis. 2d 158, 168, 634 N.W. 2d 140, 145-46 (holding a non-Indian parent's oral motion for transfer must be addressed). A parental objection to the transfer may also be made orally in open court.

7.9 Does an objection to a transfer of a foster care placement proceeding automatically carry over into a subsequent termination of parental rights proceeding?

Not necessarily. The two proceedings are legally distinct. *In re A.B.*, 2003 ND 98, ¶¶ 1-4, 663 N.W.2d 625, 627 (upholding transfer of termination of parental rights proceeding to tribal court where mother objected to foster care placement proceeding, but not termination of parental rights proceeding). For example, separate notice of a termination proceeding is required.

7.10 May a guardian *ad litem* veto a transfer by objecting?

No. A guardian *ad litem* can raise the issue of whether good cause not to transfer exists, but since the child is not given a right to object by § 1911(b), the guardian *ad litem* cannot veto a transfer. *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000). *But compare* Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts) (suggesting that good cause "may exist if an Indian child over twelve objects to the transfer."). "[T]eenagers may make some unwise decisions . . . but their views should be taken into account." Indian Child Custody Proceedings, 44 Fed. Reg. at 67,591.

7.11 Must there be a hearing on the request for a transfer?

Section 1911(b) does not specifically require a hearing. However, there is general agreement that the parties should have an opportunity to present their views. The type of opportunity depends on the circumstances. Some courts require an evidentiary hearing on good cause. *In re M.C.*, 504 N.W.2d 598, 601 (S.D. 1993); *In re Shawnda G.*, 2001 WI App 194, ¶ 14, 247 Wis. 2d 158, 169, 634 N.W.2d 140, 146 n.13 (suggesting an evidentiary hearing is likely the most efficient course, but not deciding whether some other alternative would be adequate). Other courts have required less. *In re J.L.P.*, 870 P.2d 1252, 1259 (Colo. Ct. App. 1994) (indicating, without objection, an inclination to rule without further hearing where interested parties participated in oral arguments and briefing on the issues—due process satisfied.) *See also* Indian Child Custody

Proceedings, 44 Fed. Reg. 67,584, 67,590 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts) (holding all parties need an opportunity to present their views to the court before transfer is denied on the grounds of "good cause").

7.12 What is the rationale for transferring jurisdiction of child custody proceedings from state court to tribal court?

In enacting ICWA, Congress specifically found "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). The corrective provided by the ICWA is to recognize the sovereignty and primacy of tribal courts in making determinations regarding the placement and future of Indian children and to recognize that this is in the child's best interest. "At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). *See also In re Armell*, 550 N.E.2d 1060, 1064 (Ill. App. Ct. 1990); *In re Halloway*, 732 P.2d 962, 965 (Utah 1986).

The ICWA is based on the presumption that tribal courts are best situated to decide the custody of Indian children. Thus, under the ICWA, even where a state court has initial jurisdiction over an Indian child the United States Supreme Court has held that the ICWA "creates concurrent but presumptively tribal jurisdiction" over such child. *Holyfield*, 490 U.S. at 36.

7.13 What distinct interests are protected by the transfer provision?

The legislative history indicates that the provision is intended to protect the rights of the child as an Indian, the rights of the Indian parents, and the rights of the tribe. H.R. REP. NO. 95-1385, at 21 (1978); *see also Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

7.14 Who bears the burden of proof of demonstrating "good cause to the contrary" so as to block a transfer?

The party opposing tribal court jurisdiction has the burden of proof. *In re T.I.*, 2005 SD 125, ¶¶ 17-19, 707 N.W.2d 826, 834; *In re A.B.*, 2003 ND 98 ¶¶ 14-18, 663 N.W.2d 625, 631; *In re C.R.H.*, 29 P.3d 849, 854 (Alaska, 2001); Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts).

7.15 What constitutes "good cause to the contrary" to justify a decision not to transfer?

The ICWA does not define "good cause to the contrary." Generally, according to the legislative history "[t]he subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts) (quoting H.R. REP. NO. 95-1386, at 21 (1978)); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 165 (Tex. App. 1995). The question is whether "the evidence necessary to decide the case could not be adequately presented in tribal court without undue hardship to the parties or the witnesses." Indian Child Custody Proceedings, 44 Fed. Reg. at 67,591. Mere distance is not sufficient to deny a transfer based on good cause. *In re Pima County Juvenile Action No. S-903*, 635 P.2d 187 (Ariz. Ct. App. 1981) (holding that distance from reservation does not establish good cause despite financial burden and fact that qualified expert witnesses with knowledge of tribal culture of a Montana tribe are more available in Montana; argued against retention by state court in Arizona). Nor is the inconvenience of having all of witnesses travel to the tribal court, sufficient, if hardship is not undue. *In re J.C.D.*, 2004 SD 96, ¶¶ 12-14, 686 N.W.2d 647, 650. *But see Chester County Dep't of Soc. Servs. v. Coleman* (*Coleman II*), 399 S.E.2d 773, 776 (S.C. 1990) (finding undue hardship where the tribal court was situated in South Dakota and all witnesses and key evidence were in South Carolina); *C.E.H. v. L.M.W.*, 837 S.W.2d 947, 953 (Mo. Ct. App. 1992) (finding undue hardship where all witnesses and key parties were in Missouri and tribal court was in Oklahoma).

The BIA Guidelines, although not binding, list representative factors which may constitute good cause to deny a petition for a transfer:

Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

> (1) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
>
> (2) The Indian child is over twelve years of age and objects to the transfer.
>
> (3) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
>
> (4) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

Indian Child Custody Proceedings, 44 Fed. Reg. at 67,590.

Some of these factors have been questioned by courts as to whether they are consistent with congressional intent. *See, e.g., In re J.C.D.*, 2004 SD 96, 686 N.W.2d 647 (holding that lower court erred in denying transfer of guardianship petition to tribal court); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000). State courts may still transfer jurisdiction to tribal courts when one or more of these representative factors are present.

Practice Tip:
When good cause not to transfer is an issue, undue hardship to the parties or witnesses may be overcome by having the tribal court sit at the site where most witnesses are located. The BIA Guidelines expressly contemplate this approach and some courts have approved of it. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1978) (guidelines for state courts); *In re A.B.*, 2003 ND 98, ¶¶ 21-26, 663 N.W.2d 625, 633. *Cf. In re S.W.*, 2002 OK CIV App 26, ¶¶ 56-57, 41 P.3d 1003, 1015 (holding distance not an overwhelming factor and the Nation has the capability of holding court nearer to Tulsa county); *In re Pima County Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981) (holding that in ICWA Congress created a new jurisdictional framework in Indian child welfare, replacing the outmoded geographical concepts of presence or domicile with a jurisdictional standard based on the ethnic origin of the child). It is clear from the federal law that Indian tribes have concurrent jurisdiction over all of its children involved in child custody proceedings arising outside the reservation, so off-reservation areas would fall within a tribe's jurisdiction. Tribes might benefit from adopting a provision allowing cases to be heard off the reservation. *Cf.* 7 N.N.C. § 301 (2005) (generally authorizing Navajo Nation Supreme Court to hold hearings outside the Nation). *But see Yavapai-Apache v. Mejia*, 906 S.W.2d 152 (Tex. App. 1995) (rejecting the solution of having tribal court sit outside its own territory because it has no jurisdiction outside its boundaries).

7.16 What level of proof of "good cause to the contrary" must be shown?

Most courts have held that "good cause to the contrary" must be shown by "clear and convincing evidence." *In re M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981); *In re Armell*, 550 N.E.2d 1060, 1064 (Ill. App. Ct. 1990); *In re S.W.*, 2002 OK CIV APP 26, ¶ 46, 41 P.3d 1003, 1013. A high standard is consistent with the underlying philosophy of the ICWA that a tribal forum is preferred for such determinations. Nevertheless, some courts have used lower standards. *See, e.g., In re J.L.P.*, 870 P.2d 1256 (Colo. Ct. App. 1994) (using abuse of discretion). The Supreme Court of South Dakota, in the case of *In re T.I.*, 2005 SD 125, ¶¶ 14-19, 707 N.W.2d 826, 833-34, noted that it had previously adopted an abuse of discretion standard. In this case, it reversed that ruling and adopted the clear and convincing standard, concluding that mere discretion to override the presumption of tribal court jurisdiction in the ICWA, is inconsistent with congressional intent.

7.17 In cases where courts have decided to apply the BIA Guidelines, what constitutes an advanced stage of the proceedings for purposes of the "good cause to the contrary" inquiry?

The ICWA includes a presumption that Indian child custody proceedings are best heard in tribal court, and the United States Supreme Court has ruled that a presumption in favor of tribal court jurisdiction exists under the ICWA that an Indian child custody proceeding should be transferred to tribal court. The BIA Guidelines, in their interpretation of good cause not to transfer under § 1911(b) of the ICWA, state that one of the reasons to deny transfer of jurisdiction of an Indian child custody proceeding from state court to tribal court is if the proceeding is at "an advanced stage" at the time the tribe or another party files a motion to transfer jurisdiction to tribal court in the state court. Indian Child Custody Proceedings,

44 Fed. Reg. 67,584, 67,590 (Nov. 26, 1979) (guidelines for state courts). Commentary to Guideline C.1 indicates that the good cause inquiry is meant to avoid improper manipulation of the system:

> Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions . . . . Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

Id. Good cause will depend on the circumstances of the case. Mere passage of time does not necessarily lead to a conclusion that proceedings are at an advanced stage. *In re Ashley R.*, 863 P.2d 451 (N.M. Ct. App. 1993) (holding request not untimely where served on day of guardianship hearing where no activity had previously occurred and request made six weeks after notice); *In re J.L.P.*, 870 P.2d 1252 (Colo. Ct. App. 1994) (holding one year delay not untimely where proceedings not at an advanced stage). *But see In re S.G.V.E.*, 2001 SD 105, 634 N.W.2d 88 (denying tribe's request to transfer termination proceeding 14 months after notice of petition and two months after final disposition terminating parental rights as untimely); *In re A.P.*, 1998 MT 176, 289 Mont. 521, 962 P.2d 1186 (denying tribe's request to transfer termination proceeding one month after termination order had been entered as untimely).

Practice Tip:

The BIA Guidelines and the case law that has adopted the BIA's rationale causes problems in implementing the placement provisions of the ICWA. In many ICWA cases, the Indian child's tribe will intervene in the proceeding but will leave jurisdiction initially with the state court because the parents live off-reservation and the plan is to reunite the child with the family, services to assist the family are more available in the community where the family lives and the case is being heard, and witnesses who can testify about the family's condition and circumstances and the facts justifying jurisdiction over the child live and work where the family is located. The tribe participates in the services and reunification process, but does not want to disrupt the plan to reunify the family by transferring the case immediately to tribal court.

In many cases, the initial or foster placement for the Indian child may not be a preferred option under the ICWA because homes fitting the preference criteria are not readily available. The longer an Indian child is in a non-preferred home, however, the more inertia builds toward keeping the child in that home when the case turns from reunification to permanency. The tribe tends to become more involved in an ICWA case in state court once the state decides that reunification is no longer a viable option, and seeks permanent placement of the Indian child. This stage is where the tribe's interest in retaining its children in the tribal community and culture becomes most important, and the tribe and tribal court are best equipped to make an appropriate permanent placement of the child. Unfortunately, by this stage the state court proceeding is usually at "an advanced stage" as defined by the BIA Guidelines because it has been going on for some time, and a party opposed to transfer can successfully obstruct transfer by raising the BIA Guidelines with the state court as a reason to deny transfer of jurisdiction of the placement phase of the case to tribal court.

There is no strategy that will work for all cases to overcome this problem. In many cases, it works for the Indian child's tribe to announce in writing and/or to the court at the beginning of the case that the tribe intends to leave jurisdiction with the state court while the plan remains reunification—for the reasons listed above or for other reasons—and to put the court and agency on notice that if and when the case turns to permanency, the tribe intends to transfer that phase of the proceeding to tribal court. In other cases, it may be necessary for tribal social services to research and advocate initially for an appropriate placement that may not be as convenient for the parents or family who are working towards reunification, but will already be the tribe's preferred placement when the case turns to permanency instead of reunification. Flexibility and creativity are the keys to preserving the tribe's placement options throughout an ICWA proceeding in state court.

7.18 Should the best interest of the child constitute "good cause" not to transfer?

No. Congress believed that a proper implementation of the Act itself would be in the "best interest of an Indian child." *See* H.R. REP. NO. 95-1386, at 19 (1978). Section 1911(b) reflects a *federal* determination that transfer of jurisdiction is in the child's best interests. *In re J.L.G.*, 687 P.2d 477 (Colo. Ct. App. 1984) ("Congress passed [ICWA] with the express purpose of protecting the best interests of Indian children . . . ."); *In re Pima County Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981) ("The Act is based on the fundamental assumption that it is in the Indian child's best interests that its relationship to the tribe be protected."); *In re S.B.R.*, 719 P.2d 154, 156 (Wash. Ct. App. 1986) (same); *In re Q.G.M.*, 808 P.2d 684, 685 n.2 (Okla. 1991) (same); *In re Armell*, 550 N.E.2d 1060, 1065-66 (Ill. App. 1990) (same).

To argue that transfer is contrary to the "best interest" of an Indian child ignores the statutory presumptions that a tribal court will act in the best interest of the Indian child, that the tribal court should decide the placement and future of the Indian child involved, and that the Indian child and tribe should continue to retain their ties. *Armell*, 550 N.E.2d 1060 (holding state's best interest of the child considerations cannot establish "good cause"); *Pima County S-903*, 635 P.2d 187; *In re J.L.P.*, 870 P.2d 1252 (Colo. Ct. App. 1994) (holding adoption of best interests standard would defeat purpose underlying ICWA); *In re Ashley R.*, 863 P.2d 451 (N.M. Ct. App. 1993) (holding state's best interest standard inapplicable when considering transfer of jurisdiction); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169 n.11 (Tex Ct. App. 1995); *In re A.B.*, 2003 ND 98, ¶¶ 26-30, 663 N.W.2d 625, 634 (holding best interest of child not a consideration for threshold decision of proper forum). *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53 (1989).

Nevertheless, some courts feel they can take into account whether, in their judgment, a transfer will be in the best interest of the child. See *In re Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245 (Ariz. Ct. App. 1991); *In re C.W.*, 479 N.W.2d 105 (Neb. 1992); *Chester County Dep't of Soc. Servs. v. Coleman* (*Coleman II*), 399 S.E.2d 773 (S.C. 1990); *In re T.S.*, 801 P.2d 77 (Mont. 1990); *In re J.J.*, 454 N.W.2d 317 (S.D. 1990); *In re N.L.*, 754 P.2d 863, 869 (Okla. 1988); *In re Robert T.*, 246 Cal. Rptr. 2d 168, 174-75 (Ct. App. 1988).

7.19 Is perceived inadequacy of the tribal system a valid good cause consideration?

No. The BIA Guidelines provide that "[s]ocio-economic conditions and the perceived adequacy of tribal or [BIA] social services or judicial system may not be considered in a determination that good cause exist." Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979) (guidelines for state courts). The courts agree. *In re Armell*, 550 N.E.2d 1060 (Ill. App. Ct. 1990); *In re J.J.*, 454 N.W.2d 317, 329 (S.D. 1990).

7.20 Is a dismissal of the state court proceeding necessary to transfer to tribal court?

Normally a state case is dismissed upon transfer to the tribal court, although the tribal court exercise of jurisdiction is not dependent upon formal dismissal.

7.21 What happens if a tribal court declines the transfer?

The case remains in state court. *In re T.A.G.*, 1999 MT 142N, 294 Mont. 556, 996 P.2d 885 (unpublished table decision) *available at* No. 97-524, 1999 WL 506107 (Mont. June 15, 1999). See also, FAQs 8.4, 8.5, 8.16, Role of Tribal Courts.

7.22 What effect does Public Law 280 have on § 1911(b)?

It has no effect. Tribes in Public Law 280 states can exercise jurisdiction under § 1911(b) the same as all other tribes.

Some confusion has been caused by § 1918(a) which allows tribes in Public Law 280 states to "reassume jurisdiction over Indian child custody proceedings." The Alaska Supreme Court originally held that the only way to make sense of § 1918 was to conclude that Public Law 280 states have exclusive jurisdiction over child custody proceedings. *Native Village of Nenana v. State*, 722 P.2d 219 (Alaska 1986). That decision was overruled in *In re C.R.H.*, 29 P.3d 849, 852 (Alaska 2001), which held that native tribes have jurisdiction to accept transfers under § 1911(b) without having to first petition the Secretary for reassumption under § 1918(a). This is consistent with the "longstanding position of the Office of the Solicitor that a tribe in a Public Law 280 state does not have to submit a petition under § 1918 of the ICWA to reassume transfer jurisdiction under § 1911(b)." Memorandum from Robert McCarthy, Field Solicitor, United States Department

of the Interior, to Pacific Regional Director, Bureau of Indian Affairs (July 28, 2005) (on file with the Native American Rights Fund) (available on the web site version). Accord, *In re M.A.*, 40 Cal. Rptr. 3d 439, 441-43 (Ct. App. 2006), which held that for a child not domiciled on the reservation, a tribe need do nothing under § 1918 to have jurisdiction over a transfer; reassumption of jurisdiction under § 1918 refers to reassumption of exclusive jurisdiction. *Id.* at 443. The court specifically held that Public Law 280 only granted the state concurrent jurisdiction, it did not extinguish the tribe's preexisting jurisdiction. *Id.*

**** Access to the full-text of opinions and additional materials is at 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.

FEDERAL CASES

United States Supreme Court
Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

District Courts
Brown ex rel. Brown v. Rice, 760 F. Supp. 1459 (D. Kan. 1991)
Comanche Indian Tribe of Okla. v. Hovis (*Hovis I*), 847 F. Supp. 871 (W.D. Okla. 1994)

STATE CASES

Alabama
R.B. v. State, 669 So. 2d 187 (Ala. Civ. App. 1995)

Alaska
In re C.R.H., 29 P.3d 849 (Alaska 2001)
In re J.M., 718 P.2d 150 (Alaska 1986)
Native Village of Nenana v. State, 722 P.2d 219 (Alaska 1986)

Arizona
In re Maricopa County Juvenile Action No. JD-6982, 922 P.2d 319 (Ariz. Ct. App. 1996)
In re Maricopa County Juvenile Action No. JS-7359, 766 P.2d 105 (Ariz. Ct. App. 1988)
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California
In re Larissa G., 51 Cal. Rptr. 2d 16 (Ct. App. 1996)
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In re Robert T., 246 Cal. Rptr. 168 (Ct. App. 1988)
In re Vincent M., 59 Cal. Rptr. 3d 439 (Ct. App. 2007)

Colorado
In re A.T.W.S., 899 P.2d 223 (Colo. Ct. App. 1994)
J.C.T. v. Three Affiliated Tribes, 155 P.3d 452 (Colo. Ct. App. 2006)
In re J.L.G., 687 P.2d 477 (Colo. Ct. App. 1984)
J.L.P., 870 P.2d 1252 (Colo. Ct. App. 1994)

Illinois
In re Armell, 550 N.E.2d 1060 (Ill. App. Ct. 1990)
In re S.S., 657 N.E.2d 935 (Ill. 1995)

Indiana
In re D.S., 577 N.E.2d 572 (Ind. 1991)
In re T.R.M., 525 N.E.2d 298 (Ind. 1988)

Iowa
In re A.E., 572 N.W.2d 579 (Iowa 1997)

In re B.M., 532 N.W.2d 504 (Iowa Ct. App. 1995)
In re J.R.H., 358 N.W.2d 311 (Iowa 1984)
In re J.W., 528 N.W.2d 657 (Iowa Ct. App. 1995)

Kansas
In re A.P., 961 P.2d 706 (Kan. Ct. App. 1998)
In re C.Y., 925 P.2d 447 (Kan. Ct. App. 1996)

Minnesota
In re B.W., 454 N.W.2d 437 (Minn. Ct. App. 1990)
In re R.I., 402 N.W.2d 173 (Minn. Ct. App. 1987)
In re T.T.B. (*T.T.B. II*), 724 N.W.2d 300 (Minn. 2006)
In re T.T.B. (*T.T.B. I*), 710 N.W.2d 799 (Minn. Ct. App. 2006)

Missouri
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Montana
In re A.P., 1998 MT 176, 289 Mont. 521, 962 P.2d 1186
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In re M.R.D.B., 787 P.2d 1219 (Mont. 1990)
In re T.A.G., 1999 MT 142N, 294 Mont. 556, 996 P.2d 885 (unpublished table decision) *available at* No. 97-524, 1999 WL 506107 (Mont. June 15, 1999)
In re T.S., 801 P.2d 77 (Mont. 1990)

Nebraska
In re Bird Head, 331 N.W.2d 785 (Neb. 1983)
In re C.W., 479 N.W.2d 105 (Neb. 1992)
In re J.L.M., 451 N.W.2d 377 (Neb. 1990)

New Mexico
In re Ashley R., 863 P.2d 451 (N.M. Ct. App. 1993)
In re Baby Child, 700 P.2d 198 (N.M. Ct. App. 1985)
State ex rel. Children, Youth & Families Dep't v. Andrea M., 2000-NMCA-079, 129 N.M. 512, 10 P.3d 191
In re Laurie R., 760 P.2d 1295 (N.M. Ct. App. 1988)
In re Megan S., 1996-NMCA-048, 121 N.M. 609, 916 P.2d 228
In re Wayne R.N., 757 P.2d 1333 (N.M. Ct. App. 1988)

New York
In re Christopher, 662 N.Y.S.2d 366 (Fam. Ct. 1997)

North Dakota
In re A.B., 2003 ND 98, 663 N.W.2d 625

Ohio
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Oklahoma
In re J.B., 900 P.2d 1014 (Okla. Civ. App. 1995)
In re N.L., 754 P.2d 863 (Okla. 1988)
In re Q.G.M., 808 P.2d 684 (Okla. 1991)
In re R.R.R., 763 P.2d 94 (Okla. 1988)
In re S.W., 2002 OK CIV APP 26, 41 P.3d 1003

Oregon
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Pennsylvania
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South Carolina
Chester County Dep't of Soc. Servs. v. Coleman (*Coleman II*), 399 S.E.2d 773 (S.C. 1990)
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South Dakota
In re A.L., 442 N.W.2d 233 (S.D. 1989)
In re D.M. (*D.M. II*), 2004 SD 90, 685 N.W.2d 768
In re D.M. (*D.M. I*), 2003 SD 49, 661 N.W.2d 768
In re G.R.F., 1997 SD 112, 569 N.W.2d 29
In re J.C.D., 2004 SD 96, 686 N.W.2d 647
In re J.J., 454 N.W.2d 317 (S.D. 1990)
In re J.L., 2002 SD 144, 654 N.W.2d 786
In re K.D., 2001 SD 77, 630 N.W.2d 492
In re M.C., 504 N.W.2d 598 (S.D. 1993)
In re S.G.V.E., 2001 SD 105, 634 N.W.2d 88
In re S.Z., 325 N.W.2d 53 (S.D. 1982)
In re T.I., 2005 SD 125, 707 N.W.2d 826

Texas
Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152 (Tex. App. 1995)

Utah
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In re Halloway, 732 P.2d 962 (Utah 1986)

Washington
In re E.S., 964 P.2d 404 (Wash. Ct. App. 1998)
Napoleon v. Blackwell, 114 Wash. App. 1011 (Wash. Ct. App. 2002) (unpublished decision) *available at* No. 27195-8-II, 2002 WL 31409959 (Wash. Ct. App. Oct. 25, 2002)
In re S.B.R., 719 P.2d 154 (Wash. Ct. App. 1986)

Wisconsin
In re Branden F., 2005 WI App 88, 281 Wis. 2d 274, 695 N.W.2d 905 (unpublished table decision) *available at* No. 04-2560, 2005 WL 645191 (Wis. Ct. App. March 22, 2005)
In re Cody S., 2000 WI App 194, 238 Wis. 2d 842, 618 N.W.2d 274 (unpublished table decision) *available at* No. 99-2936, 2000 WL 1184586 (Wis. Ct. App. Aug. 22, 2000)
In re Mikayla J.J., 539 N.W.2d 338 (Wis. Ct. App. 1995) (unpublished table decision) *available at* No. 95-0930, 1995 WL 478417 (Wis. Ct. App. Aug. 15, 1995)
In re Shawnda G., 2001 WI App 194, 247 Wis. 2d 158, 634 N.W.2d 140

8. ROLE OF TRIBAL COURTS

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. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extend that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

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.

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Frequently Asked Questions

8.1 What is a tribal court?

25 U.S.C. § 1903(12) provides that:

"[T]ribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Practice Tip:
A practitioner should be aware that the governing body of a tribe, such as a Tribal Council, may serve as the tribal court.

8.2 What role does a tribal court play in ICWA proceedings?

A tribal court can accept a transfer of jurisdiction over a child custody proceeding commenced in a state court upon the motion of a parent or Indian custodian or the Indian child's tribe under the Indian Child Welfare Act (ICWA) § 1911(b). Some tribal laws require a party seeking to transfer a matter to a tribal court to seek an acceptance of jurisdiction over the proceedings prior to a transfer. Tribal courts can also make findings in accepting a transfer of jurisdiction, such as finding the child to be a member of, or eligible for membership in the tribe, that are entitled to full faith and credit under § 1911(d) and may assist the tribe in getting a transfer of jurisdiction. For Indian children domiciled in Indian country, as defined at 18 U.S.C. § 1151 (2000), tribal courts exercise exclusive jurisdiction over child custody proceedings in states not governed by Public Law 280 and concurrent jurisdiction with state courts in Public Law 280 states, except where state law vests the tribal courts with exclusive jurisdiction, such as in Minnesota. If an Indian child has been declared a ward of the tribal court in previous proceedings, the tribal court retains exclusive jurisdiction over child custody proceedings involving the child in both Public Law 280 and non-Public Law 280 states. See also FAQ 2.5, Jurisdiction.

8.3 May a tribal court intervene in a state ICWA proceeding?

ICWA gives the Indian child's tribe the right to intervene in a child custody proceeding. Some tribes designate the tribal court as the tribal entity with the authority to act on behalf of the tribe, so in those circumstances the tribal court can intervene. In addition, when a child is a ward of a tribal court, the tribal court may be permitted to intervene to protect its exclusive jurisdiction under ICWA.

8.4 Should a party seeking to transfer a matter to tribal court first make a motion to the tribal court to accept a transfer of jurisdiction?

This depends upon tribal law. Some tribes require a party that is seeking to transfer a child custody proceeding from the state court to the tribal court to first petition the tribal court to accept jurisdiction and a hearing is held on that issue alone. Although this is not required under the federal law, it is within the right of the tribe to require such a procedure prior to its courts accepting a transfer of jurisdiction. The purpose of requiring this is to make sure that the tribal court and its child welfare agencies can properly provide for the child after transfer and to prevent transfers where the tribe has not located extended family members or other placements for the child. One possible adverse consequence of requiring the tribal court to accept jurisdiction first is that many parents who wish to petition for a transfer may not have the ability or resources to first petition the tribal court to accept a transfer of jurisdiction. State courts may also use the failure to comply with tribal law in obtaining an acceptance of jurisdiction as a basis for denying a transfer of jurisdiction.

Practice Tips:
Tribes need to make the transfer procedure as accessible to Indian custodians and parents as possible because many parents and custodians are represented by attorneys with limited experience in tribal courts.

The state court and/or tribal representative should ensure that the tribal court has been notified of the pending transfer request and has sufficient information about the nature of the case so that the tribal court can decide whether to accept the case.

8.5 Can a tribal court decline to accept the transfer of a state ICWA proceeding?

Yes. The ICWA states that a child custody proceeding involving an Indian child pending in a state court may be transferred to a tribal court absent declination by the tribal court. 25 U.S.C. § 1911(b).

8.6 Can the tribal court conduct hearings outside of its jurisdiction (for example, in a state court for the convenience of the parties and witnesses)?

Yes. It is clear from the federal law that Indian tribes have concurrent jurisdiction over all of its children involved in child custody proceedings arising outside the reservation, so off-reservation areas would fall within a tribe's jurisdiction. *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. App. 1995); *In re A.B.*, 2003 ND 98, 663 N.W.2d 625. The Bureau of Indian Affairs (BIA) guidelines support a tribal court conducting proceedings in the state court jurisdiction for the convenience of witnesses and the parties to the case. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979) (guidelines for state courts).

Offering to conduct hearings in such a way may defeat attempts to deny transfers on the ground of the tribal court being an inconvenient forum to hear the case. There has only been one state court to question such a procedure, a Texas appellate court, on the ground that a court may generally not conduct proceedings outside its jurisdiction. See also, FAQ 7.15, Transfer.

8.7 How are tribal courts funded regarding ICWA proceedings?

Most tribal courts are funded under the Tribal Priority Allocation portion of the tribe's Indian Self-Determination Act, 25 U.S.C. § 450f (2000), a contract with the government (often called a 638 contract), and with tribal resources. There is no specific ICWA funding designated primarily for tribal courts but tribes can utilize any Title II monies they receive to help supplement the operation of a tribal court. 25 U.S.C. §§ 1931, 1932; 25 C.F.R. §§ 23.21-.23, 23.31-.35 (2007). *See Navajo Nation v. Hodel*, 645 F. Supp. 825 (D. Ariz. 1986). Tribes may also receive funding under Title IV-B of the Social Security for Family Preservation programs that may fund tribal court operations. 42 U.S.C. § 628 (2000). The August 1994 Office of the Inspector General report indicated that only fifty-nine of five hundred and forty-two tribes receive this funding. OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH AND HUMAN SERVS., OPPORTUNITIES FOR ACF TO IMPROVE CHILD WELFARE SERVICES AND PROTECTIONS FOR NATIVE AMERICAN CHILDREN (1994). Title II ICWA grants can be used as a match. 25 U.S.C. § 1931(b). In addition, tribes can enter into cooperative agreements with states or counties under Title IV-E of the Social Security Act that may provide for some funding for tribal court personnel or judges. 42 U.S.C. § 670 *et seq.* (2000).

8.8 Is a tribal court a "court of competent jurisdiction" to invalidate actions upon a showing of certain violations under § 1914?

Tribal courts should be considered "court[s] of competent jurisdiction" under § 1914 in certain circumstances. If a state court places an Indian child in clear violation of the tribe's exclusive jurisdiction (for example the state court removes an Indian child domiciled on the reservation in a non-Public Law 280 state from her family or orders the placement of an Indian child who is a ward of the tribal court) the tribal court should be able to invalidate this action and have its order recognized under full faith and credit. 25 U.S.C. § 1911(d). The tribal court may be confronted with the argument that it cannot exercise jurisdiction over state or county officials under *Nevada v. Hicks*, 533 U.S. 353 (2001), a United States Supreme Court decision finding that tribal courts had no jurisdiction over state officials. In situations, however, where tribal courts are vested with exclusive jurisdiction under federal law, tribal courts should be able to invalidate actions that undermine that jurisdiction. On the other hand, if a proceeding is properly commenced in a state court

and involves some violation of the ICWA, it would appear that the state or federal court would be the appropriate "court of competent jurisdiction" to invalidate the action. A recent federal court decision out of California states that federal courts have such authority. *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005).

8.9 Can a tribal court in a Public Law 280 state accept a transfer of jurisdiction over a child custody proceeding to its court without reassuming jurisdiction under § 1918?

Yes A tribal court in a Public Law 280 state can seek a transfer of jurisdiction over child custody proceedings involving its children domiciled both on and off the reservation that are commenced in state courts. The reassumption provisions of ICWA permit a tribe in a Public Law 280 state to reassume its exclusive jurisdiction over Indian children domiciled on its reservation.

8.10 When a case is transferred to the tribal court what type of hearing is held in the tribal court after transfer?

It depends upon the status of the case in state court when the matter is transferred. If the proceedings were at a fairly early stage, the tribal court would initially require the tribe's presenting officer to file either an emergency custody petition or abuse/neglect proceeding in the tribal court and the initial hearing would be to determine if an out-of-home placement is warranted under the circumstances and would then proceed to a determination of whether the child is abused or neglected. If the proceeding in the state court has advanced to the termination of parental rights stage, the tribal court can conduct a hearing on the termination of parental rights or, if the tribe's presenting officer determines this, the court can conduct an alternative dispositional proceeding other than termination. Many tribes do not have termination as an option under tribal law and merely because a termination of parental rights proceeding was transferred to it from a state court does not dictate that the tribal court must consider that option. Nothing in federal law mandates that a tribal court, after transferring jurisdiction over a child custody proceeding from a state court, recognize the rulings of the state court made prior to transfer. 25 U.S.C. § 1911(d) mandates recognition of tribal court judgments and laws but not vice versa. It is important, however, in order to protect the due process rights of parents or custodians, that the tribal court schedule a prompt hearing after transfer. This hearing may result in continued out-of-home placement of the child or a return of the child to the parents or Indian custodian.

8.11 Does the tribal court have to abide by decisions made by the state court prior to transfer or can the tribal court start anew on the matter?

Tribal courts need not recognize state court decisions in child custody proceedings under federal law, but they may be required to, or have the authority to do so under tribal law. Some tribal laws require tribal courts to recognize state court orders under full faith and credit or comity. Comity is based upon respect between state and tribal courts and to maintain that respect tribal courts may feel inclined to recognize state court judgments to assure that state courts recognize their orders. Federal law may not compel recognition but tribal law may require it or make it advisable. It is especially important to cultivate a relationship of trust between the tribal court and state court to assure future transfers of jurisdiction, so in most cases the tribal court should consider recognizing orders entered by state courts in child custody proceedings prior to transfers.

8.12 When a case is transferred to tribal court and the tribal court needs to obtain the testimony of witnesses from the state or county how can the tribal court accomplish this?

It is important that once a case is transferred, the state or county child welfare agency and law enforcement agency transfer the entire record regarding the child/children to the tribe to assure that the tribe can process the case upon transfer. ICWA requires that the tribe have access to all records relevant to a placement decision in state court, and that right carries over when the case is transferred to the tribal court. 25 U.S.C. § 1912(c). The tribe can request that the state court judge, when he dismisses the state court case and transfers the matter to the tribal court, direct that the entire child welfare and law enforcement file be transmitted to the tribal court. The tribe can also request that the state court judge direct that those agencies cooperate with the giving of testimony in the tribal court upon transfer. It is difficult for a tribal court to obtain service of process upon off-reservation witnesses and to secure their testimony for the tribal court, so an order from a state court requiring this may be very helpful to the tribal presenting officer and child welfare agency.

8.13 Can the tribal court make a finding regarding a child's membership or eligibility for membership in an order accepting jurisdiction and is that finding binding on a state court?

Because ICWA requires state courts to grant full faith and credit to the "judicial proceedings" of Indian tribes in ICWA cases, a tribal court order accepting jurisdiction over an ICWA transfer may contain certain findings that may assist the tribe in gaining a transfer. Because the issue of the eligibility of certain Indian children for membership in a particular tribe is often a contentious issue, and one that tribes may prefer not be resolved by a state court, the tribal court can make such a finding in the order accepting jurisdiction and assert that this finding is entitled to full faith and credit. The mere assertion by a tribe that a child is a member or eligible for membership may not be sufficient with certain state courts to assure an application of the ICWA because some state courts require some proof of the membership or eligibility. The tribal court can assist in this area by looking at the issue and making a finding that can then be binding upon the state court.

8.14 When a case is transferred to tribal court can the tribal court keep the legal custody of the child with a state or county agency and require it to continue providing remedial services to the parents or custodians?

A transfer of jurisdiction over an Indian child is the transfer of the legal authority to continue making placement orders for that child and does not necessarily mean the transfer of the physical placement of the child. An Indian tribe may wish to transfer jurisdiction over a case involving one of its children to its court, but keep the child in the placement effected by the state or county agency. Examples may include situations where the parents and children live in an urban area some distance from the tribal community and no extended family members on the reservation have been located, or situations where the child is receiving some extraordinary medical or mental health care that cannot be made available in the tribal community. In these situations, remedial and rehabilitative services can best be offered by the state or county agency rather than the tribal agency. The child should remain eligible for all services he or she was eligible for prior to transfer of legal jurisdiction provided that the state or county child welfare agency retains placement rights and under § 1931(b) the state or county agency must honor tribal licenses. Children placed in homes by tribal courts should continue to remain eligible for Title IV-E and medical assistance benefits. Some states or counties may balk at such an arrangement because they may not be accustomed to submitting themselves to tribal court jurisdiction. However, ICWA permits these informal and formal jurisdictional arrangements under § 1919 on a case-by-case basis, so state and county agencies should be made aware of this provision of the federal law and encouraged to continue providing services to Indian children even after transfer to the tribal court.

8.15 When a case is transferred to tribal court does the state or county child welfare agency have a duty to continue providing funding for the placement of a child?

The child should remain eligible for all services for which he or she was eligible prior to transfer of legal jurisdiction, provided that the state or county child welfare agency retains placement rights. Under § 1931(b) the state or county agency must honor tribal licenses and children placed in homes by tribal courts should continue to remain eligible for Title IV-E and medical assistance benefits. Some states or counties may balk at such an arrangement because they may not be accustomed to submitting themselves to tribal court jurisdiction. However, ICWA permits these informal and formal jurisdictional arrangements under § 1919 on a case-by-case basis so state and county agencies should be made aware of this provision of the federal law and encouraged to continue providing services to Indian children even after transfer to the tribal court.

8.16 Can a tribal court transfer legal jurisdiction over an Indian child back to a state court if the tribal court determines that the tribe cannot provide services to the child?

The tribe has legal standing to request a transfer of the proceedings to the tribal court. That right, however, is contingent upon the tribal court not declining the transfer request. Ultimately, this means that the tribal court retains the authority to veto a transfer back to the tribal court. The tribal court should decline to accept jurisdiction only when the court has great concerns that there is no appropriate placement for the child or that the tribal community lacks the resources to provide for the emotional, physical or mental needs of the child. The court can always attempt to keep the physical custody of the child in the home prior to transfer as an alternative to declining to accept jurisdiction.

Once the transfer is effected, however, there appears to be no legal way under ICWA to transfer the case back to the state court unless that option is

available under tribal law and the state court is able to accept the case back. Of course, such a process, even if possible, implicates the due process rights of the parents, custodian and child and they should be notified and given the right to be heard if such a transfer back is being contemplated. If a tribal court or tribe lawfully transfers a case to its jurisdiction and then learns that the transfer was ill-advised, the best procedure may be for the tribe or tribal court to file a motion to vacate the order transferring jurisdiction and dismissing the case in state court and explain why the transfer of jurisdiction was inappropriate. Whether such relief is granted will be up to the state court, but if the tribe explains its reasoning for requesting this type of relief many state courts may grant it. This has happened in some cases where the tribal court accepts a transfer of jurisdiction and then learns that the child has serious emotional or physical problems necessitating care that cannot be provided in the tribal community.

8.17 Can a tribal court of one tribe transfer jurisdiction over a child custody proceeding to another tribal court where the child is a member or eligible for membership in that other tribe?

ICWA does not address the inter-tribal transfer of jurisdiction except tangentially under the full faith and credit provisions of ICWA that require tribes to grant full faith and credit to tribal court orders in child custody proceedings involving Indian children. This provision is broad enough to require tribal courts to honor orders from other tribal courts making Indian children wards of tribal courts, for example. As a matter of comity, however, tribal courts can transfer jurisdiction over proceedings to other tribal courts and should do so when it is clear that the child or children involved are wards of the other tribal court. Failure to do so may actually violate the full faith and credit provisions of ICWA. 25 U.S.C. § 1911(d). In other situations tribal courts may consider transferring the proceedings to other tribal courts under the provisions of tribal law or under comity.

**** Access to the full-text of opinions and additional materials is at 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.

FEDERAL CASES

Circuit Courts of Appeal
Doe v. Mann (*Mann II*), 415 F.3d 1038 (9th Cir. 2005)

District Courts
Brown ex rel. Brown v. Rice, 760 F. Supp. 1459 (D. Kan. 1991)
Navajo Nation v. Hodel, 645 F. Supp. 825 (D. Ariz. 1986)

STATE CASES

California
In re M.A., 40 Cal. Rptr. 3d 439 (Ct. App. 2006)

New Mexico
In re Megan S., 1996-NMCA-048, 121 N.M. 609, 916 P.2d 228

North Dakota
In re A.B., 2003 ND 98, 663 N.W.2d 625

Texas
Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152 (Tex. App. 1995)

Utah
Searle v. Searle, 2001 UT App 367, 38 P.3d 307

9. RECOGNITION OF TRIBAL LAW

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25 U.S.C. § 1903. Definitions

> **(2)** "extended family member" shall be defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent . . . .

25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1915. Placement of Indian children

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

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

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.

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Frequently Asked Questions

9.1 Is a state required to defer to Indian social and cultural standards in placement and treatment assessments?

The Indian Child Welfare Act (ICWA) requires a state or private placement agency to place a child in a home that reflects the prevailing social and cultural standards of the tribal community. 25 U.S.C. § 1915(d). Although the ICWA sets out placement priorities for Indian children placed by state or county child welfare agencies, the law permits the tribe to alter those preferences by resolution and the state or county must abide by the resolution unless it does not represent the least restrictive alternative for the child. 25 U.S.C. § 1915(c). In determining what type of treatment services should be made available to the family to support reunification or prevent the removal of the child from the family, the state is required to utilize culturally-appropriate services. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,592 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts). For example, if a parent is in need of chemical dependency treatment the state or county must assure that the type of treatment the parent is provided is appropriate for the tribe and parent.

9.2 Who is a member of an extended Indian family?

The ICWA directs that extended family member be defined by reference to the law or custom of the tribe, so an examination of the tribe's code of laws or other resolutions passed by the tribal governing body is in order to assure that the tribe's definition of the term is utilized. In determining customary practices, inquiry should be made with the Tribal Child Welfare office or elders associated with the tribe. Relevant literature produced by tribal members or others associated with the tribe may be another source of information. In the absence of a governing tribal definition, the federal laws define the term as an adult

person who is a grandparent, sibling, aunt or uncle, niece or nephew, brother or sister-in-law, first or second cousin, or stepparent. This term should be distinguished from an Indian custodian who is any Indian person who has custody of an Indian child under custom and tradition of the tribe or state law, or who has been given custody by a parent. An Indian custodian need not have a blood or legal relationship with an Indian child. *See* 25 U.S.C. § 1903(6) (defining Indian custodian).

9.3 Is the extended Indian family relationship the same for all tribes?

No. ICWA explicitly recognizes under the definition of extended family member that each tribe's customs and laws must be adhered to in determining extended family members. 25 U.S.C. § 1903(2). In some tribes the extended family relationship may extend even to tribal members not related by blood or law to the child because of the societal obligations certain tribal members owe to children within the community.

Practice Tip:
Some states have defined this term in state ICWA laws and the practitioner may wish to refer to state law.

9.4 What law applies in a tribal forum?

The ICWA applies to state court proceedings, but does not apply to tribal court proceedings unless the tribal governing body has incorporated the provisions of the ICWA into tribal law. Most tribes have adopted their own procedural and substantive laws that apply to child welfare cases and many of these laws are similar to the requirements of ICWA, but this may not always be true. Some tribes have opted to handle child welfare cases through Wellness Courts (similar to drug courts) and others by traditional courts. Some of these courts may not be courts of record. In addition, some tribes may not have dispositional options such as terminations of parental rights and may instead rely upon guardianships and traditional adoptions. Traditional adoptions and the requirements therefor differ from tribe to tribe but generally involve adoptions that are not preceded by terminations of parental rights. In some situations, when the tribe operates its child welfare program with cooperative agreements with a state or county agency, the tribe may be required to adhere to certain state procedural requirements in order to obtain funding under the cooperative agreement. This may include requirements in Title IV-E, including those added by the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 673b, 678, 679b (2000). An example would be requiring findings that reasonable efforts have been made to prevent the removal of the child. Some states may attempt to impose the requirements of ASFA upon tribes through cooperative agreements in a manner that might conflict with ICWA, but at least one court has held that ASFA does not supersede ICWA . *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611.

Practice Tip:
When tribes enter into cooperative agreements with state or county governments in order to access Title IV-E foster care monies, tribes may negotiate the terms of a cooperative agreement to assure that the implementation of Title IV-E by the tribe is done in a manner that respects the tribe's customs and traditions, while still assuring compliance with minimum federal standards under Title IV-E.

9.5 Are tribes subject to the minimum federal standards established by the ICWA for state court proceedings?

Usually not. Although if the tribe has incorporated ICWA into its tribal code or the tribe operates its child welfare system under a cooperative agreement with a state that includes a requirement that the tribe comply with ICWA or other federal standards, the tribe may have contracted to comply with ICWA. It should be noted that the jurisdictional provisions of ICWA, § 1911(a) and § 1911(b), do apply and govern the extent of tribal jurisdiction over Indian children.

9.6 How are terms defined under ICWA and when is it appropriate to utilize tribal law to define ICWA terms?

There are four different sources for definitions under ICWA. The federal law defines certain terms under § 1903. For example, an Indian child is defined at § 1903, as is the term "parent" and Indian child's tribe. Other definitions are omitted in the federal law so a person would have to look at the Bureau of Indian Affairs (BIA) Guidelines. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) (guidelines for state courts). Examples of undefined terms include "good cause" for denying a transfer of jurisdiction. This term is not defined in the federal law but the BIA Guidelines give several examples of what that agency considers to be good cause. Another source of definitions can be found in federal and state court decisions. For example, in the United States Supreme Court decision *Mississippi*

Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), the Court defined the term "domicile" under § 1911(a) and stated that the definitions should be uniform and not differ from state to state. As the result of this need for uniformity it is generally not appropriate to utilize state law definitions of terms in the ICWA unless those definitions promote uniformity. In some situations it is appropriate to look to tribal law and customs to determine the meaning of a term. For example, to determine if a person qualifies as an "Indian custodian" it must be determined if that person has custody under state or tribal customary or written law. Similarly, although federal law defines the term "extended family member" it is necessary to look to tribal law to determine how that term is utilized to assess the customs and practices of a particular tribe. Another example is the term "ward," which is not defined under federal law and therefore it would be appropriate to look to tribal law to assess whether a child has been made a "ward" of a tribal court. The bottom line is that Congress intended to assure that state courts, when applying ICWA in its courts, do so cognizant of tribal values and customs regarding childrearing practices and it is appropriate to look to tribal law to define those values and customs absent a definitive answer in the statute itself.

9.7 What does full faith and credit mean and how does it affect ICWA proceedings?

The general term "full faith and credit" means that one government must accept and enforce the laws and court decisions of another government, if that other government had the authority to enact such laws and to enter that order. For example, if a person is married in one state, that marriage must be honored in all other states. ICWA requires states and tribes to give full faith and credit to the public acts and records and judicial proceedings of tribes with regard to child custody proceedings. If a tribe has records indicating that a child is a member of that tribe, other states and tribes must recognize that record for purposes of ICWA. Similarly if a tribal court with jurisdiction enters an order pertaining to a child custody proceeding, such as placing the child into the custody of an aunt or uncle, other states and tribes must honor that order.

9.8 What is the doctrine of comity and does it apply to ICWA proceedings?

Comity is another legal principle that permits states and tribes to honor each other's orders. It generally refers to the principle that one court, out of respect for another court system, will honor that court's orders to assure an orderly and fair administration of justice. In the ICWA context, for example, if a state court were to conduct a trial and find that a minor child were abused and neglected under state law and then that case were transferred to a tribal court, the tribal court may honor that order under the principle of comity. Comity differs from full faith and credit because comity is generally a product of the judicial system, while full faith and credit is required under the Constitution or law. For comity to apply, the enforcing court must find that the issuing court had subject matter and personal jurisdiction, the system by which the decision was reached was a fair process, and the order does not violate the public policy of the enforcing court.

9.9 Does a state have to abide by a tribal court order related to an ICWA proceeding?

Under § 1911(d), state courts and state agencies must respect and enforce tribal court decisions in child custody proceedings under the court's jurisdiction. For example, if a tribal court permits the adoption of an Indian child and the record of that adoption is sent to a state agency, that agency must honor the adoption decree and amend a birth record if requested by the tribe.

9.10 Does a tribe have to abide by a state/federal court order related to an ICWA proceeding?

Nothing in the ICWA requires a tribal court or tribe to abide by a state court decision in a child custody proceeding. A tribe may wish to honor such an order under the principle of comity, especially if other members of the tribe reside within the state's jurisdiction and there may be other cases where the tribe will need the cooperation of the state to protect its children. Some federal laws such as 18 U.S.C. § 2265 (2000) (domestic violence protection orders) and 28 U.S.C. § 1738B (2000) (child support orders) require tribes to honor state court decisions. With regard to federal court decisions, although there are no laws mandating tribal court recognition of federal court decisions, many federal courts have held that tribes and their agencies must abide by federal court decisions, especially if federal funding is involved.

9.11 What are public acts, records and judicial proceedings as stated in § 1911(d)?

Public acts could include the Constitution, laws, tribal ordinances, and resolutions that tribes have enacted. An example would be if the tribe adopts an adoption placement preference law, the state, under §

1915, would be required to recognize this adoption placement preference and enforce it in proceedings involving children from that tribe. Records would include such things as enrollment or membership records, probate records establishing blood lines or other relationships, or any other record that is issued by a tribe that may be relevant to a child custody proceeding. Judicial proceedings would include tribal court orders, tribal court findings that a child is a member of or eligible for membership in a tribe, tribal court adjudications of paternity, and any other type of court order that may be relevant in a child custody proceeding.

9.12 Does a tribal court have to provide full faith and credit to another tribal court order?

The manner in which § 1911(d) was written by Congress, it does appear to require that tribes honor the public records and judicial orders of sister tribes pertinent to child custody proceedings to the same extent that tribes honor the records and court orders of "other entities." Therefore, if a child custody proceeding is commenced in a state court and one tribe intervenes and another tribe asserts that it has jurisdiction over the child because the child is a ward of its court and is able to produce a court order showing this, both the state and other tribe would have to give the order full faith and credit, provided the tribe grants full faith and credit to the orders of other entities. As a practical matter, this means that if Indian tribes recognize other state and tribal court orders as a matter of practice, they must also honor orders pertaining to child custody proceedings.

Practice Tip:
This issue may come up most often in situations where more than one tribe asserts that the child is a member or eligible for membership in that particular tribe and the issue becomes whether each tribe must abide by the other's determination. If at all possible, the two interested tribes should try to discuss the matter with the aim of resolution instead of airing their differences in a state forum.

9.13 Must the order/document be related to a child custody proceeding for full faith and credit to apply under ICWA?

It does appear that for full faith and credit to apply, the court order or record must be pertinent to a child custody proceeding. For example, a tribal court finding that someone is the father of a child involved in a state court child custody proceeding should be entitled to full faith and credit because it does pertain to the rights of the father in the child custody proceeding. However, if a tribal court had divorced the parents of an Indian child and awarded custody of the child to the mother, that order would not prevent a state court from removing the child from the mother if she and the child are residing in state court jurisdiction and the child is being neglected or abused. The divorce decree is excluded as a child custody proceeding under ICWA. That order could be recognized under the doctrine of comity, however.

9.14 Can a state court review a tribal court order to determine whether a tribal court had proper jurisdiction over the child proceeding?

Probably. Especially if the Indian child is within the state court's lawful jurisdiction. For example, if a state court child custody proceeding is commenced and the child is removed from the mother and the mother of the child then petitions the tribal court to award her the custody of the minor child and to remove the child from the state placement agency's custody, the state court would have to determine if the tribal court under its laws had jurisdiction to enter such an order. A state court would not have authority, however, to second-guess a tribe's public acts or records such as enrollment records. The extent to which a state court may have authority to review a tribal court decision may also depend on whether the tribe is asserting jurisdiction under § 1911(a) (exclusive jurisdiction) or § 1911(b) (concurrent jurisdiction). A state court's authority to second guess a tribal court's jurisdiction may be greater in the latter situation.

9.15 Can a state court review a tribal court order determination of whether a child is Indian under the ICWA?

No. It is clear under ICWA that tribal determinations, including tribal court determinations, of membership or eligibility for membership are entitled to full faith and credit and cannot be questioned. This is true even if it is demonstrated later that the determination may have been erroneous. For example, in a state court case from South Dakota, *In re J.J.*, 454 N.W.2d 317 (S.D. 1990), the court held that it had to honor one tribe's assertion of membership even if that defeated the rights of another tribe.

9.16 How are tribal court orders and documents authenticated to conform to the state's recognition of foreign judgments?

This depends upon the law of each state. Most states accept tribal records and even affidavits without foundational testimony but a few states have denied the admission of affidavits asserting tribal membership, for example, because they were considered hearsay under state law. *Quinn v. Walters* (*Quinn II*), 881 P.2d 795 (Or. Ct. App. 1994).

Some states require the document to be self-authenticating, which means that the official custodian of the record (tribal secretary for tribal records and the tribal court clerk for tribal court records) must certify on the document that it is a true and accurate copy of the original on file with that office. At a minimum, the document should bear some certification from the tribe indicating that it is an accurate copy of the original record. Other courts may require the official custodian of the record to come to court and testify that the document is a true and accurate copy.

9.17 Does a state court have to abide by a tribal resolution altering the placement preference provisions for foster care and adoptive placements of Indian children?

Yes. § 1915 of ICWA states that a tribe may alter the placement preferences by resolution and that such is binding upon the state court. Such a resolution replaces the placement preferences of ICWA. However, a limited number of state courts have refused to implement tribal resolutions barring non-Indians from adopting children from that tribe and have failed to treat such resolutions as resolutions within the meaning of § 1915. *In re Laura F.*, 99 Cal. Rptr. 2d 859 (Ct. App. 2000) (certified for partial publication). These decisions ignore the spirit of ICWA that encourages tribes to make decisions regarding placements of their children and have those decisions honored in state fora. Because this policy is a federal one, it should trump any state policy in conflict with it.

9.18 Is a tribal court order decreeing that a child is a member or eligible for membership in a particular tribe binding upon a state court?

Yes. § 1911(d) states that the state court must honor any tribal court order from a judicial proceeding in a child custody proceeding. If an Indian tribal court makes that kind of determination, that order is binding upon the state court and cannot be questioned.

9.19 Can a tribal court issue a decree finding that a child is a member of the tribe for ICWA purposes only, and is that decision binding upon a state court?

This is a much more controversial question than simply having the tribal court determine membership or eligibility for membership. If tribal law permits a tribal court to make determinations that certain children are eligible for membership for ICWA purposes only, then such determinations should be binding upon state courts. For example, some Indian tribes that are related to Canadian First Nations may desire to permit their tribal courts to provide protections for their Canadian relatives involved in state court proceedings by permitting the tribal court to make such a finding. If, however, tribal law directs that only the tribal council can make membership decisions, it is unlikely that a tribal court can make such a ruling.

9.20 If a tribal court has issued an order regarding a child prior to a state court asserting jurisdiction over the child, is that child a ward of the tribal court?

It depends upon whether that order issued by the tribal court was part of a child custody proceeding. If it was, or the tribal court has explicitly declared the child a ward of the tribal court, then that declaration deprives the state court of jurisdiction. Some tribal courts may have exercised jurisdiction over a private custody dispute between the parents and that type of exercise of jurisdiction, however, may not deprive a state court of jurisdiction later when the child is being neglected or abused within state court jurisdiction.

9.21 Does a tribal court order awarding custody to a non-parent of a child make that non-parent an Indian custodian for ICWA purposes?

No. An Indian custodian as defined under federal law must be an Indian person. 25 U.S.C. § 1903(6). However, such an order would be entitled to full faith and credit in the state court because it is the placement of a child with a person where the parent cannot regain custody upon demand and is therefore a child custody proceeding under ICWA.

9.22 If a state agency pays for tribal court placements in child welfare cases, does the tribal court have to abide by state laws and regulations enacted pursuant to the Adoption and Safe Families Act or must the state defer to tribal law?

No definitive answer to this question exists. If the cooperative agreement between the state and tribe or county and tribe stipulates that the tribe and its court will abide by ASFA, the tribe may have bound itself to comply. The Administration for Children and Families, the branch of the Department of Health and Human Services that deals with foster care and adoptive placement issues, has indicated in policy statements that states must assure adherence to ASFA standards by any entity with which they contract. However, a recent South Dakota Supreme Court decision has held that ASFA does not trump ICWA and thus calls into question the policy of many states to impose the ASFA requirements upon tribal placements and courts**.** *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611. The key is that tribes be vigilant to assure that laws that seem to promote termination of parental rights not be imposed upon them by contract if they do not support such laws. States do not need to compel tribes to file termination petitions in order to comply with Title IV-E if the tribal law supports other types of permanent orders such as permanent guardianships or customary adoptions not involving the termination of parental rights.

9.23 If tribal law or tradition does not permit terminations of parental rights, then is the state required to abide by that custom or practice?

Probably not. ICWA does not expressly state that states are prohibited from doing terminations if the tribal law prohibits it. Of course, if a tribe adopted a law prohibiting terminations of its children both on and off the reservation it would be an interesting legal issue whether the state would have to abide by that under full faith and credit. 25 U.S.C. § 1911(d). See also FAQ 19, Application of Other Federal Laws.

**** Access to the full-text of opinions and additional materials is at 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.

FEDERAL CASES

United States Supreme Court
Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

Circuit Courts of Appeal
Boozer v. Wilder, 381 F.3d 931 (9th Cir. 2004)
Native Village of Venetie I.R.A. Council v. Alaska (*Venetie II*), 944 F.2d 548 (9th Cir. 1991)
Native Village of Venetie I.R.A. Council v. Alaska (*Venetie I*), 918 F.2d 797 (9th Cir. 1990)

District Courts
Brown ex rel. Brown v. Rice, 760 F. Supp. 1459 (D. Kan. 1991)
Comanche Indian Tribe of Oklahoma v. Hovis (*Hovis I*), 847 F. Supp. 871 (W.D. Okla. 1994)
Doe v. Mann (*Mann I*), 285 F. Supp. 2d 1229 (N.D. Cal. 2003)
Navajo Nation v. District Court, 624 F. Supp. 130 (D. Utah 1985)

STATE CASES

Alaska
In re A.S., 740 P.2d 432 (Alaska 1987)

California
In re Laura F., 99 Cal. Rptr. 2d 859 (Ct. App. 2000) (certified for partial publication)

Colorado
In re A.G.-G., 899 P.2d 319 (Colo. Ct. App. 1995)

Indiana
In re T.R.M., 525 N.E.2d 298 (Ind. 1988)

Louisiana
Owens v. Willock, 29-595 (La. App. 2 Cir. 2/26/97); 690 So. 2d 948

Minnesota
In re B.W., 454 N.W.2d 437 (Minn. Ct. App. 1990)
Gerber v. Eastman, 673 N.W.2d 854 (Minn. Ct. App. 2004)
In re R.I., 402 N.W.2d 173 (Minn. Ct. App. 1987)
In re S.N.R., 617 N.W.2d 77 (Minn. Ct. App. 2000)

Montana
In re Riffle (*Riffle II*), 922 P.2d 510 (Mont. 1996)

New Mexico
In re Megan S., 1996-NMCA-048, 121 N.M. 609, 916 P.2d 228

Oregon
Nelson v. Hunter, 888 P.2d 124 (Or. Ct. App. 1995)
Quinn v. Walters (*Quinn II*), 881 P.2d 795 (Or. Ct. App. 1994)

South Dakota
In re J.J., 454 N.W.2d 317 (S.D. 1990)
In re J.S.B., Jr., 2005 SD 3, 691 N.W.2d 611

Utah
Searle v. Searle, 2001 UT App 367, 38 P.3d 307

Wisconsin
In re Genevieve K., 2003 WI App 201, 267 Wis. 2d 280, 670 N.W.2d 559 (unpublished table decision) *available at* No. 03-1402, 2003 WL 21910691 (Wis. Ct. App. Aug. 12, 2003)

10. TRIBAL-STATE AGREEMENTS

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25 U.S.C. § 1919. Agreements between States and Indian tribes

(a) Subject coverage

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

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

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.

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Frequently Asked Questions

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10.1 Can a state and tribe enter into an agreement with respect to Indian child welfare matters?

Yes. The Indian Child Welfare Act (ICWA) § 1919 authorizes tribes and states to enter into mutual agreements or compacts with respect to Indian child welfare matters. In some instances tribes have also entered into agreements with local governmental entities to address these same issues.

Practice Tip:
Section 1919 is not the sole source of authority for tribes and states to enter into ICWA agreements. Under inherent tribal sovereign authority and states' general intergovernmental agreement statutes, both tribes and states routinely enter into Title IV-E agreements without implicating § 1919.

10.2 What type of ICWA issues can be addressed in tribal-state agreements?

Pursuant to § 1919, agreements can address several subject areas found within ICWA proceedings. Specifically, the Act provides tribes and states the ability to address care and custody issues, and resolve jurisdiction issues including how cases are transferred to tribes and the state cases are closed and the exercise of concurrent jurisdiction. Additionally,

agreements can fill in the gaps of ICWA by, for example, addressing how states notify tribes in emergency removal and initial state hearings, who pays for placements, identify preferred Indian child placements schemes, foster home recruitment and the like. In the state of Oregon, however, an agreement cannot expand the definition of an Indian child to include a biological child of an enrolled tribal member who is not eligible for membership. *In re Kirk*, 11 P.3d 701 (Or. Ct. App. 2000). Yet, in other jurisdictions, agreements at times extend ICWA-type protections to children of Canadian First Nations and for certain non-federally recognized tribes through the adoption of certain administrative procedure to be used when such children are encountered. For example, ICWA tribal-state agreements in the State of Washington define an Indian tribe to include First Nations and non-federally recognized tribes. Model Agreement Regarding Child Custody Services and Proceedings Between Indian Tribes and the State of Washington Department of Social and Health Services, http://www.dshs.wa.gov/pdf/ca/state_ConJuris.pdf.

10.3 Can a state or tribe revoke an agreement, and if so, how?

Yes. A tribe or a state can revoke an agreement. Under § 1919(b) either party can revoke the agreement upon providing one hundred and eighty days written notice to the other party. Revocations do not affect any action or proceeding where a court has already assumed jurisdiction, unless an ICWA agreement provides otherwise. 25 U.S.C. § 1919(b).

10.4 Does § 1919 require a tribe or state to enter into tribal-state agreements to address foster placement and foster care payments between the state and tribe?

No. A state is not required to enter into an ICWA agreement with a tribe. *Native Village of Stevens v. Smith*, 770 F.2d 1486 (9th Cir. 1985). Conversely, tribes are also not required to enter into ICWA agreements with states. Agreements, however, are entered into as a cooperative endeavor between sovereigns and can help structure limited available resources and services to best serve Indian children and families. A tribe may also want to enter into a Title IV-E agreement with a state to access much needed federal funding and ensure states coordinate with tribes in Indian child foster placements and comply with tribal placement preferences. See also FAQ 19.5, 19.6, and 19.7, Application of Other Federal Laws.

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FEDERAL CASES

District Courts of Appeal
Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985)

STATE CASES

Minnesota
In re S.W., 727 N.W.2d 144 (Minn. Ct. App. 2007)
Sayers ex rel. Sayers v. Beltrami County, 481 N.W.2d 547 (Minn. 1992)

Oregon
In re Kirk, 11 P.3d 701 (Or. Ct. App. 2000)

11. FOSTER CARE PLACEMENT AND REMOVAL

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25 U.S.C. § 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated . . . .

25 U.S.C. § 1915. Placement of Indian children

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

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.

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Frequently Asked Questions

11.1 What is a foster care placement under the ICWA?

The Indian Child Welfare Act (ICWA), § 1903(1)(i) defines foster care placement as:

> [A]ny action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.

This can encompass guardianships, foster care placements as a result of neglect and abuse proceedings, custodial placements with relatives and non-parents, placements as a result of status offenses or Child in Need of Services (CHINS) proceedings, placements in residential homes and others.

11.2 Are placement preferences applicable to foster care placements?

Yes. Section 1915(b) specifically makes the placement preferences applicable to foster care placements.

11.3 What are the placement preferences applied to a foster care placement?

The preferences, as provided in § 1915(b), are:

(a) a member of the Indian child's extended family;

(b) a foster home licensed, approved, or specified by the Indian child's tribe;

(c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or,

(d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

These are in order of preference and are not equally suitable. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts).

11.4 Can a tribe alter the order of preference?

Yes. See FAQ 16.5 for discussion.

11.5 Do the placement preference criteria apply to subsequent foster care placements in the event an Indian child is removed from a foster home?

Yes. Section 1916(b) provides that:

> Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

Practice Tip:
This includes a right to separate notice of any change of placement.

11.6 How must consent to a voluntary foster care placement be executed?

Section 1913(a) provides that:

> Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences

> of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent of Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

11.7 What is a court of competent jurisdiction?

In cases where the child resides on or is domiciled on the reservation or is a ward of the tribal court, the tribal court would have exclusive jurisdiction of any child custody proceeding involving an Indian child and hence would be the court of competent jurisdiction for a voluntary consent. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). Otherwise, jurisdiction would be concurrent in state and tribal court, so either would be a court of competent jurisdiction. Issues may arise as to whether notice should be given to the appropriate tribe or tribes and whether they might move for a transfer of jurisdiction.

Practice Tip:
For an Indian child residing on, or domiciled on a reservation, or who is a ward of a tribal court a state court is generally not a court of competent jurisdiction. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

11.8 Can a parent or Indian custodian withdraw consent?

Yes. Section 1913(b) provides that: "[a]ny parent or Indian custodian may withdraw consent to a foster care placement under State law at any time . . . ." The apparent contradiction between the definitional section of § 1903(1)(i) which defines a foster care placement as one in which the child cannot be returned on demand and § 1913(b) which allows for withdrawal of consent of a foster care placement at any time is resolved in favor of § 1913(b). *In re K.L.R.F.*, 515 A.2d 33, 37 (Pa. Super. Ct. 1986).
See also FAQ 17.6, Voluntary Proceedings.

11.9 Must the child in a voluntary foster care placement be returned when a parent or Indian custodian withdraws consent to such a placement?

Yes. Section 1913(b) provides that: "upon such withdrawal, the child shall be returned to the parent or Indian custodian."

Practice Tip:
Parents and Indian custodians should be aware that a voluntary placement or arrangement with a state to obtain services or respite care may lead to an involuntary petition being filed.

11.10 Prior to an involuntary foster care placement, what efforts, if any, must be made to avoid such placement?

Section 1912(d) provides that:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

See also FAQs 12.1-12.8, Active Efforts Requirements.

11.11 What must be shown to remove a child from the custody of the parent or Indian custodian?

Section 1912(e) requires a showing 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." The determination must be "supported by clear and convincing evidence, including the testimony of qualified expert witnesses . . . ." This burden includes a showing that the parents cannot be persuaded to change their behavior. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts); *C.J. v. State*, 18 P.3d 1214, 1218-19 (Alaska 2001) (reversing decision to terminate where conduct not shown to be likely to continue). See also FAQ 14.10, Expert Witness.

11.12 Do the placement preference provisions apply to both voluntary and involuntary placements?

Yes. Section 1915(b) specifically provides that the preferences are to be applied "[i]n any foster care or pre-adoptive placement . . . in the absence of good cause to the contrary." See also FAQ 17.13, Voluntary Placement.

11.13 What standards should govern in meeting the placement preferences?

Section 1915(d) provides that "[t]he standards to be applied . . . shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties."

Thus, for example, the Bureau of Indian Affairs (BIA) Guidelines state that a bias against single parent placements in the non-Indian community, should not apply in the Indian context. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594 (Nov. 26, 1979) (guidelines for state courts). The social and cultural standards of the Indian community sometimes conflict with state standards, which are often biased in terms of age, marital status, economic status, sexual orientation, and other requirements.

11.14 What types of factors might constitute good cause to deviate from the foster care and pre-adoptive placement preferences?

See FAQ 16.4 for discussion.

11.15 Can bonding be considered in a foster care placement proceeding?

Under the ICWA's statutory presumptions it is in the best interest of the child to maintain ties with its tribe, culture and family. *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169 (Tex. App. 1995); *In re W.D.H., III*, 43 S.W.2d 30 (Tex. App. 2001). The placement preferences are the "most important substantive requirement imposed on state courts." Bonding certainly should not be used to demonstrate good cause to deviate from the placement preferences where the bonding occurred as a result of violations of the requirements of the ICWA. *In re Desiree F.*, 99 Cal. Rptr. 2d 688 (Ct. App. 2000); *B.R.T. v. Executive Dir. of Soc. Servs. Bd.*, 391 N.W.2d 594, 601 n.10 (N.D. 1986). *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989) (holding that three years development of family ties does not change outcome of what is the proper forum).

Some courts have held that only the factors listed on the BIA Guidelines can constitute good cause and that the need for permanence cannot itself constitute extraordinary emotional need. *In re S.E.G. (S.E.G. II)*, 521 N.W.2d 357 (Minn. 1994). *Compare In re Baby Boy Doe (Baby Boy Doe II)*, 902 P.2d 477 (Idaho 1995) (finding the likelihood of serious psychological and emotional trauma if removed from adoptive parents a legitimate factor in good cause to deviate from placement preferences). Where courts do not feel bound by the guidelines, bonding has at least played a part in findings of good cause. *In re B.G.J.* (*B.G.J. II*), 133 P.3d 1 (Kan. 2006) (finding good cause to deviate from the placement preferences based in part on bonding not an abuse of discretion).

11.16 Are tribes allowed to license foster homes eligible for federal benefits?

Yes. Section 1931(b) provides that: "[f]or purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State."

11.17 Who pays for the foster care placement?

The state placement agency if the case remains in state court and even when transferred to tribal court if an intergovernmental agreement exists or if a tribal court maintains placement rights with the state agency. See also FAQ 19 Application of Other Federal Laws.

Practice Tip:
Please note that there is a federal court decision, *Native Village of Stevens v. Smith*, 770 F.2d 1486 (9th Cir. 1985), holding that a state agency is not responsible for subsidizing tribal court placements absent a cooperative agreement. However, in limited circumstances after exhausting all possible resources of funding, the BIA may be a potential source of funding for these placements.

**** Access to the full-text of opinions and additional materials is at 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.

FEDERAL CASES

United States Supreme Court
Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

Circuit Courts of Appeal
Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985)

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Alaska
A.H. v. State, 779 P.2d 1229 (Alaska 1989)
C.J. v. State, 18 P.3d 1214 (Alaska 2001)
D.H. v. State, 723 P.2d 1274 (Alaska 1986)
In re J.M., 718 P.2d 150 (Alaska 1986)
J.W. v. R.J., 951 P.2d 1206 (Alaska 1998)
Jordan v. Jordan, 983 P.2d 1258 (Alaska 1999)
L.G. v. State, 14 P.3d 946 (Alaska 2000)

Arizona
In re Maricopa County Juvenile Action No. JS-8287, 828 P.2d 1245 (Ariz. Ct. App. 1991)

Arkansas
Burks v. Ark. Dep't of Human Servs., 61 S.W.3d 184 (Ark. Ct. App. 2001)

California
In re Aaron R., 29 Cal. Rptr. 3d 921 (Ct. App. 2005)
In re Brandon M., 63 Cal. Rptr. 2d 671 (Ct. App. 1997)
In re Desiree F., 99 Cal. Rptr. 2d 688 (Ct. App. 2000)
Fresno County Dep't of Children & Family Servs. v. Superior Court, 19 Cal. Rptr. 3d 155 (Ct. App. 2004)
In re Jennifer A., 127 Cal. Rptr. 2d 54 (Ct. App. 2002)
In re Kenneth M., 19 Cal. Rptr. 3d 752 (Ct. App. 2004) (certified for partial publication)
In re Larissa G., 51 Cal. Rptr. 2d 16 (Ct. App. 1996) (certified for partial publication)
In re Levi U., 92 Cal. Rptr. 2d 648 (Ct. App. 2000)
In re S.B., 30 Cal. Rptr. 3d 726 (Ct. App. 2005) (certified for partial publication)
In re Samuel P., 121 Cal. Rptr. 2d 820 (Ct. App. 2002)

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In re A.E., 572 N.W.2d 579 (Iowa 1997)
In re H.N.B., 619 N.W.2d 340 (Iowa 2000)
In re J.R.H., 358 N.W.2d 311 (Iowa 1984)
In re J.W., 528 N.W.2d 657 (Iowa Ct. App. 1995)

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In re J.A.S., 488 N.W.2d 332 (Minn. Ct. App. 1992)
In re R.I., 402 N.W.2d 173 (Minn. Ct. App. 1987)
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Nebraska
In re Enrique P., 709 N.W.2d 676 (Neb. Ct. App. 2006)
In re Phoebe S., 664 N.W.2d 470 (Neb. Ct. App. 2003)

New Mexico
In re Ashley R., 863 P.2d 451 (N.M. Ct. App. 1993)

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In re Oscar C., Jr. (*Oscar II*), 600 N.Y.S.2d 957 (App. Div. 1993)
In re Oscar C., Jr. (*Oscar I*), 559 N.Y.S.2d 431 (Fam. Ct. 1990)

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In re Baby Girl B., 2003 OK CIV APP 24, 67 P.3d 359
Duncan v. Wiley, 657 P.2d 1212 (Okla. Civ. App. 1982)
In re N.L., 754 P.2d 863 (Okla. 1988)
In re Q.G.M., 808 P.2d 684 (Okla. 1991)

Oregon
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In re Cooke, 744 P.2d 596 (Or. Ct. App. 1987)

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In re Z.F.S., 51 P.3d 170 (Wash. Ct. App. 2002)

Wisconsin
In re S.L., 455 N.W.2d 678 (Wis. Ct. App. 1990) (unpublished table decision) *available at* 1990 WL 57500 (Wis. Ct. App. Feb. 7, 1990)

Wyoming
In re S.N.K., 2005 WY 30, 108 P.3d 836 (Wyo. 2005)

12. ACTIVE EFFORTS REQUIREMENT

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. § 1912. Pending court proceedings

(d) Remedial services and rehabilitative programs; preventive measures

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

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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.

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.

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Frequently Asked Questions

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12.1 What service requirements are imposed on a party seeking to make a foster care placement or seeking termination of parental rights?

Whether a state or private party, the Indian Child Welfare Act (ICWA) § 1912(d) requires the party seeking foster care placement under § 1912(e) or termination of parental rights under § 1912(f) to prove that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that such efforts have proved unsuccessful. *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007); *In re N.B.*, No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007); *D.J. v. P.C.*, 36 P.3d 663, 667 (Alaska 2001). The active efforts requirement even applies in situations that involve the termination of the rights of a non-Indian parent. *C.J. v. State*, 18 P.3d 1214 (Alaska 2001).

At least one court has held that a parent who is voluntarily consenting to terminate her parental rights is not entitled to active efforts to prevent the termination of that relationship. *See B.R.T. v. Executive Dir. of Soc. Servs. Bd.*, 391 N.W.2d 594 (N.D. 1986). However, if a proceeding is commenced as an involuntary, one the active efforts requirement applies even if the parent or Indian custodian ultimately voluntarily consents to a placement or admits the petition initiating the proceeding.

In some circumstances it may appear to be impractical for the party initiating the child custody proceeding to be required to provide "active efforts." This is true, for example, in stepparent adoption proceedings where the initiating party is a private party. However, a private party is obligated as a matter of law to provide active efforts. *See, e.g., In re N.B.*, No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007). In those situations, the onus may also fall upon the state court to refer the biological parent to appropriate services to rehabilitate that parent prior to making the decision whether to terminate parental rights and permit the adoption.

12.2 What is the burden of proof to show that active efforts have been provided?

Section 1912(d) does not contain a burden of proof. Some courts will apply the burden of proof required in the underlying action. They will apply the clear and convincing burden required in a foster care placement under § 1912(e) and the beyond a reasonable doubt burden required in a termination of parental rights under § 1912(f). Other state courts, on the other hand, will apply a lesser burden based on state law.

Courts Applying the Burden of the Underlying Proceeding

Iowa: *In re L.N.W.*, 457 N.W.2d 17 (Iowa Ct. App. 1990) (applying the § 1912(f) "beyond a reasonable doubt" standard in TPR)
Michigan: *In re Morgan*, 364 N.W.2d 754 (Mich. Ct. App. 1985); *In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986)
Minnesota: *In re M.S.S.*, 465 N.W.2d 412 (Minn. Ct. App. 1991)
Montana: *In re G.S.*, 2002 MT 245, 312 Mont. 108, 59 P.3d 1063
Nebraska: *In re Enrique P.*, 709 N.W.2d 676 (Neb. Ct. App. 2006)
South Dakota: *In re S.R.*, 323 N.W.2d 885 (S.D. 1982); *In re P.B.*, 371 N.W.2d 366 (S.D. 1985)
Wisconsin: *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992)

Courts Applying a Lesser Burden Based on State Law.

Alaska: *K.N. v. State*, 856 P.2d 468 (Alaska 1993); *E.A. v. State*, 46 P.3d 986 (Alaska 2002)
California: *In re Michael G.*, 74 Cal. Rptr. 2d 642 (Ct. App. 1998); *In re Hannah S.*, 48 Cal. Rptr. 3d 605 (Ct. App. 2006)
Idaho: *In re Baby Boy Doe* (*Baby Boy Doe II*), 902 P.2d 477 (Idaho 1995)
Illinois: *In re Cari B.*, 763 N.E.2d 917 (Ill. App. Ct. 2002)
Kansas: *In re A.P.*, 961 P.2d 706 (Kan. Ct. App. 1998)
Maine: *In re Annette P.*, 589 A.2d 924 (Me. 1991)
North Dakota: *In re M.S.*, 2001 ND 68, 624 N.W.2d 678
Oklahoma: *In re H.J.*, 2006 OK CIV APP 153, 149 P.3d 1073
Oregon: *In re Charles*, 688 P.2d 1354 (Or. Ct. App. 1984)
Utah: *In re D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997)
Washington: *In re A.M.*, 22 P.3d 828 (Wash. Ct. App. 2001)

12.3 What are reasonable efforts?

The Adoption Assistance and Child Welfare Act was passed by Congress in 1980. Under it, reasonable efforts, an undefined term, must be made to preserve and reunify families where a child is removed. The states have passed implementing legislation on their part. NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES ET AL., MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 41 (Linda Lange ed., 1988) [hereinafter MAKING REASONABLE EFFORTS]. Reasonable efforts must be made in most ICWA cases. ICWA also requires "active efforts" in every case, a stringent requirement. There is no exception. *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007); *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611.

Practice Tip:
A state or private party should not be able to argue that a child cannot be reunified with his or her family because active efforts have not been met when reasonable efforts have been met.

12.4 What are active efforts compared to reasonable efforts?

The "'active efforts' standard requires more effort than a 'reasonable efforts' standard does." *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007). A Montana court stated "The term active efforts, by definition, implies heightened responsibility compared to passive efforts." *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 384, 106 P.3d 556, 560. An Alaska court cited an ICWA commentator who distinguished between active and passive efforts: "passive efforts entail merely drawing up a reunification plan and requiring the 'client' to use 'his or her own resources to . . . bring . . . it to fruition.'" *A.M. v. State*, 945 P.2d 296, 306 (Alaska 1997) (citing CRAIG J. DORSAY, THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES 157-58 (1984)). "Active efforts, on the other hand, include 'tak[ing] the client through the steps of the plan rather than requiring the plan to be performed on its own.'" *Id.* As part of active efforts, the party "shall take into account the prevailing social and cultural conditions and the way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social services agencies, and individual Indian care givers." Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,592 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts). A tribe may have an agreement with a state that defines active efforts. *See, e.g., Minn. Tribal/State Indian Child Welfare Agreement*, BULLETIN 99-68-11 (Minn. Dep't of Human Servs., Minn.) Aug. 25, 1999, at 5.

Practice Tip:
A rule of thumb is that "active efforts" is to engage the family while "reasonable efforts" simply offers referrals to the family, and leaves it to them to seek out assistance.

Some courts require proof that all active efforts to provide the parents with adequate rehabilitative services have been exhausted, but others do not require an undertaking of futile or nonproductive efforts. *See Nicole B.*, 927 A.2d 1194; *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611. In a recurring situation, courts have found that incarceration standing alone is not a justifiable excuse to limit active efforts. *See In re D.G.*, 2004 SD 54, 679 N.W.2d 497.

Practice Tip:
A state or private party cannot utilize the argument that it lacks resources to provide active efforts in order to refuse the mandate to provide efforts. There are no exceptions in ICWA to the mandate.

Generally, what constitutes active efforts is specific to the given situation, including the governing law and accepted social work standards, because such efforts are aimed at remedying the basis for the underlying proceedings, whether it is foster care placement or termination of parental rights. The types of required services and length of providing such services also depend on the facts of the case.

Practice Tip:
To best meet the needs of the child and family and to avoid unnecessary conflicts, the best practice is to seriously consider whether one has met the "active efforts" requirement, as opposed to reasonable efforts, prior to filing a petition to terminate parental rights.

12.5 Do active efforts include the extended family?

Yes. The Bureau of Indian Affairs (BIA) Guidelines provide that a court should take into account "the prevailing social and cultural conditions and way of life of the Indian child's tribe. [Remedial services] shall also involve and use the available resources of the extended family, the tribe, Indian

social services agencies and individual Indian care givers." Indian Child Welfare Proceedings, 44 Fed. Reg. 67,584, 67,592 (Nov. 26, 1979) (guidelines for state courts).

12.6 Why are active efforts required?

Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and . . . that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(4)-(5).

Active efforts are thus required to prevent the break up of an Indian family by preventing an out-of-home placement or by fostering reunification when the child is removed from the physical or legal custody of his or her parents.

12.7 How does Adoption and Safe Families Act change the ICWA active efforts requirement?

The Adoption and Safe Families Act of 1997 (ASFA), 42 U.S.C. §§ 673b, 678, 679b (2000), does not change the ICWA active efforts requirement. The ASFA recognizes certain circumstances under which no reasonable efforts are necessary such as where a court has found that a parent has subjected the child to aggravated circumstances of abuse or neglect. Thus, it purportedly relieves the showing of reasonable efforts under state law, but it does not alter ICWA's active efforts requirement. *See In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611. For a discussion on the interaction between ASFA and ICWA, see DAVID SIMMONS & JACK TROPE, P.L. 105-89 ADOPTION AND SAFE FAMILIES ACT OF 1997, ISSUES FOR TRIBES AND STATES SERVING INDIAN CHILDREN (1999). See also FAQs 19.8, 19.9, 19.10 Application of Other Federal Laws; and FAQ 16.17, Placement.

12.8 How does Title IV-E of the Social Security Act interact with ICWA?

The Adoption Assistance and Child Welfare Act was passed by Congress in 1980. Under it, an agency must make reasonable efforts to safely maintain the child in the home or to reunify the family if the child is removed. Reasonable efforts must be made in each case for every child where a state seeks reimbursement under Title IV-E of the Social Security Act for federally funded foster care maintenance payments. 42 U.S.C. §§ 671(a)(15), 672(a)(2) (2000); MAKING REASONABLE EFFORTS, *supra* at 41. See also FAQ 19.5, 19.6, Application of Other Federal Laws.

Title IV-E was passed without taking into account that tribes have jurisdiction over the domestic affairs of tribal members, including the foster and adoptive care of their children. Indian children placed in foster or adoptive care by a tribal court where it has exclusive jurisdiction under § 1911(a) of the ICWA, or where jurisdiction is transferred to a tribe under § 1911(b), are not afforded services for such things as food, shelter, clothing, and school supplies because tribes are not allowed direct access to funds under Title IV-E. Tribes are also denied the ability to seek reimbursement for administrative and training costs. Tribes inevitably suffer because their children are disadvantaged by lack of services and additional burdens are placed on already severely limited tribal services and resources.

To support tribal foster care systems in an equitable manner, some tribes have entered into cooperative agreements with states to share funding received by the states under Title IV-E. But the current law erects barriers that foreclose the opportunity for most tribes and states to enter into cooperative agreements. It is imperative for the United States Congress to fix the problem. Eddie F. Brown et al., *Using Tribal/State Title IV-E Agreements to Help American Indian Tribes Access Forster Care and Adoption Funding*, 83 CHILD WELFARE 293 (2004).

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Doe v. Mann (*Mann I*), 285 F. Supp. 2d 1229 (N.D. Cal. 2003)

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C.J. v. State, 18 P.3d 1214 (Alaska 2001)
D.H. v. State, 929 P.2d 650 (Alaska 1996)
D.J. v. P.C., 36 P.3d 663 (Alaska 2001)
E.A. v. State, 46 P.3d 986 (Alaska 2002)
E.M. v. State, 959 P.2d 766 (Alaska 1998)
Gilbert M. v. State, 139 P.3d 581 (Alaska 2006)
J.A. v. State, 50 P.3d 395 (Alaska 2002)
J.S. v. State, 50 P.3d 388 (Alaska 2002)
In re J.W., 921 P.2d 604 (Alaska 1996)
K.N. v. State, 856 P.2d 468 (Alaska 1993)
N.A. v. State, 19 P.3d 597 (Alaska 2001)
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V.S.B. v. State, 45 P.3d 1198 (Alaska 2002)
Wendell C., II v. State, 118 P.3d 1 (Alaska 2005)

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Letitia V. v. Superior Court, 97 Cal. Rptr. 2d 303 (Ct. App. 2000)
In re Michael G., 74 Cal. Rptr. 2d 642 (Ct. App. 1998)
In re Riva M., 286 Cal. Rptr. 592 (Ct. App. 1991) (certified for partial publication)
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In re N.B., No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007)

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Illinois
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Iowa
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In re T.F., 2004 ND 126, 681 N.W.2d 786

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In re S.L., 455 N.W.2d 678 (Wis. Ct. App. 1990) (unpublished table decision) *available at* 1990 WL 57500 (Wis. Ct. App. Feb. 7, 1990)

13. TERMINATION OF PARENTAL RIGHTS

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. § 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement . . . .

25 U.S.C. § 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

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

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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 U.S.C. § 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

25 U.S.C. § 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

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.

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Frequently Asked Questions

13.1 Do parents have a fundamental liberty interest in the care, custody, and management of their children which is protected by the United States Constitution?

Yes. The United States Supreme Court has held that parents have a fundamental liberty interest in the care, custody, and management of their children which is protected by the Due Process clause of the Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). *See also In re P.B.*, 371 N.W.2d 366, 372 (S.D. 1985).

13.2 What is the burden of proof for termination of parental rights to an Indian child under the ICWA?

The Indian Child Welfare Act (ICWA) § 1912(f) provides that "[n]o termination of parental rights may be ordered in such proceedings in the absence of a determination, supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, 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." *In re O.S.*, 2005 SD 86, ¶¶ 4-7, 701 N.W.2d 421, 424; *In re A.N.*, 2005 MT 19, ¶¶ 16-23, 325 Mont. 379, 383-85, 106 P.3d 556, 560.

13.3 Who has the burden of proof to demonstrate that parental rights should be terminated?

The party petitioning to have parental rights terminated has the burden of proof. *K.N. v. State*, 856 P.2d 468 (Alaska 1993); *D.W.H. v. Cabinet For Human Res.*, 706 S.W.2d 840, 842-43, (Ky. Ct. App. 1986).

13.4 What must be proved under § 1912(f) to show that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child?

It must be shown, beyond a reasonable doubt, that the conduct of the parents or Indian custodian, is likely to harm the child and that the parent, or Indian custodian, is unlikely to change the harmful conduct. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts); *E.A. v. State*, 46 P.3d 986, 992 (Alaska 2002); *In re J.W.*, 921 P.2d 604, 607 (Alaska 1996).

Practice Tips:
In addition to proving the ICWA standard, state law may require the party to prove other factors, which may give the parents more protection, prior to termination of parental rights.

Note that ICWA applies to a termination of parental rights proceeding even when it is the non-Indian parent whose rights are at issue. *See, e.g., C.J. v. State*, 18 P.3d 1214, 1217 (Alaska 2001); *In re T.N.F.*, 781 P.2d 973, 975, 978 (Alaska 1989) (holding ICWA applied to adoption of child by Indian father and his wife, even though child's biological mother was not Indian); *In re N.S.*, 474 N.W.2d 96 (S.D. 1999).

General conditions of poverty cannot suffice to uphold a termination of parental rights. The Bureau of Indian Affairs (BIA) Guidelines specifically state:

"Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or noncomforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child." Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (Nov. 26, 1978) (guidelines for state courts).

13.5 May bonding be considered a ground for termination?

This should not be a ground for termination. The court in *In re Phoebe S.*, 664 N.W.2d 470, 484-85 (Neb. Ct. App. 2003) rejects the use of bonding in the termination of parental rights in general, and even more so under ICWA. *See also In re J.W.*, 742 P.2d 1171, 1174 (Okla. Civ. App. 1987) (holding lack of bonding with mother understandable under the circumstances, and not a basis for termination of parental rights); *In re K.L.R.F.*, 515 A.2d 33, 38 (Pa. Super. Ct. 1986) (holding appellant had the right to withdraw consent to placement of child even if doing so will uproot the child). *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (holding bonding cannot override jurisdictional provisions). Some courts have found that removing the child from the "only safe, stable, environment the minor child has known would inflict serious emotional injury." *In re Bluebird*, 411 S.E.2d 820, 824 (N.C. Ct. App. 1992); *A.M. v. State* (*A.M. I*), 891 P.2d 815, 826 (Alaska 1995); *In re S.A.*, 912 P.2d 1235, 1241 (Alaska 1996).

13.6 Can parental rights be terminated without attempts to remediate the problems?

No. Section 1912(d) provides that "any party seeking to effect a . . . termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." The duty of showing that active efforts have been made extends to private petitioners and must be demonstrated beyond a reasonable doubt. *D.J. v. P.C.*, 36 P.3d 663 (Alaska 2001).

Practice Tip:
It should be noted that under the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 673b, 678, 679b (2000), states are relieved of the obligation to provide reasonable efforts to reunite the family in certain aggravated circumstances. However, these exceptions do not apply to the requirement to provide "active efforts" under the ICWA. *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611.

13.7 Is there a duty toward a father before paternity has been established?

No. In defining "parent," § 1903(9) specifically states that it does not include an "unwed father where paternity has not been acknowledged or established." *See A.A. v. State*, 982 P.2d 256 (Alaska 1999). However, it should be noted that all parties to a child custody proceeding have a duty to determine if the child is Indian.

13.8 What are active efforts under § 1912(d)?

See discussion at FAQ 12.4, Active Efforts Requirements.

13.9 Must there be remedial measures when conditions exist which, under the Adoption and Safe Families Act (ASFA) would not require them?

See discussion at FAQs 12.7, Active Efforts Requirements and 19.9, Application of Other Federal Laws.

13.10 Does ASFA affect standards for termination of parental rights?

See discussion at FAQs 19.9 and 19.10, Application of Other Federal Laws.

13.11 What role does state law play in regard to termination of parental rights?

State law may require proof of matters to justify termination which are independent of the requirements under § 1912(f). *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992); *In re Roberts*, 732 P.2d 528 (Wash. Ct. App. 1987).

13.12 What burden of proof is required of state grounds for termination in ICWA cases?

Some courts hold that the state and federal schemes create dual burdens of proof which must be met separately. *In re Bluebird*, 411 S.E.2d 820, 823 (N.C. Ct. App. 1992) (holding state burden of proof applied to state grounds and federal burden of proof to federal grounds); *In re Elliott*, 554 N.W.2d 32, 38 (Mich. Ct. App. 1996) (holding both the state and the federal burdens of proof must be met as to the respective grounds); *In re S.A.E.*, 912 P.2d 1002, 1004-05 (Utah Ct. App. 1996) (holding ICWA burden applies only to the federal grounds, while the state burden continues to apply to the state grounds, and those grounds are not preempted; indeed, § 1921 recognizes viability of differing state standards of protection—both requirements for termination must be met by their respective burdens); *In re D.S.P.*, 480 N.W.2d 234, 238-39 (Wis. 1992) (holding dual burden of proof applies; since § 1921 requires use of

state law whenever that state law provides a higher standard, "we find it appropriate that where the children's code provides additional safeguards beyond what is mandated by the ICWA, those additional safeguards should be followed"); *In re Roberts*, 732 P.2d 528, 531 (Wash. Ct. App. 1987) (holding where an Indian child is involved, the ICWA imposes an additional burden on the state, but does not replace state law); *In re Denice F.*, 658 A.2d 1070, 1072 (Me. 1995) (holding a dual burden—state grounds provide a supplemental degree of protection).

As noted, some courts view the state provisions as providing an extra degree of protection that is in harmony with § 1921's requirement that higher state standards should be applied. Some courts have held, however that the state standards conflict with the ICWA. *See In re W.D.H., III*, 43 S.W.3d 30, 35-37 (Tex. App. 2001) ("[I]t was error for the trial court to make any findings under the Family code because the provisions providing for the involuntary termination of parental rights are in conflict with the ICWA."). The court specifically held that the requirement under state law of finding a termination to be in the best interests of the child under the standards contained in the state's Family Code, standards of the dominant culture, conflicted with the meaning of that term under the ICWA, which places priority on maintaining the child's relationship with the Indian tribe, culture, and family. *Id.* at 36. Some courts seem to apply the ICWA burden of proof to state grounds for termination. *See In re T.H.*, 2005 OK CIV APP 5, 105 P.3d 354. See also FAQ Expert Witnesses regarding burdens of proof.

13.13 Does § 1921 require standards in state statutes applicable to child custody proceedings to apply in termination of parental rights proceedings under ICWA if those standards are higher?

Yes. If they provide a higher level of protection for Indian parents or custodians. See discussion in FAQ 13.12.

13.14 Can a parent of an Indian child revoke his or her consent to the termination of parental rights after the final order terminating his or her rights is entered?

No. Section 1913(c) provides that:

> In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

25 U.S.C. § 1913(c). *In re J.R.S.*, 690 P.2d 10, 13-14 (Alaska 1984) held that a consent to termination of parental rights cannot be withdrawn after the termination of such rights became final. It rejected the argument that such consent could be withdrawn at any time before a final decree of adoption was entered, noting that "[i]f Congress had intended consents to termination to be revocable at any time before entry of a final decree of adoption, the words 'as the case may be' would not appear in the statute." The right to withdraw consent ends when the order terminating parental rights is final. *See also In re Kiogima*, 472 N.W.2d 13 (Mich. Ct. App. 1991); *B.R.T. v. Executive Dir. of Soc. Servs. Bd.*, 391 N.W.2d 594 (N.D. 1986) (holding right to withdraw consent under § 1913 expired when the order terminating parental rights became final).

**** Access to the full-text of opinions and additional materials is at www.narf.org/icwa ****

The following list is representative of cases that discuss the topic. However, the list is not exhaustive. The practitioner is encouraged to conduct their own independent research.

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In re Davis, 857 P.2d 888 (Or. Ct. App. 1993)
In re Lucas, 33 P.3d 1001 (Or. Ct. App. 2001)
In re Tucker, 710 P.2d 793 (Or. Ct. App. 1985)
In re Woodruff, 816 P.2d 623 (Or. Ct. App. 1991)

Pennsylvania
In re K.L.R.F., 515 A.2d 33 (Pa. Super. Ct. 1986)

South Dakota
In re A.R.P., 519 N.W.2d 56 (S.D. 1994)
In re B.J.E., 422 N.W.2d 597 (S.D. 1988)
In re B.S., 1997 SD 86, 566 N.W.2d 446
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In re D.B., 2003 SD 13, 670 N.W.2d 67
In re D.G., 2004 SD 54, 679 N.W.2d 497

In re D.M. (*D.M. I*), 2003 SD 49, 661 N.W.2d 768
In re E.M., 466 N.W.2d 168 (S.D. 1991)
In re J.L.H. (*J.L.H. II*), 316 N.W.2d 650 (S.D. 1982)
In re J.L.H. (*J.L.H. I*), 299 N.W.2d 812 (S.D. 1980)
In re J.S.B., Jr., 2005 SD 3, 691 N.W.2d 611
In re K.A.B.E., 325 N.W.2d 840 (S.D. 1982)
In re M.H., 2005 SD 4, 691 N.W.2d 622
In re N.S., 474 N.W.2d 96 (S.D. 1991)
In re O.S., 2005 SD 86, 701 N.W.2d 421
In re P.B., 371 N.W.2d 366 (S.D. 1985)
In re S.D., 402 N.W.2d 346 (S.D. 1987)
In re S.G.V.E., 2001 SD 105, 634 N.W.2d 88
In re S.L., 349 N.W.2d 428 (S.D. 1984)
In re S.R., 323 N.W.2d 885 (S.D. 1982)
In re T.I., 2005 SD 125, 707 N.W.2d 826

Tennessee
In re Morgan, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997)

Texas
Doty-Jabbaar v. Dallas County Child Protective Servs., 19 S.W.3d 870 (Tex. App. 2000)
In re W.D.H., III, 43 S.W.3d 30 (Tex. App. 2001)

Utah
In re D.A.C., 933 P.2d 993 (Utah Ct. App. 1997)
In re F.M., 2002 UT App 340, 57 P.3d 1130
In re S.A.E., 912 P.2d 1002 (Utah Ct. App. 1996)
In re S.D.C., 2001 UT App 353, 36 P.3d 540
In re V.H., 2007 UT App 1, 154 P.3d 867

Vermont
In re A.J., 733 A.2d 36 (Vt. 1999)
In re G.F., 2007 VT 11, 923 A.2d 578
In re J.T., 693 A.2d 283 (Vt. 1997)

Washington
In re A.M., 22 P.3d 828 (Wash. Ct. App. 2001)
In re E.C., 115 Wash. App. 1032 (Wash. Ct. App. 2003)
In re Fisher, 643 P.2d 887 (Wash. Ct. App. 1982)
In re M.D., 42 P.3d 424 (Wash. Ct. App. 2002)
In re Roberts, 732 P.2d 528 (Wash. Ct. App. 1987)

Wisconsin
In re Arianna R.G., 2003 WI 11, 259 Wis. 2d 563, 657 N.W.2d 363
In re Branden F., 2005 WI App 88, 281 Wis. 2d 274, 695 N.W.2d 905 (unpublished table decision) *available at* No. 04-2560, 2005 WL 645191 (Wis. Ct. App. March 22, 2005)
In re D.S.P., 480 N.W.2d 234 (Wis. 1992)
In re Daniel R.S., 2005 WI 160, 286 Wis. 2d 278, 706 N.W.2d 269
In re Genevieve K., 2003 WI App 201, 267 Wis. 2d 280, 670 N.W.2d 559 (unpublished table decision) *available at* No. 03-1402, 2003 WL 21910691 (Wis. Ct. App. Aug. 12, 2003)
In re J.J., 462 N.W.2d 551 (Wis. Ct. App. 1990) (unpublished table decision) *available at* No. 90-0158, 1990 WL 174568 (Wis. Ct. App. Sept. 18, 1990)
In re Maryah M., 2001 WI App 254, 248 Wis. 2d 529, 635 N.W.2d 906 (unpublished table decision) *available at* No. 01-1438-9-NM, 2001 WL 1035334 (Wis. Ct. App. Sept. 11, 2001)
In re Shawnda G., 2001 WI App 194, 247 Wis. 2d 158, 634 N.W.2d 140

14. EXPERT WITNESS

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. § 1912. Pending court proceedings

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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.

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.

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Frequently Asked Questions

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14.1 When is an expert witness required in an ICWA case?

The use of a "qualified expert witness" is required in foster care placements and actions for termination of parental rights. Under § 1912(e), the party attempting a foster care placement must prove by clear and convincing evidence, including testimony of a qualified expert witness, that a parent's or Indian custodian's continued custody of the Indian child will result in serious emotional or physical damage. Under § 1912(f), the party attempting a termination of parental rights must prove beyond a reasonable doubt, including testimony of a qualified expert witness, that a parent's or Indian custodian's continued custody of the Indian child will result in serious emotional or physical damage.

Courts have also required a qualified expert witness to testify in support of a deviation from the placement preferences under § 1915(a) and (b) based upon the extraordinary emotional and physical needs of the child. *In re Baby Girl B.*, 2003 OK CIV APP 24, ¶¶ 56-61, 67 P.2d 359, 370.

14.2 Who may be qualified as an expert witness under this section?

The ICWA does not define the term, but the BIA Guidelines, although non-binding, list three types of experts who would be qualified under the Act. The Guidelines state:

> (b) [P]ersons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings: (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family or organization in childrearing practices. (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians and an extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe. (iii) A professional having substantial education and experience in the area of his or her specialty.

Indian Child Custody Proceedings, 44 Fed. Reg. 67,583, 67,593 (Nov. 26, 1979) (guidelines for state courts). Some states, for example Minnesota and Iowa, have enacted more stringent laws or guidelines that an individual must meet to qualify as an expert witness possessing expertise in Indian child-rearing practices. *See* MINN. DEP'T OF HUMAN SERVS., MINNESOTA SOCIAL SERVICES MANUAL, XIII-3586 (1999); IOWA CODE § 232B.10 (2000 & Supp. 2004).

14.3 What qualifications must a qualified expert witness possess?

A qualified expert witness must possess expertise beyond the normal social worker. Most courts have required all categories of expert witnesses to have knowledge of and experience with Indian culture "to provide the Court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias." *In re N.L.*, 754 P.2d 863, 867 (Okla. 1988). The term "expert" was intended to include those individuals capable of rendering an opinion on whether an Indian child is suffering emotional or physical harm because of the actions or inactions of the parents or caretaker. Indian family structure and child rearing customs or practices differ and the expert must be qualified with this knowledge. Also, the remedial active efforts to cure the behavior of the parents or caretaker may be different due to cultural differences; for example, where a child's symptoms of illness are being treated by a medicine man, rather than a doctor.

Some state courts have allowed a person to qualify as an expert under the third category in the BIA Guidelines listed above even if he or she has no knowledge of, or experience with, Indian culture. *See e.g., Rachelle S. v. Ariz. Dep't of Econ. Sec.*, 958 P.2d 459 (Ariz. Ct. App. 1998); *In re Tucker*, 710 P.2d 793 (Or. Ct. App. 1985). Those courts justify such holdings on the basis that the given case fails to implicate Indian culture, such as where mental illness is involved, a child was the victim of shaken-baby syndrome, a parent is subject to long-term incarceration, or a child suffered severe physical or sexual abuse where the perpetrator was one or both of the Indian parents. Active efforts to remedy the situation, however, may implicate cultural differences, especially when it is possible for a tribe or family to use traditional Indian ceremonies or other unique cultural means as part of the remedial plan. Such possibilities may be only disclosed if a qualified expert witness testifies. However, there is no provision in the ICWA that requires that Indian culture be implicated before the ICWA becomes applicable and to allow a state court to require a determination that tribal culture is implicated before the Act applies runs contrary to the very assumption underlying the ICWA that state courts are not qualified to make such determinations. 25 U.S.C. § 1901(5).

Practice Tip:
The practitioner should contact the tribe or other agencies to identify persons with knowledge about the cultural aspects of tribal life that may assist in determining whether a parent's or Indian custodian's continued custody of the Indian child will result in serious emotional or physical damage. Tribal personnel should offer assistance in identifying qualified personnel in this regard or who may qualify as expert witnesses. State court judges are encouraged to call the tribal judge to enlist help in securing an expert witness. Having stated that, the tribal court may find it difficult to assist or cooperate with the state proceedings if termination or foster care placement are being considered. However, it is these very issues that the court or tribe should be involved with and provide the requested assistance. In the end, the qualified expert witness should not be called to testify as to the legal meaning of the ICWA, which often occurs. Rather, the testimony should go to whether a parent's or Indian custodian's continued custody of the Indian child will result in serious
(continued on next page)

emotional or physical damage. The practitioner should note that in Minnesota there is an agreement between state and tribal courts on implementation of the ICWA.

14.4 How many experts are required?

Courts have held that a single qualified expert witness can establish the necessary proof. The use of the plural form "expert witnesses" in the ICWA has been held to mean a single qualified expert. *See, e.g., In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986); *In re Baby Boy Doe* (*Baby Boy Doe II*), 902 P.2d 477 (Idaho 1995). In specific cases, depending on complexity, more than one expert may be required.

14.5 Can the qualifications of an expert be challenged?

Yes. *In re M.E.M.*, 635 P.2d 1313 (Mont. 1981). Some courts, however, have held that ICWA does not preempt a state's error preservation rules, unless a party has not had an opportunity to object. A party must timely challenge or object to the qualifications of a purported expert witness or a failure to use a qualified expert witness in accordance with local rules. *In re R.L.F.*, 437 N.W.2d 599 (Iowa Ct. App. 1989).

On appeal, appellate courts often utilize a deferential standard, mostly abuse of discretion, in reviewing a trial court's finding that a person is qualified as an expert witness. *In re O.S.*, 2005 SD 86, 701 N.W.2d 421. This may be a question of law, and if so appellate review is governed by a de novo standard; i.e., an appellate court exercising plenary, independent and non-deferential authority when reviewing a trial court's legal ruling.

14.6 What is the effect of failing to use a qualified expert?

The failure to use an expert witness deprives a court of authority to find that the statutory ICWA burden in § 1912(e) and (f) has been met, and is grounds for a mandatory reversal under § 1914. *In re N.L.*, 754 P.2d 863 (Okla. 1988); *In re M.H.*, 2005 SD 4, 691 N.W.2d 622.

14.7 Does a state social worker qualify as an expert witness?

Yes. So long as the individual possesses expertise beyond the normal social worker qualifications, that is, knowledge of and experience with Indian culture, including Indian childrearing practices. *See, e.g., In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986).

Practice Tip:
Although not prohibited by the ICWA, an employee of the agency seeking foster care placement or termination of parental rights should not be utilized as an expert witness because of conflicts of interests.

14.8 Does a tribal social worker qualify as an expert witness?

Yes. So long as the individual possesses expertise beyond the normal social worker qualifications, that is, knowledge of and experience with Indian culture, including Indian childrearing practices. *In re Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245 (Ariz. Ct. App. 1991); *but cf. In re M.H.*, 2005 SD 4, 691 N.W.2d 622.

Practice Tip:
The practitioner should be aware that a qualified tribal social worker may be used by the state to show there is no need for a qualified expert witness under the ICWA because Indian culture is not implicated (see FAQ 14.3 above) by phrasing questions that can lead to the conclusion that the harmful actions or inactions of the parent(s) are not part of Indian culture. Indian culture should rarely, if ever, be offered as a defense to abuse or harmful actions of Indian parents. The practitioner should be aware that remedial measures to correct such action or inaction does implicate Indian culture which the tribal social worker, as a qualified expert witness, can testify about, especially where such knowledge and experience is critical to the outcome of the case.

14.9 Must expert witness testimony be based on direct personal contact with the relevant parties?

It depends on the jurisdiction where the proceeding occurs. Depending on the circumstances, an expert may testify based solely on the reading of personal files without personal interviews, or more, as a Montana Court found. *In re A.N.*, 2005 MT 19, 325 Mont. 379, 106 P.3d 556.

Practice Tip:
Consider the use of telephonic testimony by an expert witness, especially if the expert is based on an Indian reservation or resources limit physical participation in a proceeding. Any party seeking to utilize the use of telephonic testimony should seek permission of the court prior to the proceeding.

14.10 How is expert testimony used in cases involving ICWA and the state law burden of proof?

Some states apply a dual burden of proof. In a foster care placement, the court will use the applicable state burden of proof to determine if the state factors have been met to place the Indian child in foster care. Then, under § 1912(e), it will use the higher ICWA "clear and convincing" burden of proof to determine whether "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." Among other things, the BIA ICWA Guidelines make it clear that socio-economic conditions are not to be considered. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (Nov. 26, 1979) (guidelines for state courts).

In a termination of parental rights proceeding, the court will use the applicable state burden of proof to determine if the state factors have been met to terminate the parental rights to an Indian child. Then, under § 1912(f), it will use the higher ICWA "beyond a reasonable doubt" burden of proof to determine whether "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."

In those states where a dual burden of proof is not used, the court will use only the ICWA burden of proof in either type of proceeding.

States following dual burden of proof; § 1912(e); Foster Care

California, *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996)
New York, *In re Oscar C., Jr.* (*Oscar II*), 600 N.Y.S.2d 957 (App. Div. 1993)
Washington, *In re Mahaney*, 51 P.3d 776 (Wash. 2002).

State following only ICWA burden of proof; § 1912(e); Foster Care

Oklahoma, *Uniform Jury Instructions*, 2005 OK 12, 116 P.3d 119 (juvenile cases).

States following dual burden of proof; § 1912(f); Termination of Parental Rights

Alaska, *C.J. v. State*, 18 P.3d 1214 (Alaska 2001)
California, *In re Matthew Z.*, 95 Cal. Rptr. 2d 343 (Ct. App. 2000) (certified for partial publication).
Kansas, *In re A.P.*, 961 P.2d 706 (Kan. Ct. App. 1998)
Maine, *In re Denice F.*, 658 A.2d 1070 (Me. 1995)
Michigan, *In re Dougherty*, 599 N.W.2d 772 (Mich. Ct. App. 1999)
North Carolina, *In re Williams*, 563 S.E.2d 202 (N.C. Ct. App. 2002)
North Dakota, *In re M.S.*, 2001 ND 68, 624 N.W.2d 678
South Dakota, *In re N.S.*, 474 N.W.2d 96 (S.D. 1991)
Utah, *In re S.A.E.*, 912 P.2d 1002 (Utah Ct. App. 1996)
Washington, *In re Roberts*, 732 P.2d 528 (Wash. Ct. App. 1987)
Wisconsin, *In re Daniel R.S.*, 2005 WI 160, 286 Wis. 2d 278, 706 N.W.2d 269.

States following only ICWA burden of proof; § 1912(f); Termination of Parental Rights

Nebraska, NEB. REV. STAT. § 43-1505(5)-(6) (1987)
New Mexico, *In re Laurie R.*, 760 P.2d 1295 (N.M. Ct. App. 1988)
Oklahoma, *Uniform Jury Instructions*, 2005 OK 12, 116 P.3d 119 (juvenile cases)
Texas, *In re W.D.H., III*, 43 S.W.3d 30 (Tex. App. 2001).

Practice Tip:
If the ICWA burden has not been met, even where a court uses a dual burden of proof and only the state burden is met, the petition for placement in foster care or termination of parental rights must be denied.

14.11 How can one locate an expert witness?

The best resource is the tribe involved in the child custody proceeding because it will generally have the personnel or know of tribal members who can speak to the issue of tribal-specific social and cultural norms and practices, including family organization and tribal childrearing practices. *In re O.S.*, 2005 SD 86, 701 N.W.2d 421. Another resource is the Bureau of Indian Affairs' (BIA) case worker or social worker. They frequently work in tandem with local tribal ICWA programs or tribal social services departments. In addition, the list of BIA and tribal and urban organizations, provided in the Resource Section of this Guide, is a useful starting point to identify an expert because an organization may have a referral system leading to an expert. It includes national Indian organizations and urban Indian organizations. In addition, a practitioner should consider social workers employed by Indian Health Services hospitals or clinics, treatment facilities and Native American Rehabilitation Association clinics. Lastly, tribal courts can also help locate an expert witness.

**** Access to the full-text of opinions and additional materials is at 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

Alabama
Long v. State, 527 So. 2d 133 (Ala. Civ. App. 1988)
S.H. v. Calhoun County Dep't of Human Res., 798 So. 2d 684 (Ala. Civ. App. 2001)

Alaska
A.B.M. v. M.H., 651 P.2d 1170 (Alaska 1982)
C.J. v. State, 18 P.3d 1214 (Alaska 2001)
D.A.W. v. State, 699 P.2d 340 (Alaska 1985)
D.H. v. State, 929 P.2d 650 (Alaska 1996)
D.J. v. P.C., 36 P.3d 663 (Alaska 2001)
E.A. v. State, 46 P.3d 986 (Alaska 2002)
E.M. v. State, 959 P.2d 766 (Alaska 1998)
J.A. v. State, 50 P.3d 395 (Alaska 2002)
J.J. v. State, 38 P.3d 7 (Alaska 2001)
In re J.R.B., 715 P.2d 1170 (Alaska 1986)
J.S. v. State, 50 P.3d 388 (Alaska 2002)
Jordan v. Jordan, 983 P.2d 1258 (Alaska 1999)
K.N. v. State, 856 P.2d 468 (Alaska 1993)
L.G. v. State, 14 P.3d 946 (Alaska 2000)
State v. M.L.L., 61 P.3d 438 (Alaska 2002)
In re T.O., 759 P.2d 1308 (Alaska 1988)
V.S.B. v. State, 45 P.3d 1198 (Alaska 2002)

Arizona
In re Maricopa County Juvenile Action No. JS-8287, 828 P.2d 1245 (Ariz. Ct. App. 1991)
Rachelle S. v. Ariz. Dep't of Econ. Sec., 958 P.2d 459 (Ariz. Ct. App. 1998)

Arkansas
Burks v. Ark. Dep't of Human Servs., 61 S.W.3d 184 (Ark. Ct. App. 2001)

California
In re Bridget R., 49 Cal. Rptr. 2d 507 (Ct. App. 1996)
In re Crystal K., 276 Cal. Rptr. 619 (Ct. App. 1990)
In re Hannah S., 48 Cal. Rptr. 3d 605 (Ct. App. 2006)
In re Kyrstle D., 37 Cal. Rptr. 2d 132 (Ct. App. 1994)
In re Matthew Z., 95 Cal. Rptr. 2d 343 (Ct. App. 2000) (certified for partial publication)
In re Riva M., 286 Cal. Rptr. 592 (Ct. App. 1991)

Colorado
In re A.N.W., 976 P.2d 365 (Colo. Ct. App. 1999)
In re C.A.J., 709 P.2d 604 (Colo. Ct. App. 1985)
In re K.D., 155 P.3d 634 (Colo. Ct. App. 2007)
In re R.L., 961 P.2d 606 (Colo. Ct. App. 1998)

Connecticut
In re Jessica T., 1993 WL 566662 (Conn. Super. Ct. Dec. 20, 1993)

Idaho
In re Baby Boy Doe (*Baby Boy Doe II*), 902 P.2d 477 (Idaho 1995)

Indiana
In re D.S., 577 N.E.2d 572 (Ind. 1991)
In re T.R.M., 525 N.E.2d 298 (Ind. 1988)

Iowa
In re J.D.B., 584 N.W.2d 577 (Iowa Ct. App. 1998)
In re J.W., 528 N.W.2d 657 (Iowa Ct. App. 1995)
In re J.Y., 670 N.W.2d 433 (Iowa Ct. App. 2003) (unpublished table decision) *available at* No. 03-0983, 2003 WL 22017245 (Iowa Ct. App. Aug. 27, 2003)
In re L.N.W., 457 N.W.2d 17 (Iowa Ct. App. 1990)
In re R.L.F., 437 N.W.2d 599 (Iowa Ct. App. 1989)
In re S.M., 508 N.W.2d 732 (Iowa Ct. App. 1993)

Kansas
In re A.P., 961 P.2d 706 (Kan. Ct. App. 1998)
In re H.A.M., 961 P.2d 716 (Kan. Ct. App. 1998)
In re J.J.G., 83 P.3d 1264 (Kan. Ct. App. 2004)
In re S.M.H., 103 P.3d 976 (Kan. Ct. App. 2005)

Kentucky
D.W.H. v. Cabinet for Human Res., 706 S.W.2d 840 (Ky. Ct. App. 1986)

Maine
In re Denice F., 658 A.2d 1070 (Me. 1995)

Michigan
In re Dougherty, 599 N.W.2d 772 (Mich. Ct. App. 1999)
In re Elliott, 554 N.W.2d 32 (Mich. Ct. App. 1996)
In re Kreft, 384 N.W.2d 843 (Mich. Ct. App. 1986)
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Minnesota
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In re J.B., 698 N.W.2d 160 (Minn. Ct. App. 2005)
In re M.S.S., 465 N.W.2d 412 (Minn. Ct. App. 1991)
In re R.I., 402 N.W.2d 173 (Minn. Ct. App. 1987)
In re R.M.M., 316 N.W.2d 538 (Minn. 1982)
In re S.E.G. (*S.E.G. II*), 521 N.W.2d 357 (Minn. 1994)
In re S.W., 727 N.W.2d 144 (Minn. Ct. App. 2007)
In re T.J.J., 366 N.W.2d 651 (Minn. Ct. App. 1985)

Missouri
C.E.H. v. L.M.W., 837 S.W.2d 947 (Mo. Ct. App. 1992)

Montana
In re A.N., 2005 MT 19, 325 Mont. 379, 106 P.3d 556
In re C.H., 2003 MT 308, 318 Mont. 208, 79 P.3d 822
In re H.M.O., 1998 MT 175, 289 Mont. 509, 962 P.2d 1191
In re K.H., 1999 MT 128, 294 Mont. 466, 981 P.2d 1190
In re K.S., 2003 MT 212, 317 Mont. 88, 75 P.3d 325
In re L.F., 880 P.2d 1365 (Mont. 1994)
In re M.E.M., 635 P.2d 1313 (Mont. 1981)

In re M.P.M., 1999 MT 78, 294 Mont. 87, 976 P.2d 988
In re M.R.G., 2004 MT 172, 322 Mont. 60, 97 P.3d 1085
In re M.R.G., 2003 MT 60, 314 Mont. 396, 66 P.3d 312
In re S.C., 2005 MT 241, 328 Mont. 476, 121 P.3d 552
In re S.R., 2004 MT 227, 322 Mont. 424, 97 P.3d 559
In re T.S., 801 P.2d 77 (Mont. 1990)
In re T.W., 2003 MT 197N, 317 Mont. 530, 77 P.3d 553 (unpublished table decision) *available at* No. 03-055, 2003 WL 21792302 (Mont. Aug. 5, 2003)

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In re C.W., 479 N.W.2d 105 (Neb. 1992)
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In re Phoebe S., 664 N.W.2d 470 (Neb. Ct. App. 2003)

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In re Laurie R., 760 P.2d 1295 (N.M. Ct. App. 1988)

New York
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North Carolina
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North Dakota
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Oregon
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In re Cooke, 744 P.2d 596 (Or. Ct. App. 1987)
In re Davis, 857 P.2d 888 (Or. Ct. App. 1993)
In re Lucas, 33 P.3d 1001 (Or. Ct. App. 2001)
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In re K.A.B.E., 325 N.W.2d 840 (S.D. 1982)
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In re N.S., 474 N.W.2d 96 (S.D. 1991)
In re O.S., 2005 SD 86, 701 N.W.2d 421
In re S.D., 402 N.W.2d 346 (S.D. 1987)
In re S.R., 323 N.W.2d 885 (S.D. 1982)
In re T.I., 2005 SD 125, 707 N.W.2d 826

Texas
Doty-Jabbaar v. Dallas County Child Protective Servs., 19 S.W.3d 870 (Tex. App. 2000)
In re W.D.H., III, 43 S.W.3d 30 (Tex. App. 2001)

Utah
In re D.A.C., 933 P.2d 993 (Utah Ct. App. 1997)
In re F.M., 2002 UT App 340, 57 P.3d 1130
In re S.A.E., 912 P.2d 1002 (Utah Ct. App.1996)

Washington
In re Fisher, 643 P.2d 887 (Wash. Ct. App. 1982)
In re Mahaney, 51 P.3d 776 (Wash. 2002)
In re Roberts, 732 P.2d 528 (Wash. Ct. App. 1987)

Wisconsin
In re D.S.P., 480 N.W.2d 234 (Wis. 1992)
In re Daniel R.S., 2005 WI 160, 286 Wis. 2d 278, 706 N.W.2d 269

15. ACCESS TO RECORDS FOR TRIBAL ENROLLMENT PURPOSES

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.

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.

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Frequently Asked Questions

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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

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 ****

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).

16. PLACEMENT

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25 U.S.C. § 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

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

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this Section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

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.

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Frequently Asked Questions

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16.1 What are the preferred foster and adoptive placements?

The policy section of the Indian Child Welfare Act (ICWA), § 1902, states that one of the primary purposes of the ICWA is to ensure the placement of Indian children "in foster and adoptive homes which will reflect the unique values of Indian culture." Legislative history to § 1915 states that the section seeks "to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." H.R. REP. NO. 95-1386, at 23 (1978). Section 1915 reflects this purpose by establishing an order of preference for foster and adoptive placement of an Indian child.
Section 1915(a) establishes the following order of preference for adoptive placement of an Indian child:

> (1) A member of the Indian child's extended family;
>
> (2) Other members of the Indian child's tribe; or
>
> (3) Other Indian families.

Section 1915(b) establishes the following order of preference for foster care placement of an Indian child:

> (1) A member of the Indian child's extended family;
>
> (2) A foster home licensed, approved, or specified by the Indian child's tribe;
>
> (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (4) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

There are additional preferences that apply to foster placements of an Indian child. The child must be placed in the least restrictive setting which most approximates a family and in which the child's special needs, if any, can be met. The Indian child must also be placed within reasonable proximity to his or her home, taking into account any special needs of the child.

Practice Tip:
In most instances, Indian children should be placed in relative foster care or adoptive homes if Title IV-E funds are supporting the placement. Even for a child who does not meet the definition of an Indian child under ICWA, Title IV-E requires states to first look to relatives for foster care and adoptive placements for children. See also FAQ 19 Application of Other Federal Laws. The practitioner should be aware that placement with relatives satisfies the permanency requirements of the Adoption and Safe Families Act of 1997 (ASFA), 42 U.S.C. §§ 673b, 678, 679b (2000), and constitutes good cause not to proceed with termination of parental rights.

16.2 How is extended family defined?

The ICWA defines "extended family member" for purposes of the Act as "defined by the law or custom of the Indian child's tribe." 25 U.S.C. § 1903(2). In the absence of a tribal law definition, the ICWA defines extended family member as "a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent." If a tribal law definition exists in writing, a copy may be submitted to an appropriate state agency or court as a public record of the tribe entitled to full faith and credit under § 1911(d), so long as the copy is prepared to conform with state evidence requirements for self-authentication.

The term extended family member under the ICWA applies primarily to the selection of appropriate placements for Indian children pursuant to the placement preferences of § 1915. The definition of extended family member under the ICWA includes both Indian and non-Indian relatives. Some tribal laws express a preference for extended family members who are members of the tribe.

16.3 How are non-Indians in general and non-Indian family members involved in placement?

The ICWA treats non-Indian parents and extended family members the same as Indian family members, with regard to placement preferences, although a family member's ability to foster or maintain an Indian child's connection to his or her tribe or culture is an appropriate factor to consider in determining placement of the child.

The ICWA does not absolutely prohibit placement of an Indian child in a non-Indian home, although there is a strong preference for placement in an Indian home. Legislative history to § 1915 states that where possible, an Indian child should remain in the Indian community, but the section "is not to be read as precluding the placement of an Indian child with a non-Indian family." H.R. REP. NO. 95-1386, at 23 (1978). Placement in a non-Indian, non-extended family member home can occur under three circumstances. First, if the tribe has licensed the non-Indian home, that home is entitled to a preference for a foster or pre-adoptive placement. Second, placement of an Indian child with a non-Indian family can occur after a diligent search has been completed for families meeting the preference criteria and no suitable homes are available. Third, placement of an Indian child in a non-Indian family can occur if good cause not to follow the placement preferences of § 1915 is established to the satisfaction of the court, and pursuant to the ICWA.

16.4 What is good cause not to follow the Act's preferences?

Section 1915 of the ICWA states for both adoptive (§ 1915(a)) and foster care (§ 1915(b)) placements that the listed preferences shall be given with regard to the placement of an Indian child "in the absence of good cause to the contrary." This term is not defined in the ICWA. In legislative history to an earlier draft of the bill that became the ICWA, the Senate Committee on Indian Affairs stated that the term "good cause for refusal" was designed to provide state courts with a degree of flexibility in determining the disposition of a placement proceeding involving an Indian child. S. REP. NO. 95-597, at 17 (1977). The Bureau of Indian Affairs (BIA) Guidelines cite this legislative history in interpreting good cause as set forth in § 1915. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) (guidelines for state courts).

The burden of proof for showing good cause not to follow the ICWA's placement preferences is on the

party who is opposing compliance with the preferences. Indian Child Custody Proceedings, 44 Fed. Reg. at 67,594. This burden must be met by clear and convincing evidence. *In re S.E.G.*, 507 N.W.2d 872, 878 (Minn. Ct. App. 1993), *rev'd on other grounds*, 521 N.W.2d 357 (Minn. 1994). The BIA Guidelines state that the state courts must follow strict procedures and meet stringent requirements to justify any result contrary to § 1915's placement preferences. Indian Child Custody Proceedings, 44 Fed. Reg. at 67,586.

The BIA Guidelines set out a list of three factors that may, either singly or together, constitute good cause not to follow the placement preferences in appropriate cases. *Id.* at 67,594.

These three factors are:

(1) The request of the biological parents or the child when the child is of sufficient age;

(2) The extraordinary physical or emotional needs of the child as established by testimony of qualified expert witnesses; or

(3) The unavailability of suitable homes that meet the preference criteria.

Parental preference is discussed in response to another question in this section. The BIA Guidelines state that the wishes of an "older child" are important in making an effective placement. Regarding extraordinary physical or emotional needs, the BIA Guidelines state that "in a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live." Extraordinary emotional or physical needs must be established by a qualified expert witness. *S.E.G. I*, 507 N.W.2d 872. The unavailability of suitable homes is addressed in response to another question in this section.

Some state courts have applied criteria other than those listed by the BIA as good cause not to follow the placement preferences of the ICWA. *In re F.H.*, 851 P.2d 1361 (Alaska 1993). Other state courts have rejected these same factors, such as bonding, as inappropriate factors to constitute good cause under the ICWA. *S.E.G. I*, 507 N.W.2d 872. There has been a tendency to attempt to expand the category of extraordinary physical or emotional needs to include a much broader range of physical or emotional circumstances than the narrow category contemplated by the BIA in its Guidelines. *See, e.g., Seminole Tribe of Fla. v. Dep't of Children & Families*, 959 So. 2d 761 (Fla. Dist. Ct. App. 2007); *In re F.H.*, 851 P.2d 1361; *In re B.G.J.*, 111 P.3d 651, 659 (Kan. Ct. App. 2005), *aff'd*, 133 P.3d 1 (Kan. 2006). Good cause is one of the main areas of continuing litigation under the ICWA, and there is continuing development in the law.

16.5 Can a tribe alter the order of placement preference, and if so, how is this accomplished?

Yes. Section 1915(c) of the ICWA allows an Indian tribe to establish a different order of placement preference for foster care placements and adoptive placements than those set out in § 1915(a) and (b). The tribe effects this change in placement preference order by resolution. When the tribal resolution is received by the agency or court effecting the placement of an Indian child, the agency or court shall follow the changed order of preference so long as the placement is the least restrictive setting appropriate to the particular needs of the child as provided in § 1915(b). Tribal input on placements of tribal children can also be the subject of a state-tribal child welfare agreement pursuant to § 1919 of the ICWA.

Many tribes have established an order of preference for placement of tribal children in their juvenile or family law codes. Since these codes are enacted by resolution of the tribal governing body and are public acts of the tribe, they may satisfy the requirements of this section, but see the practice tip below.

In many ICWA cases, a tribe will advocate a specific tribal placement for an Indian child who is the subject of a state child custody proceeding. The tribe has the most chance of success if it has selected a home that is interested in the specific child, is qualified to meet any special needs the child may have, and the tribe has performed a home study, and references support the home.

Practice Tip:
For tribes that intend to alter ICWA's placement preferences, it is important that the tribal governing body enact a tribal resolution or code explicitly referring to the ICWA placement preferences in state court proceedings in compliance with § 1915(c).

16.6 How does recruitment of Indian families play into placement?

Recruitment of Indian foster and adoptive families is perhaps the most critical component necessary to

implement the ICWA. If foster and adoptive families meeting the ICWA's placement preferences are not available, the ICWA's intent to maintain Indian children within their tribal culture and community cannot be fulfilled. Indian children can be placed outside the preference order of the ICWA only after a diligent search to find suitable homes meeting the preference criteria has been completed, and has been unsuccessful. The BIA Guidelines state that a diligent search to find a suitable family should include at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes, and contact with nationally known Indian programs with available placement resources. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,595 (Nov. 26, 1979) (guidelines for state courts).

The primary problem with finding suitable Indian foster and adoptive homes is recruitment and funding. Grant money under Part II of the ICWA, §§ 1931-34, can be used by tribes for foster care and adoptive home recruitment. States must be continually aware of their responsibility to recruit Indian homes, and tribes must assist and encourage states to seek Indian foster and adoptive homes. Active recruitment and retention efforts are necessary because of Indian peoples' historical suspicion of involvement with state social services' agencies. The tribes and states should identify federal funding that can be used to recruit Indian homes. Some states have special funds available to assist recruitment of Indian homes.

Practice Tip:
The Multi-Ethnic Placement Act (MEPA), 42 U.S.C. §§ 622, 1996b (2000), places federal requirements on states to recruit a diverse pool of foster and adoptive homes that reflect the diversity of children in substitute care. See also FAQ 19.11 and 19.12, Application of Other Federal Laws.

States should be actively involved with tribes and urban Indian organizations to increase the pool of foster and adoptive homes for the placement of Indian children. Mainstream methods of recruiting Indian homes are rarely successful, necessitating the engagement of tribal governments and Indian urban organizations.

16.7 Does the Removal of Barriers to Inter-Ethnic Adoption provision in Title IV-E affect ICWA placements?

No. The provisions under this law, that were formerly under the Multi-Ethnic Placement Act (MEPA), 42 U.S.C. §§ 622, 1996b (2000), bar the delay or denial of placements based upon race. This law expressly exempts ICWA placements from its coverage. 42 U.S.C. § 674(d)(4) (2000). See also FAQ 19.11 and 19.12, Application of Other Federal Laws.

16.8 How do tribal values apply to placement?

One of the primary purposes of the ICWA is to foster or maintain the connections between an Indian child and his or her community, tribe and culture. This purpose is achieved by placing an Indian child who requires placement within his or her tribal community. Tribal values apply to placement since placement within the tribe or tribal community by definition fulfills the purposes of the ICWA. Legislative history of the ICWA documented the failure of state social services' agencies and state courts to view tribal values and conditions as legitimate, and concluded that many removals of Indian children and placement of those children in non-Indian homes occurred for inappropriate reasons.

Congress, in enacting the ICWA, declared that complying with the Act's provisions is in the best interests of the Indian child. Since the ICWA incorporates tribal values throughout its text—in preference for tribal court jurisdiction over Indian children, in granting preference to tribal policy decisions about placement preferences for Indian children, in defining adequate tribal courts according to tribal values—Congress in essence declared that complying with tribal values with regard to Indian children is in those children's best interests.

Practice Tip:
One of the many ways that tribes incorporate tribal values into placements is through use of customary adoptions. These adoptions do not entail the termination of parental rights. They have also been approved for federal subsidies under Title IV-E.

16.9 How do socio-economic conditions factor into placement?

The ICWA states that the standards to be applied in meeting the preference requirements of § 1915 of the ICWA "shall be the prevailing cultural standards of

the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." This standard displaces state regulations and requirements about what constitutes an adequate placement, for example, with regard to the physical condition of the structure where the child will be placed or how many people live in the home. It also displaces non-Indian perceptions about the propriety of the involvement of extended family members in raising an Indian child. Legislative history of the ICWA notes that under tribal custom and tradition, members of the Indian child's extended family have definite responsibilities and duties in assisting in child-rearing, but that many non-Indian institutions look at custody of an Indian child by extended family members as prima facie evidence of parental neglect. H.R. REP. NO. 95-1386, at 10 (1978). Under ICWA case law, a state agency cannot refuse to approve placement of an Indian child within the tribal community because of preconceived notions about whether conditions within the tribal community are adequate. *In re M.E.M.*, 635 P.2d 1313 (Mont. 1981). If the tribal social services agency approves a specific placement, that should end the inquiry about the physical adequacy of the home.

16.10 What happens when a placement is changed?

The ICWA is involved whenever the placement of an Indian child is changed. Change of placement is covered by § 1916 of the ICWA. Whenever an Indian child is removed from a foster care placement for the purpose of further foster care or an adoptive placement, such placement shall be in accordance with the placement preference and other provisions of ICWA, unless the child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

If a final decree of adoption of an Indian child is vacated or set aside, or the adoptive parents voluntarily consent to termination of their parental rights to that child, a biological parent or Indian custodian whose parental rights have previously been terminated may petition for return of custody and the court shall grant such petition unless there is a showing, subject to the provisions of § 1912 of the ICWA, that return of custody would not be in the best interests of the child.

16.11 What if a parent objects to a particular placement?

The question that must be decided when the parent of an Indian child objects to a specific placement of an Indian child, say with a home that qualifies under the placement preferences, is whether such objection is appropriate in light of the ICWA's intent to maintain or foster the child's connection to his or her tribal culture.

16.12 What is the legal significance of a parent expressing a preference for a particular placement or requesting anonymity?

Section 1915(c) of the ICWA provides that, "where appropriate," the preference of the Indian child or parent shall be considered in deciding a placement under § 1915(a) or (b). Legislative history of the ICWA states that parental preference should be given weight. The BIA Guidelines state that parental preference may constitute good cause to deviate from the placement preferences under ICWA.

When the bill was pending before Congress, the BIA recommended that a parental preference for a specific placement of an Indian child should control over all other considerations. Congress did not accept the BIA's recommendation on this issue.

Case law gives varying weight to the request of parents who object to a particular placement. *Compare In re Baby Boy Doe* (*Baby Boy Doe II*), 902 P.2d 477 (Idaho 1995) *with In re Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993). There is some authority that holds that when the tribe has modified the placement preference order under the ICWA or supports a specific placement, the tribe's decision should control. *See In re Child of Indian Heritage* (*Indian Child II*), 543 A.2d 925, 932 (N.J. 1988).

The ICWA allows a parent who is consenting to the placement of his or her child to request anonymity with regard to that placement. 25 U.S.C. § 1915(c) states that the court or agency shall give weight to a desire for anonymity in apply the Act's placement preferences. Legislative history to this section states that while the court or agency should give weight to a parent's desire for anonymity, that desire "is not meant to outweigh the basic right of the child as an Indian." H.R. REP. NO. 95-1386, at 24 (1978). The BIA Guidelines seem to state that when a parent requests anonymity the tribe and extended family members are not entitled to notice. However, this does not relieve the state court from the obligation to comply with the placement preferences

under ICWA. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594 (Nov. 26, 1979) (guidelines for state courts).

The hardest case is when the parent of an Indian child selects a non-Indian family as the permanent placement for that child and states that he or she does not want their child raised in an Indian environment, and the tribe has selected a home for that child that falls within the placement preferences of the ICWA. The court must balance the parent's request against the child's right to grow up as an Indian, the tribe's right to have the child grow up as a member of the tribal community, any qualified relative's right to placement preference, and any potential mitigating factors such as a non-qualifying family's willingness to educate the Indian child about his or her culture and to participate in tribal activities. The case law is fact-specific on this issue.

16.13 What happens when a placement is changed from a temporary to a permanent placement?

When a placement is changed, § 1916(b) requires that the provisions of the ICWA, including notice, be followed in making the change of placement. This is easy to do when an Indian child is physically moved to another home when a temporary placement is changed to a permanent placement. It is less clear when a foster placement for an Indian child is later selected as the permanent placement for the child.

Other provisions of the ICWA, taken as a whole, require that any placement that is changed from a temporary to a permanent placement, whether the Indian child is physically moved or not, be treated as a new proceeding or phase of a case under the ICWA, triggering compliance with all applicable provisions of the Act. For example, when a state decides to move from foster care to a termination of parental rights proceeding, new notice must be sent to the Indian child's tribe pursuant to § 1912(a) of the ICWA. An Alaska case held that allowing foster parents to move across the country with an Indian child was de facto termination of parental rights, requiring compliance with permanency provisions of the ICWA. *D.H. v. State*, 723 P.2d 1274, 1276 (Alaska 1986).

16.14 How does tribal licensing approval apply to placement?

The foster care placement preferences of the ICWA at § 1915(b) grant a preference for foster homes licensed, approved or specified by the Indian child's tribe. If the Indian child's tribe has licensed, approved or specified a foster home for an Indian child, the Indian child must be placed in that home unless the state court determines that good cause exists not to do so.

Part II of the ICWA at § 1931(b) also ratifies the acceptability of tribal foster homes by stating that "for purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State." This language means, for example, that a tribally-licensed foster home qualifies for Title IV-E funding that is allocated to states by the federal government, if the state places the child directly in the tribally-licensed home or the tribe and state have a Title IV-E Agreement between them or a state-tribal § 1919 agreement.

Many Indian tribes also license or approve adoptive homes for tribal children. Under the ICWA, an Indian child must be placed in such a home unless the state court determines that good cause exists not to comply with the ICWA's preference criteria. See also FAQ 16.4.

Practice Tip:
When tribes and states enter into an intergovernmental agreement, the state may want the tribe to follow state licensing standards, but this is not required by federal law. A majority of the agreements recognize the use of tribal licensing standards provided they do not conflict with federal law.

16.15 What about a placement inconsistent with the ICWA placement preferences?

Two separate fact situations are raised by this question. Difficulties arise because the ICWA does not expressly provide for invalidation of a placement of an Indian child that has taken place in violation of the ICWA. *See* 25 U.S.C. § 1914. In a number of states, the ICWA has been enacted into state law, and state law may provide separate authority for invalidation of an placement inconsistent with the ICWA.

If an Indian child has been placed by a state agency or a state-licensed private agency in a placement inconsistent with the ICWA, the state court should be petitioned to revoke such placement and change the placement to one conforming to the placement preferences of the ICWA. The state court is required

to comply with the ICWA, and an inconsistent placement could be overturned by a state appellate court for violating the Act if a determination of good cause to avoid the placement preferences had not been made.

Section 1920 of the ICWA may also provide some assistance when an action is filed by the party who gained or kept custody of Indian child in violation of the law. If the unauthorized custodian petitions the state court for ratification of his or her custodial arrangement, the tribe has the right to intervene in that proceeding under § 1911(c) and can ask the court under § 1920 to decline jurisdiction and to place the child as recommended by the tribe—either back with the parent or Indian custodian from whose custody the child was removed, or in a placement that conforms with § 1915's preference order along with initiation of a proper ICWA child custody proceeding.

16.16 How do interstate compacts affect placement?

See FAQ 19.14, Application of Other Federal Laws, for an answer.

16.17 How does the Adoption and Safe Families Act of 1997 affect placement?

The Adoption and Safe Families Act of 1997 (ASFA), 42 U.S.C. §§ 673b, 678, 679b (2000), was enacted to facilitate the permanent placement and safety of children in foster care. Every state has enacted ASFA into its children's codes as a condition of receiving federal foster care funds. While at least two state supreme courts have now ruled that ASFA does not override the ICWA and that the states must comply with both ASFA and the ICWA, ASFA adds a layer of complexity to placement of an Indian child under the ICWA. *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611; *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007).

ASFA may affect the placement of an Indian child in one of three ways. First, ASFA moves children in foster care toward permanency placement on a faster schedule than previously existed. ASFA requires that a state court conduct a permanency hearing for a child within twelve months after the child enters foster care. ASFA also requires that the state conduct concurrent permanency planning even before that time. These requirements mean that an Indian child in the state court system is going to be moved toward permanent placement fairly quickly, in order to satisfy federal requirements. The time period that parents have to reform their conduct and obtain reunification with their child is shortened. A tribe must start planning for a permanent placement for an Indian child soon after the child enters foster care. It is important for the tribe to seek and obtain a permanent placement alternative for the child that conforms with the ICWA's placement preferences, or the state will be forced by ASFA requirements to start considering non-conforming placement options.

Second, ASFA restricts placement options by imposing licensing restrictions on placements for a child. All placement options, including relatives, must meet the same licensing requirements, while before ASFA, relative placements were not required to meet all aspects of the state's licensing scheme. Most importantly, potential custodians must now pass a criminal background check, and are disqualified if they have been convicted of any of a broad list of crimes. These requirements have the potential to disqualify many potential preference placements under the ICWA. Each state is required to establish its own licensing scheme and requirements under ASFA, and state regulations and statutes must be consulted to ensure that a potential placement under the ICWA will qualify under ASFA restrictions. It is not entirely certain how the ICWA's statement that tribal licensing shall be deemed equivalent to state licensing or approval for purposes of qualifying for assistance under a federally assisted program meshes with ASFA's strict disqualification requirements for homes that do not meet the statutory and regulatory criteria.

The third interaction between ICWA and ASFA reinforces the policies of the ICWA. ASFA requires that the state proceed with termination of parental rights of a foster child within a stated period of time, unless a compelling reason exists. Placement of a child with a relative is such a compelling reason under ASFA that excuses having to proceed with termination of parental rights. Compliance with the placement preferences of § 1915 of the ICWA therefore satisfies the permanency requirements of ASFA.

One option for responding to ASFA issues is to transfer the proceeding to tribal court. ASFA does not apply to Indian tribes, only to states. If a proceeding is transferred to tribal court, the tribal court does not have to follow the strict termination of parental rights time line imposed by ASFA. In addition, Indian tribes are not subject to the licensing restrictions of ASFA, as enacted by each state, so an Indian child can be placed in a home that might otherwise be disqualified under state law, for example because of a

criminal violation committed while a juvenile. Be aware, however, that if the tribe contracts with the state pursuant to Title IV-E for foster care funding for tribal foster homes, those homes must meet state requirements, including qualifying for licensing under ASFA.

16.18 What happens if a party challenges placement?

If placement of an Indian child is contested, the state court must hold a good cause hearing to determine whether good cause exists to avoid the placement preferences of the ICWA. *See In re M.*, 832 P.2d 518 (Wash. Ct. App. 1992); Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979) (guidelines for state courts). The burden of proof is on the party urging that an exception to the placement preferences is necessary, since Congress has established a clear preference for placements within the tribal culture. Indian Child Custody Proceedings, 44 Fed. Reg. at 67,595. The burden must be met by clear and convincing evidence. *In re S.E.G.*, 507 N.W.2d 872, 878 (Minn. Ct. App. 1993), *rev'd on other grounds*, 521 N.W.2d 357 (Minn. 1994). An expert witness is required to support a deviation from the placement preferences, specifically if good cause is asserted based on the extraordinary emotional or physical needs of an Indian child.

Under § 1920, if a custodian who is contesting a change of placement improperly obtains or retains custody of an Indian child and petitions the court for custody, the court shall dismiss the proceeding and return the child to the custody of the parent or Indian custodian.

16.19 How can one advocate for an exemption for a past-criminal history for relative placement?

ASFA requirements enacted by each state require disqualification of potential placement options for listed reasons, including a long list of criminal law violations. Each state must enact its own foster care licensing process that conforms to ASFA. Indian tribes are supposed to be consulted under federal regulations as part of this state regulatory process. The waiver process varies from state-to-state, although statutory requirements imposed by the federal ASFA statute cannot be waived or avoided by a state. The tribe must advocate for an exemption for a past-criminal history for a relative placement with the state agency process. In addition, the tribe can negotiate for a more liberal waiver process as part of an inter-governmental agreement with the state where the tribe is located. Finally, if jurisdiction is transferred to tribal court and Title IV-E is not implicated with regard to the potential placement, the tribe is free to establish its own licensing criteria and process that would allow relative placement despite potential criminal law issues.

16.20 Can voluntary adoption take place in tribal court?

The answer to this question is dependent upon the law of each tribe. Some tribes do not believe in adoption under any circumstances and do not provide for adoption in tribal law. Other tribes have adoption ordinances that mirror state adoption laws. Some tribes have laws that permit adoption of tribal children, but only by tribal members or perhaps other Indians. The law of each tribe must be reviewed to determine the answer to this question.

In some cases, the permanent placement of an Indian child who is the subject of a state child custody proceeding can be facilitated by transferring the case to tribal court. Tribes and tribal courts are not subject to the ICWA unless the tribe in question has incorporated the ICWA into tribal law.

16.21 Can non-Indians adopt in tribal court?

The answer to this question depends on the law of each tribe. Some tribes do not permit adoption under any circumstances. Some tribes' laws permit adoption only by tribal members or by Indian families. Some tribal laws permit adoption by any family, under specified conditions and procedures. The law of the tribe in question must be reviewed to determine the answer to this question.

16.22 Does ICWA apply to guardianships?

Yes. The ICWA includes guardianship under the definition of foster care at § 1903(1)(i). Guardianships are included under the ICWA and require compliance with ICWA provisions.

ASFA added a new type of guardianship to the law when it was enacted in 1997. ASFA allows for "permanent guardianships" as one permanency option, as an alternative to adoption. The difference between regular guardianships and permanent guardianships is that a permanent guardianship stays in effect until age eighteen unless dissolved, and the parents lose the ability to petition the court to dissolve the guardianship based on changed circumstances. Only the agency (state or tribe) or the

court on its own motion may reopen a permanent guardianship.

There is an unresolved question about the status of permanent guardianships under the ICWA, since the ICWA distinguishes between temporary placements, including guardianships, and adoptive placements. A permanent guardianship fits more comfortably within the definition of a foster care proceeding. The ICWA is intended to cover all types of child custody proceedings, and the case law has included permanent guardianships within the purview of the ICWA. *See In re J.C.D.*, 2004 SD 96, 686 N.W.2d 647; *In re Q.G.M.*, 808 P.2d 684 (Okla. 1991).

**** Access to the full-text of opinions and additional materials is at 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.

FEDERAL CASES

District Courts
Doe v. Mann (*Mann I*), 285 F. Supp. 2d 1229 (N.D. Cal. 2003)
Navajo Nation v. Superior Court, 47 F. Supp. 2d 1233 (E.D. Wash. 1999)

STATE CASES

Alaska
In re Bernard A., 77 P.3d 4 (Alaska 2003)
C.L. v. P.C.S., 17 P.3d 769 (Alaska 2001)
D.H. v. State, 723 P.2d 1274 (Alaska 1986)
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In re J.R.S., 690 P.2d 10 (Alaska 1984)
J.S. v. State, 50 P.3d 388 (Alaska 2002)
In re Keith M.W., 79 P.3d 623 (Alaska 2003)
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Arkansas
Cutright v. State, 97 Ark. App. 70 (Ct. App. 2006)

California
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In re Alicia S., 76 Cal. Rptr. 2d 121 (Ct. App. 1998)
In re Baby Girl A., 282 Cal. Rptr. 105 (Ct. App. 1991) (certified for partial publication)
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In re Desiree F., 99 Cal. Rptr. 2d 688 (Ct. App. 2000)
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In re Hannah S., 48 Cal. Rptr. 3d 605 (Ct. App. 2006)
In re Jullian B., 99 Cal. Rptr. 2d 241 (Ct. App. 2000) (certified for partial publication)
In re Liliana S., 10 Cal. Rptr. 3d 553 (Ct. App. 2004)
In re Robert T., 246 Cal. Rptr. 168 (Ct. App. 1988)

Colorado
B.H. v. X.H., 138 P.3d 299 (Colo. 2006)

Florida
Seminole Tribe of Fla. v. Dep't of Children & Families, 959 So. 2d 761 (Fla. Dist. Ct. App. 2007)

Idaho
In re Baby Boy Doe (*Baby Boy Doe II*), 902 P.2d 477 (Idaho 1995)

Indiana
In re T.R.M., 525 N.E.2d 298 (Ind. 1988)

Iowa
In re A.E., 572 N.W.2d 579 (Iowa 1997)
In re J.R.H., 358 N.W.2d 311 (Iowa 1984)
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In re B.G.J. (*B.G.J. I*), 111 P.3d 651 (Kan. Ct. App. 2005)

Maryland
In re Nicole B., 927 A.2d 1194 (Md. Ct. Spec. App. 2007)

Minnesota
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In re S.E.G. (*S.E.G. II*), 521 N.W.2d 357 (Minn. 1994)
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In re S.N.R., 617 N.W.2d 77 (Minn. Ct. App. 2000)

Missouri
In re C.G.L. (*C.G.L. II*), 63 S.W.3d 693 (Mo. Ct. App. 2002)
In re C.G.L. (*C.G.L. I*), 28 S.W.3d 502 (Mo. Ct. App. 2000)

Montana
In re A.G., 2005 MT 81, 326 Mont. 403, 109 P.3d 756
In re Baby Girl Doe, 865 P.2d 1090 (Mont. 1993)
In re C.H., 2000 MT 64, 299 Mont. 62, 997 P.2d 776
In re G.S., 2002 MT 245, 312 Mont. 108, 59 P.3d 1063
In re L.F., 880 P.2d 1365 (Mont. 1994)
In re M.E.M., 725 P.2d 212 (Mont. 1986)
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In re Riffle (*Riffle II*), 922 P.2d 510 (Mont. 1996)

Nebraska
In re Bird Head, 331 N.W.2d 785 (Neb. 1983)
In re C.W., 479 N.W.2d 105 (Neb. 1992)

New Jersey
In re Child of Indian Heritage (*Indian Child II*), 543 A.2d 925 (N.J. 1988)

North Dakota
B.R.T. v. Executive Dir. of Soc. Servs. Bd., 391 N.W.2d 594 (N.D. 1986)

Oklahoma
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Duncan v. Wiley, 657 P.2d 1212 (Okla. Ct. App. 1982)
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In re N.L., 754 P.2d 863 (Okla. 1988)
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Oregon
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South Dakota
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In re J.S.B., Jr., 2005 SD 3, 691 N.W.2d 611

Tennessee
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Washington
In re Z.F.S., 51 P.3d 170 (Wash. Ct. App. 2002)
In re M., 832 P.2d 518 (Wash. Ct. App. 1992)

17. VOLUNTARY PROCEEDINGS

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. § 1903 Definitions

(1) "child custody proceeding" shall mean and include –

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

25 U.S.C. § 1913 Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

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.

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Frequently Asked Questions

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17.1 What types of voluntary proceedings are covered by the ICWA?

The ICWA covers three types of voluntary proceedings: foster care placements, termination of parental rights proceedings, and adoption proceedings.

The voluntary proceeding provisions of the ICWA primarily apply to the giving of consent by a parent or Indian custodian in a voluntary foster care placement, termination of parental rights, or adoptive placement proceeding. Voluntary foster care placement proceedings include giving temporary custody to another person or to a tribal, state or private social services agency, guardianships, conservatorships, institutional placements and any other temporary custody arrangements. Voluntary termination of parental rights proceedings may take place independently or as part of an adoption proceeding, depending upon the law of different states. Adoptive proceedings include any action resulting in a final decree of adoption, and include proceedings such as step-parent adoptions. A child-custody proceeding may be voluntary as to one parent and involuntary as to the other parent.

There is a discrepancy in use of the term "foster care placement" under the ICWA as it affects voluntary proceedings. Foster care placement is defined by the ICWA at § 1903 (1)(i) as any temporary placement of an Indian child where the parent or Indian custodian cannot have the child returned upon demand. The voluntary foster placement provision of the ICWA states that a parent or Indian custodian has a right to withdraw consent to a foster care placement at any time, at which time the child shall be returned to the parent or Indian custodian.

Any provision in a voluntary foster care placement consent, attempting to limit the parent or Indian custodian's right to withdraw his or her consent, would be invalid under the ICWA. Educational placement agreements may be voluntary foster care placements under the ICWA if they contain a restriction on immediate return of the child to his or her family.

The "existing Indian family" judicial exception to application of the ICWA, applied in a few states, has primarily been applied in the context of voluntary adoption proceedings under the ICWA. See also FAQ 1-3, Application.

17.2 Can there be an open adoption?

Yes. Nothing in the ICWA precludes an open adoption. An open adoption can further the purposes of the ICWA. One of the primary purposes of the ICWA is to foster or maintain an Indian child's connection to his or her family, tribe and culture, and an open adoption can advance those purposes even when an Indian child cannot remain with his or her parents or Indian custodians. For an Indian child who is adopted by non-Indians, an open adoption is a way to address some of the concerns of the child's Indian tribe and extended family that the child will be separated from his or her Indian culture and identity.

17.3 What is a voluntary proceeding under the ICWA?

The ICWA does not specifically define involuntary and voluntary proceedings. Section 1912 of the ICWA addresses involuntary proceedings, and § 1913 addresses voluntary proceedings. A voluntary proceeding under the ICWA is a proceeding where the parent or Indian custodian consents to the foster care or adoptive placement of an Indian child, or voluntarily consents to termination of parental rights. In some cases the proceeding is initiated by the parent or Indian custodian, and in others the proceeding is initiated by the proposed custodian or a social services agency. The common thread is that the parent or Indian custodian agrees with or approves of the proposed custodial arrangement. The ICWA does not prohibit voluntary placements, but imposes conditions on voluntary proceedings to ensure the purposes and intent of the ICWA are followed.

A child custody proceeding under the ICWA is voluntary even if the proceeding takes place instead of, or to head off an involuntary proceeding, such as when a parent voluntarily consents to termination of parental rights to avoid a termination of parental rights trial. A voluntary ICWA proceeding may become involuntary after a period of time if, for example, a voluntary custody arrangement is entered into with the State in order to allow a parent to work on parenting issues and at the end of the voluntary placement period the State believes the parent has not made enough progress and the child is in danger, or if the parent attempts to end the arrangement without completing the services agreed to. In an Alaska case, a parent did not show up at the end of a voluntary six month foster care placement agreement to reclaim her child, and the State initiated an involuntary emergency placement proceeding under § 1922 of ICWA. *D.E.D. v. State*, 704 P.2d 774 (Alaska 1985).

17.4 Is notice required under voluntary placement?

The notice provisions of the ICWA in § 1912(a) apply on their face only to involuntary foster care placement and termination of parental rights proceedings (including involuntary termination of parental rights proceedings that are part of an adoption proceeding). Because Indian tribes and extended family members have substantial rights under the ICWA in voluntary proceedings, especially regarding placement of an Indian child (the child's tribe may adopt a modified placement preference order by resolution, § 1915(c), which must be followed in the absence of good cause to the contrary extended family members who would be willing to take custody of an Indian child must be considered before good cause to avoid the placement preferences can be found), and because of the Tribe's right to intervene in any proceeding for foster care placement of an Indian child or termination of parental rights to an Indian child, a number of courts have implicitly required that the Indian tribe and extended family members be notified of any voluntary placement proceedings under the ICWA. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *In re M.E.M.*, 725 P.2d 212 (Mont. 1986); *In re Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993); *In re Junious M.*, 193 Cal. Rptr. 40 (Ct. App. 1983) (certified for partial publication); *In re J.R.S.*, 690 P.2d 10 (Alaska 1984). The only explicit requirement of notice is that in § 1912(a), relating to involuntary proceedings. *Cherokee Nation v. Nomura*, 2007 OK 40, 160 P.3d 967, while dealing with a state statute requiring notice in voluntary proceedings also noted that the purposes of the federal act cannot be met without notice to the tribe in voluntary proceedings.

Several state courts have ruled that while notice of an ICWA voluntary proceeding is not required under the language of the ICWA itself, intervention by the Indian child's tribe is allowed or required under the permissive or mandatory intervention court rules of the State (the equivalent of Rule 24 of the Federal Rules of Civil Procedure). *See J.R.S.*, 690 P.2d 10. If these state court rules are applied, notice is required so the relevant tribe can properly exercise its right of intervention. Some courts have held that Indian tribes are not entitled to notice under the ICWA or under state court rules of voluntary ICWA proceedings. *See Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999), *aff'd on other grounds sub nom. Navajo Nation v. Norris*, 331 F.3d 1041 (9th Cir. 2003); *Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159 (Alaska 1989). This ruling has occurred for the most part with regard to voluntary adoption proceedings. See FAQ 4.16, Notice, and FAQ 18.11 Adoption, for further discussion of the need for notice in voluntary proceedings. Some states require such notice by statute. *See, e.g.,* IOWA CODE § 232B.5(8) (2003) (providing for notice to tribes in voluntary proceedings); MINN. STAT. § 260.761(3) (1999) (providing for notice to tribes in voluntary adoptive and pre-adoptive proceedings); OKLA. STAT. tit. 10, § 40.4 (2006) (providing for notice to tribes in voluntary proceedings).

Under § 1915(c), a consenting parent may request anonymity with regard to the ICWA's placement

preferences, and the court or agency effecting placement of an Indian child may give weight to such desire in applying the placement preferences of the ICWA. A few courts have ruled that a parent's request for anonymity with regard to their Indian child means the child's tribe does not get notice of the pending ICWA proceeding. Other courts have ruled that a parent cannot adversely impact an Indian tribe's right to notice under the ICWA, and that notice to the Tribe will not compromise the parent's anonymity. *See Baby Girl Doe*, 865 P.2d 1090.

17.5 What procedures are required for voluntary consent?

The ICWA requires that specific procedures be complied with whenever any parent or custodian of an Indian child consents to a foster care placement or to termination of parental rights to an Indian child.

A voluntary consent is not valid under the ICWA unless the following conditions are met:

(1) The consent must be in writing;

(2) The consent must be recorded before a judge of a court of competent jurisdiction;

(3) The consent must be accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian;

(4) The court must also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood;

(5) Any consent cannot be given before or within ten days after birth of the Indian child, or it will not be valid.

Many States allow for consents to be executed in front of a notary public or in a lawyer's office. Such consents are not valid under the ICWA. The consent does not necessarily have to be executed in open court, especially where the parent or Indian custodian requests anonymity regarding a proposed placement. For an Indian child who is domiciled or who resides on an Indian reservation, or is a ward of a tribal court, the only court that is competent to receive the parent's or Indian custodian's consent is the tribal court, except in Public Law 280 States, where the State has concurrent jurisdiction with the tribal court. *See Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005). See also FAQ 18.10, Adoption.

17.6 Under what circumstances may a parent withdraw consent?

The circumstances under which a parent may withdraw consent depend on whether the consent given was for a foster care placement, consent to voluntary termination of parental rights, or consent to an adoptive placement.

For a voluntary foster care placement under the ICWA, § 1913(b) allows the parent to withdraw his or her consent to such placement at any time during such placement.

For voluntary consent to termination of parental rights, the parent under § 1913(c) may withdraw his or her consent for any reason at any time prior to the entry of a final decree of termination of parental rights. The time between when the consent is given and a final decree of termination of parental rights is entered varies from state to state. In some States voluntary termination of parental rights is a separate proceeding and a decree terminating parental rights is entered soon after the consent is given. In other States parental rights are terminated at the same time an adoption decree is entered, and some time may pass between execution of a consent to termination of parental rights and entry of a decree terminating parental rights. Once a termination decree has been entered, the consent to termination can no longer be withdrawn. Some States have laws that provide that a consent to termination of parental rights becomes irrevocable when executed according to specific procedures. Such consents are preempted by the ICWA, and the parent of an Indian child can still withdraw their consent to termination up to the time a decree terminating parental rights is "entered" by a court. *Quinn v. Walters*, 845 P.2d 206 (Or. Ct. App. 1993), *rev'd on other grounds*, 881 P.2d 795 (Or. 1994).

In some states, where parental rights are not terminated in a separate proceeding, a parent may execute a consent to adoptive placement of an Indian child. Such consents are typically executed in favor of specific adoptive parents, or to an adoptive agency. Under the ICWA, the parent of an Indian child may withdraw such adoptive consent at any time for any reason up to the time the final decree of adoption is entered by a court. If a parent who has executed a consent to adoptive placement has their parental rights terminated before the adoptive placement is finalized and the specified adoptive

placement is not consummated, the weight of opinion is that the parent no longer has the legal right to withdraw their consent to adoptive placement because they are no longer a parent of the Indian child under the law. The Idaho Supreme Court in *In re Baby Boy Doe* (*Baby Boy Doe II*), 902 P.2d 477 (Idaho 1995), held that when a parent executed a consent to adoptive placement of an Indian child, that consent and any termination of parental rights was "conditional," and the consent could be withdrawn under the ICWA if the child were not going to be placed in the adoptive placement specified by the parent.

17.7 Under what circumstances may a voluntary adoption become invalidated?

Under most state laws, an adoption decree cannot be invalidated once it is finalized, or can be invalidated only in extremely limited circumstances. The ICWA provides slightly broader grounds for invalidation of an adoption decree once finalized. A parent or Indian custodian may withdraw a consent to adoption after the entry of a final decree of adoption if it petitions the court and proves that the consent was obtained through fraud or duress. There is a two year limit under § 1913(d) for an Indian parent to invalidate an adoption decree for these reasons, unless otherwise permitted under State law.

Section 1914 of the ICWA mandates the invalidation of any state court proceeding that violates the enumerated provisions of the ICWA, including violation of the voluntary consent provisions of § 1913. No statute of limitations is provided by § 1914. The United States Supreme Court invalidated the adoption of an Indian child that had been final for many years when it determined that the state court was without jurisdiction to grant the adoption to begin with. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). However, the Alaska Supreme Court held that the State of Alaska's one year statute of limitations applied to further limit the time under which an adoption decree can be invalidated under the ICWA for failure to comply with the Act's consent requirements. *In re T.N.F.*, 781 P.2d 973 (Alaska 1989).

17.8 Who can intervene/participate in a voluntary process?

The ICWA provides at § 1911(c) that the Indian child's tribe has a right to intervene in any foster care placement or termination of parental rights proceeding, including voluntary proceedings. A number of state courts have held that Indian tribes also have a right to intervene in voluntary proceedings involving an Indian child under state court rules governing intervention of interested parties, even where intervention is not required by the ICWA. *See, e.g., In re J.R.S.*, 690 P.2d 10 (Alaska 1984). Most courts have applied the policies of the ICWA to conclude that Indian tribes are clearly interested parties with regard to the custody of tribal children, justifying tribal intervention.

The Montana Supreme Court held in *In re M.E.M.*, 725 P.2d 212 (Mont. 1986), that the aunt of an Indian child who had asked for custody of her nephew was entitled to participate in a placement proceeding involving that Indian child.

An unwed father is entitled to intervene and participate in a voluntary proceeding after he has established or acknowledged paternity pursuant to the ICWA. *See In re Child of Indian Heritage* (*Indian Child II*), 543 A.2d 925 (N.J. 1988); *In re Baby Boy Doe* (*Baby Boy Doe I*), 849 P.2d 925 (Idaho 1993).

17.9 What happens to the child when consent is withdrawn? Or placement dismissed?

When the parent or custodian of an Indian child withdraws his or her consent to voluntary foster care placement of the child, "the child shall be returned to the parent or Indian custodian." 25 U.S.C. § 1913(b).

When the parents of an Indian child withdraw their consent to termination of parental rights (before a final court decree terminating their parental rights is entered) or withdraw their consent to adoptive placement (before a final court decree of adoption is entered), "the child shall be returned to the parent."

Despite this language, an Indian child is not always returned to the parent or Indian custodian when consent to foster placement, termination of parental rights, or adoption is withdrawn. For example, if a state social services agency determines that it would be dangerous to return an Indian child to his or her parents after consent to foster care placement is withdrawn, the State may initiate an involuntary proceeding pursuant to the ICWA and ask that custody of the child be legally removed from the parents. The same option can be exercised when consent to termination of parental rights or consent to adoptive placement is withdrawn.

In some cases, the person or family who has voluntary placement of an Indian child does not want to return the child after the parents have withdrawn consent. Section 1920 of the ICWA states that where

a petitioner in a state court Indian child custody proceeding has improperly retained custody of an Indian child after a visit or temporary relinquishment of custody, the court shall decline jurisdiction over the proceeding and will forthwith return the child to his or her parent or Indian custodian. The sole exception to this requirement is if returning the child to his or her parent or Indian custodian would subject the child to a substantial and immediate danger or threat of such danger. Legislative history to the ICWA states that the person or family that is improperly refusing to return custody of the Indian child to his or her parents is not permitted to make the showing that returning the child to the parents would be dangerous, establishing a "clean hands" doctrine of custody. H.R. REP. NO. 95-1386, at 25 (1978).

17.10 Can an "on-reservation" parent place his or her child for adoption in a state court, and bypass tribal court?

No. The ICWA is in large part a jurisdictional law that confirmed pre-existing United States Supreme Court rulings. Where an Indian child is "domiciled" or resides on an Indian reservation, the only court with jurisdiction over that child is the tribal court. The tribal court has exclusive jurisdiction over the child. For example, the only court that can entertain a parental consent to foster care placement or termination of parental rights to an Indian child who is domiciled or resides on an Indian reservation is the tribal court. The United States Supreme Court ruled in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), that domicile of an Indian child under the ICWA is to be determined according to federal common law.

There is an exception to this rule in Public Law 280 states. The exclusive jurisdiction provision of the ICWA at § 1911(a) provides an exception where jurisdiction is otherwise vested in a state pursuant to Public Law 280. In *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005), the Ninth Circuit Court of Appeals held that Public Law 280 vests those states where Public Law 280 applies with concurrent jurisdiction over ICWA proceedings. In a Public Law 280 state, therefore, a parent residing on a reservation can exercise a choice between tribal and state court when deciding where to place their child for adoption, unless the tribe has reassumed exclusive jurisdiction under § 1918 of the ICWA.

17.11 What if the parent or tribe disagrees on the voluntary placement?

If one parent consents to voluntary placement of an Indian child and the other parent disagrees with that placement, the proceeding is voluntary as to the consenting parent and an involuntary ICWA proceeding as to the non-consenting parent. If an ICWA involuntary proceeding is not commenced and the ICWA burden of proof is not met, the non-consenting parent is entitled to custody of the Indian child. *In re S.B.R.*, 719 P.2d 154 (Wash. Ct. App. 1986).

If the parents and the Indian tribe disagree about the voluntary placement of an Indian child, the Indian tribe can intervene and participate in the voluntary proceeding, advocating that the placement preferences of the ICWA be followed or its own conforming alternative placement preferences. The tribe has less legal protection, however, than when it advocates that other provisions of the ICWA have not been followed, because the invalidation section of the ICWA at § 1914 does not require invalidation of state actions that violate the placement section of the ICWA. The Tribe therefore may not be able under the ICWA to overturn a decision to place an Indian child in violation of the placement preferences of the ICWA. The Tribe can attempt to transfer the proceeding to tribal court pursuant to § 1911(b), but if the parents disagree with the Tribe's placement choice and participation, they are likely to object to the transfer request.

If the parents disagree among themselves about the placement of the Indian child, or if the Indian tribe disagrees with the parents about their choice of placement, the parents may withdraw their consent and reassume custody of the child. This action cannot be successfully opposed unless it can be shown that it would be dangerous to return custody to the consenting parent. In *In re Baby Boy Doe* (*Baby Boy Doe II*), 902 P.2d 477 (Idaho 1995), the Idaho Supreme Court held that the mother's desire that specific adoptive parents adopt her child was sufficient justification to override the Tribe's wishes as to placement.

17.12 Does the Interstate Compact for the Placement of Children apply in voluntary procedures?

Yes. The Interstate Compact for the Placement of Children (ICPC) does not directly apply to Indian tribes. The ICPC generally applies whenever an Indian child is being placed across state boundaries,

whether the proceeding is voluntary or involuntary. It therefore applies when an Indian child is being placed from a reservation to an off-reservation placement in another State. It applies when a child is being moved from one State to another State. The ICPC may not apply when an Indian child is being moved to another tribal placement in another State. See also FAQ 19.14, Application of Other Federal Laws.

17.13 Do placement preferences apply in voluntary procedures even if the tribe does not intervene?

Yes. Application of the ICWA is not dependent upon participation of the Indian tribe. The placement preferences apply in all ICWA proceedings, unless good cause to not follow those preferences is determined. The United States Supreme Court called the placement preference section of the ICWA the "most important substantive requirement" of the ICWA. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). Advocacy for following the placement preferences of the ICWA is of course not likely to be as vigorous if the tribe does not participate in the proceeding, however.

17.14 Are active efforts required in voluntary proceedings?

The requirement of active efforts under the ICWA appears in § 1912, which generally applies to involuntary proceedings. Nevertheless, there are several situations in which active efforts to keep the Indian family together could be an issue in voluntary proceedings, as follows:

(1) In some cases, a parent may voluntarily agree to termination of parental rights in an involuntary proceeding to avoid the burden of going to trial. While the case law treats termination in this situation as a voluntary termination proceeding, active efforts must have been made and must continue to be made up to the time the voluntary termination of parental rights decree is entered.

(2) In some voluntary proceedings, the proceeding is voluntary as to one parent (the consenting parent) and involuntary as to the other parent (the non-consenting parent), such as in a proposed step-parent adoption where the non-custodial parent does not agree to the adoption. In such case, active efforts must be provided to the non-consenting parent and the petitioner(s) must meet the ICWA standard of proof before the non-custodial parent's parental rights can be terminated.

(3) In a purely voluntary proceeding, where both parents are consenting to placement or to termination of parental rights, an argument can be made that active efforts should be provided to the parents that would remedy the conditions (poverty, drug use, etc.) that have led the parents to agree to give up their children, before the parents are allowed to consent to placement or to termination of parental rights. *But see In re B.R.T. v. Executive Dir. of Soc. Servs. Bd.*, 391 N.W.2d 594 (N.D. 1986).

**** Access to the full-text of opinions and additional materials is at 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.

FEDERAL CASES

United States Supreme Court
Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

Circuit Courts of Appeal
Doe v. Mann (*Mann II*), 415 F.3d 1038 (9th Cir. 2005)
Navajo Nation v. Norris, 331 F.3d 1041 (9th Cir. 2003)

District Courts
Navajo Nation v. Superior Court, 47 F. Supp. 2d 1233 (E.D. Wash. 1999)

STATE CASES

Alaska
A.B.M. v. M.H., 651 P.2d 1170 (Alaska 1982)
Catholic Soc. Servs., Inc. v. C.A.A., 783 P.2d 1159 (Alaska 1989)
D.E.D. v. State, 704 P.2d 774 (Alaska 1985)
Harvick v. Harvick, 828 P.2d 769 (Alaska 1992)
In re J.R.S., 690 P.2d 10 (Alaska 1984)
In re Keith M.W., 79 P.3d 623 (Alaska 2003)
In re T.N.F., 781 P.2d 973 (Alaska 1989)

California
In re Baby Girl A., 282 Cal. Rptr. 105 (Ct. App. 1991) (certified for partial publication)
In re Junious M., 193 Cal. Rptr. 40 (Ct. App. 1983) (certified for partial publication)

Idaho
In re Baby Boy Doe (*Baby Boy Doe II*), 902 P.2d 477 (Idaho 1995)
In re Baby Boy Doe (*Baby Boy Doe I*), 849 P.2d 925 (Idaho 1993)

Indiana
In re T.R.M., 525 N.E.2d 298 (Ind. 1988)

Iowa
In re H.N.B., 619 N.W.2d 340 (Iowa 2000)

Kansas
In re B.G.J. (*B.G.J. I*), 111 P.3d 651 (Kan. Ct. App. 2005)

Michigan
In re Kiogima, 472 N.W.2d 13 (Mich. Ct. App. 1991)

Missouri
In re D.C.C., 971 S.W.2d 843 (Mo. Ct. App. 1998)
C.E.H. v. L.M.W., 837 S.W.2d 947 (Mo. Ct. App. 1992)

Montana
In re Baby Girl Doe, 865 P.2d 1090 (Mont. 1993)
In re M.E.M., 725 P.2d 212 (Mont. 1986)

New Jersey
In re Child of Indian Heritage (*Indian Child II*), 543 A.2d 925 (N.J. 1988)

North Dakota
B.R.T. v. Executive Dir. of Soc. Servs. Bd., 391 N.W.2d 594 (N.D. 1986)

Oklahoma
In re Baby Boy L., 2004 OK 93, 103 P.3d 1099

Oregon
Quinn v. Walters (*Quinn II*), 881 P.2d 795 (Or. 1994)
Quinn v. Walters (*Quinn I*), 845 P.2d 206 (Or. Ct. App. 1993)

South Dakota
In re J.J., 454 N.W.2d 317 (S.D. 1990)

Tennessee
In re Morgan, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. 1997)

Washington
In re S.B.R., 719 P.2d 154 (Wash. Ct. App. 1986)

18. ADOPTION

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. § 1903. Definitions

(1) "child custody proceeding" shall mean and include—

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

25 U.S.C. § 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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 U.S.C. § 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

25 U.S.C. § 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

25 U.S.C. § 1916. Return of Custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

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. § 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 November 8, 1978, 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.

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.

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Frequently Asked Questions

18.1 What is an adoptive placement under the ICWA?

An adoptive placement under the Indian Child Welfare Act (ICWA) is "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." 25 U.S.C. § 1903(1)(iv). An adoptive placement is one of the categories of child custody proceedings to which the ICWA applies, along with foster care placements, termination of parental rights, and pre-adoptive placements. 25 U.S.C. § 1903(1). The Act applies to extended-family adoptive placements as well as step-parent adoptions. *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982); *In re Baade*, 462 N.W.2d 485 (S.D. 1990); *In re Lindsay C.*, 280 Cal. Rptr. 194 (Ct. App. 1991). See FAQ 1.2, Application, for a further explanation of the issue related to the application of the ICWA in an intra-family dispute.

18.2 What is the difference between an involuntary and voluntary adoptive placement and are there different procedural requirements?

The ICWA refers to involuntary proceedings, § 1912(a), and to voluntary proceedings, § 1913(a), which specifically include foster care placements and terminations of parental rights. Adoption occurs after parental rights have been terminated. Thus, an involuntary adoptive placement is the result of an initial involuntary proceeding, such as removal of the child from his or her parent or Indian custodian where parental rights have been terminated, while a voluntary adoptive placement occurs as a result of the

parents' deliberate intention to relinquish their parental rights to and legal custody of their child, usually through a private adoption agreement.

The ICWA imposes several significant, but varying conditions on both proceedings. See also FAQ 4, Notice, FAQ 16, Placement and FAQ 17, Voluntary Proceedings.

Practice Tip:
In some states an adoption can take place over the objection of a natural parent and without the termination of that parent's rights if the court finds that the parent has abandoned the child. These laws are superseded by the ICWA which expressly requires a termination of parental rights prior to an adoption. *See Baade*, 462 N.W.2d at 490. Section 1913(c) mentions consents to adoption placement in addition to voluntary termination proceedings.

18.3 Does ICWA apply to private agency adoptive proceedings?

Yes. In enacting the ICWA, Congress noted the particularly harmful consequences of the unwarranted removal of Indian children from their families "by nontribal public and private agencies," and their "alarmingly high" placements "in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). State court child custody proceedings involving an adoptive placement of an Indian child, whether privately arranged or conducted by a state agency, are subject to the ICWA. 25 U.S.C. § 1903(1)(iv); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 39 (1989).

18.4 When does an adoption of an Indian child become final?

It depends on state law if a state court handles the adoption, and tribal law if the adoption occurs in tribal court. In state court, an adoption becomes final upon entry of a formal decree or order of adoption. Each state specifies the time period between the termination of parental rights and adoptive placement and the final decree of adoption. For example, Mississippi adoption law provides for a six month waiting period between the filing of the adoption petition and final decrees of adoption, but grants the state court discretionary authority to waive that requirement and immediately enter a final decree of adoption. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 38 (1989) (state court entered final decree of adoption less than one month after the babies' birth). The waiting period between the filing of the petition and the final decree of adoption in Minnesota is ninety days and is six months in North Dakota. *See* MINN. STAT. § 259.53(2) (1999); N.D. CENT. CODE § 14-15-13(3)(a) (2003).

If the adoption occurs in tribal court when allowed under tribal law, and whether under tribal statutory or customary law, the timing and process of finalization of the adoption will depend on tribal law.

Practice Tip:
The practitioner should research the law of adoption for the particular tribe involved, including the law of customary adoption. The practitioner also should seek guidance from a knowledgeable tribal person, such as an elder or a medicine man, who is familiar with that particular tribe's customary law.

18.5 Can you have an adoption without termination of parental rights?

Yes. Under certain circumstances. Adoption without termination of parental rights implements some of the purposes of the ICWA because it allows an Indian child to maintain contact with their family and tribal culture. The Administration for Children and Families within the federal Department of Health and Human Services has issued a bulletin concluding that the adoption of an Indian child can occur without the necessity of terminating parental rights, because of respect for tribal culture and tradition. *Title IV-E Adoption Assistance (Eligibility & Ancillary Policies)*, POL'Y ANNOUNCEMENT (U.S. Dep't of Health & Human Servs. Admin. for Children, Youth & Families, Washington, D.C.), Jan. 23, 2001. Some tribal laws also allow adoption without termination of parental rights. Most state laws require termination of parental rights as a matter of state law before (or at the time) an adoption decree can be entered, and this state law may inhibit an adoption without termination of parental rights.

18.6 Can an adoption of an Indian child be challenged and, if so, for how long after the final adoption decree is entered?

Yes. There are two principal ways in which an adoption may be challenged under the ICWA. The first is when the adoption was obtained through fraud or duress. In these circumstances, the adoption is subject to challenge for two years after the final decree of adoption has been entered. 25 U.S.C. § 1913(d). After two years, the adoption may not be invalidated unless permitted by state law.

The second is pursuant to § 1914, which permits "any parent or Indian custodian from whose custody [an Indian] child was removed," and the child's tribe to "petition any court of competent jurisdiction to invalidate" a foster care placement or termination of parental rights for the violation of any provision of § 1911 (jurisdiction), § 1912 (notice, appointment of counsel, determination of damage to child), or § 1913 (consent, withdrawal of consent, voluntary termination of parental rights). Numerous issues may arise under this provision.

One issue concerns the person from whose custody the child was removed. A non-custodial parent may challenge an adoptive placement under § 1914. *Morrow v. Winslow*, 94 F.3d 1386, 1394 (10th Cir.1996); *cf. In re Child of Indian Heritage* (*Indian Child II*), 543 A.2d 925, 937-38 (N.J. 1988). Another issue involves the type of custodial relationship the parent or Indian custodian maintains with the child. The prevailing view is that § 1914 permits a parent or Indian custodian who has legal custody to challenge an adoptive placement. *Indian Child II*, 543 A.2d at 937-38; *cf. In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982). A further issue pertains to the proper court to hear the challenge. Federal and state courts generally have authority to review alleged violations of the ICWA. *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005).

While challenges pursuant to § 1914 are probably subject to regular state appellate time limitations, no time limits apply to jurisdictional challenges to a state court adoption that was issued in violation of the exclusive jurisdiction of the tribal court. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 41 (1989); *In re Halloway*, 732 P.2d 962, 963 (Utah 1986).

18.7 May a parent petition for the return of an adopted Indian child if the adoption is vacated?

Following a vacated final adoption decree, § 1916(a) permits either the parent or Indian custodian to petition the court for custody of the child, notwithstanding the prior voluntary consent to adoption, "and the court shall grant such petition unless there is a showing, in a proceeding subject to the provision of section 1912 of [the ICWA], that such return of custody is not in the best interests of the child." *A.B.M. v. M.H.*, 651 P.2d 1170, 1174–75 (Alaska 1982). See also, FAQ 16.10, Placement.

18.8 What legal status do step-parents have under the ICWA?

The ICWA includes step-parents in the definition of "extended family member," § 1903(2), to whom preference is given in foster care and adoptive placements. 25 U.S.C. § 1915(a)-(b). Although not included in the ICWA's definition of "parent," § 1903(9), an Indian step-parent may qualify as an "Indian custodian," which means any Indian person who has "legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." 25 U.S.C. § 1903(6). This status affords a step-parent certain legal rights and standing similar to those of a parent. *See, e.g.,* 25 U.S.C. §§ 1911(c), 1912(e).

18.9 May an Indian child adoption be arranged prior to the birth of the child?

A voluntary placement may be planned prior to the birth of an Indian child. No legal action, however, may be taken until more than ten days after the birth of the child, at which time the child's parents may consent to the child's placement. 25 U.S.C. § 1913(a). The consent must be validly given according to the ICWA's consent requirement.

18.10 What are the procedural requirements for executing consent to an adoptive placement?

To effectuate a valid consent to a voluntary termination of parental rights or adoption, the ICWA requires that the consent be (1) in writing, (2) recorded before a judge of a court of competent jurisdiction, (3) certified to by the presiding judge that the consequences of the consent were fully explained, (4) certified to by the court that the parent or custodian understood the explanation in English or had the explanation translated into a language understood by the parent, and (5) executed after the child is more than ten days old. 25 U.S.C. § 1913(a). The Bureau of Indian Affairs (BIA) Guidelines indicate that the consent should be executed in open court unless confidentiality is requested. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (Nov. 26, 1979) (guidelines for state courts). The Guidelines also specify the basic information to be provided in the consent. *Id.*

18.11 What type of notice does the Act require for an adoptive placement?

In involuntary proceedings, the ICWA requires that notice be given to the parent or Indian custodian and the child's tribe by registered mail, return receipt requested, "where the court knows or has reason to know that an Indian child is involved . . . ." 25 U.S.C. § 1912(a). An adoptive placement effected after an involuntary termination of parental rights is an involuntary proceeding and notice to the tribe of both the termination and the adoption is required.

Some courts hold that notice is not required to be sent to a tribe in voluntary adoptive placements. *Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159 (Alaska 1990). Several practical reasons dictate that notice be given to a tribe in voluntary child custody proceedings. For one, once parental rights have been terminated, particularly in a matter involving a child who resides or is domiciled on the reservation, the tribe's interest in the child becomes paramount, and the ICWA anticipates tribal involvement in voluntary foster care placement and termination of parental rights proceedings through transfer and intervention petitions, § 1911(b)-(c), and in placement decisions. 25 U.S.C. § 1915; *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989). For another, it not uncommon that voluntary placements later convert to involuntary child custody proceedings in which notice is required.

Practice Tips:
Several states have enacted more stringent requirements and require that notice be given to tribes in both voluntary and involuntary Indian child custody proceedings. IOWA CODE § 232B.5(8) (2003) (providing notice to tribes in voluntary proceedings); MINN. STAT. § 260.761(3) (1999) (providing notice to tribes in voluntary adoptive and pre-adoptive proceedings); OKLA. STAT. tit. 10, § 40.4 (2006); OR. REV. STAT. § 109.309 (2005). See also, FAQ 4, Notice, especially FAQ 4.16, and FAQ 17.4, Voluntary Proceedings, concerning the need for notice in voluntary proceedings.

Notice is also advisable, and may be mandated, in a voluntary proceeding where the domicile of the child and parents is unclear, or the wardship status of the child is unclear, because the state court has a responsibility to determine its jurisdiction under the ICWA, even in voluntary proceedings, and notice to the tribe may be the best way to determine if the parent or parents consenting to a voluntary placement or termination are domiciled on a reservation or if the child is a ward of a tribal court. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). There may also be situations where the parent or parents consenting are unsure of the Indian status of the child and the state court may be compelled to notify the tribe to ascertain the child's status with the tribe to assure compliance with the ICWA.

8.12 Do the placement preferences of the Act apply to adoptive placements?

Yes. State courts must follow the ICWA's placement preference in adoptive and pre-adoptive placements. 25 U.S.C. § 1915(a)-(b). This requirement corresponds to the ICWA's goal of placing Indian children "in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902; H.R. REP. NO. 95-1386, at 8 (1978).

18.13 What are the placement preference criteria for adoptive placements?

Section 1915(a) provides, "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." The ICWA also provides that "in meeting the preference requirements of this section," courts shall apply a standard of "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." 25 U.S.C. § 1915(d).

It also is important to note that a tribe may establish a different order of preference by tribal law and resolution which must be followed in state court placements "so long as the placement is the least restrictive setting appropriate to the particular needs of the child." 25 U.S.C. § 1915(c). See also FAQ, 16.5, Placement.

Practice Tip:
When a tribe intends to alter the order of preference for placements made by state courts, the tribal resolution adopting the placement preferences should specifically reference § 1915(c). Some courts have not been receptive to general tribal laws or resolutions that have adopted tribe-specific placement preference without reference to § 1915(c). *See In re Laura F.*, 99 Cal. Rptr. 2d 859 (Ct. App. 2000) (certified for partial publication) (holding invalid a tribal resolution barring non-Indians from adopting tribal members as contrary to state policy); *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988); *In re Q.G.M.*, 808 P.2d 684 (Okla. 1991).

18.14 What constitutes "good cause to the contrary" for a court to deviate from the placement preferences?

Section 1915(a) of the ICWA permits state courts to deviate from the placement preference upon a showing of "good cause to the contrary." In addition, the burden of establishing the existence of good cause not to follow the placement preferences rests with the party seeking the deviation. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594, (Bureau of Indian Affairs Nov. 26 1979) (guidelines for state courts). While the term "good cause" is not defined in the ICWA, the BIA Guidelines suggest three grounds to deviate from the preferences. "For the purposes of … adoptive placement, a determination of good cause not to follow the order of preference … shall be based on one or more of the following considerations: (i) The request of the biological parents or the child when the child is of sufficient age. (ii) The extraordinary physical needs of the child as established by testimony of a qualified expert witness. (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria." Indian Child Custody Proceedings, 44 Fed. Reg. at 67,594. See also FAQ 16.4 , Placement.

There is a split in authority on what burden of persuasion is required to show good cause. The Minnesota Supreme Court has stated that clear and convincing evidence is required while the Alaska Supreme Court has held that a preponderance of the evidence will suffice. *See In re S.E.G.* (*S.E.G. II*), 521 N.W.2d 357 (Minn. 1994); *In re N.P.S.*, 868 P.2d 934 (Alaska 1994). See also FAQ 16.4, Placement.

18.15 What are the rights of the child to tribal benefits after and during adoption?

Generally, to participate in or be entitled to tribal benefits, a person must be recognized as a member of the tribe, usually through formal enrollment in the tribe. Membership is an internal matter within the tribe's exclusive authority. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). An Indian child who has been adopted may become enrolled in a tribe depending on the tribe's membership and enrollment criteria. The membership process may be a complicated process where the birth parents have requested that their identities be kept confidential, the original birth certificates have been modified and the court records are sealed. In an open adoption or customary adoption under tribal law, the child's tribal affiliation may be more readily established.

The ICWA specifically authorizes an adopted Indian child to obtain information about his or her tribal affiliation upon attaining the age of eighteen. Section 1917 permits the individual to receive information about his or her tribal affiliation and "other information as may be necessary to protect any rights flowing from the individual's tribal relationship." See FAQ 15, Access to Adoption Records.

Practice Tip:
Enrolling an Indian child in his or her tribe before an adoption is finalized, or requiring the child's enrollment as a requirement of finalizing the adoption decree, avoids later problems in unsealing adoption records and obtaining original birth certificates necessary to protections of tribal membership and association with his or her tribal culture without interruption.

**** Access to the full-text of opinions and additional materials is at 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.

FEDERAL CASES

United States Supreme Court
Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

Circuit Courts of Appeal
Doe v. Mann (*Mann II*), 415 F.3d 1038 (9th Cir. 2005)
Morrow v. Winslow, 94 F.3d 1386 (10th Cir. 1996)

STATE CASES

Alaska
A.B.M. v. M.H., 651 P.2d 1170 (Alaska 1982)
In re Bernard A., 77 P.3d 4 (Alaska 2003)
Catholic Soc. Servs., Inc. v. C.A.A., 783 P.2d 1159 (Alaska 1989)
C.L. v. P.C.S., 17 P.3d 769 (Alaska 2001)
Doe v. Hughes, 838 P.2d 804 (Alaska 1992)
In re Erin G., 140 P.2d 886 (Alaska 2006)
In re F.H., 851 P.2d 1361 (Alaska 1993)
In re J.M.F., 881 P.2d 1116 (Alaska 1994)
In re J.R.S., 690 P.2d 10 (Alaska 1984)
J.W. v. R.J., 951 P.2d 1206 (Alaska 1998)
In re Keith M.W., 79 P.3d 623 (Alaska 2003)
In re N.P.S., 868 P.2d 934 (Alaska 1994)
In re Sara J., 123 P.3d 1017 (Alaska 2005)
In re T.N.F., 781 P.2d 973 (Alaska 1989)
In re W.E.G., 710 P.2d 410 (Alaska 1985)

California
In re Aaron R., 29 Cal. Rptr. 3d 921 (Ct. App. 2005)
In re Baby Girl A., 282 Cal. Rptr. 105 (Ct. App. 1991) (certified for partial publication)
Fresno County Dep't of Children & Family Servs. v. Superior Court, 19 Cal. Rptr. 3d 155 (Ct. App. 2004)
In re Jullian B., 99 Cal. Rptr. 2d 241 (Ct. App. 2000) (certified for partial publication)
In re Laura F., 99 Cal. Rptr. 2d 859 (Ct. App. 2000) (certified for partial publication)
In re Lindsay C., 280 Cal. Rptr. 194 (Ct. App. 1991)

Florida
Step-parent Adoption Forms, 870 So. 2d 791 (Fla. Supreme Court 2004) (family law forms amendments)

Idaho
In re Baby Boy Doe (*Baby Boy Doe II*), 902 P.2d 477 (Idaho 1995)
In re Baby Boy Doe (*Baby Boy Doe I*), 849 P.2d 925 (Idaho 1993)

Indiana
In re T.R.M., 525 N.E.2d 298 (Ind. 1988)

Iowa
In re H.N.B., 619 N.W.2d 340 (Iowa 2000)

Kansas
In re Baby Boy L., 643 P.2d 168 (Kan. 1982)

Louisiana
Hampton v. J.A.L., 27-869 (La. App. 2 Cir. 7/6/95); 658 So. 2d 331

Minnesota
In re M.T.S., 489 N.W.2d 285 (Minn. Ct. App. 1992)
In re S.E.G. (*S.E.G. II*), 521 N.W.2d 357 (Minn. 1994)

Nebraska
In re Kenten H., 725 N.W.2d 548 (Neb. 2007)

New Jersey
In re Child of Indian Heritage (*Indian Child II*), 543 A.2d 925 (N.J. 1988)
In re Child of Indian Heritage (*Indian Child I*), 529 A.2d 1009 (N.J. Super. Ct. App. Div. 1987)
In re Mellinger, 672 A.2d 197 (N.J. Super. Ct. App. Div. 1996)

New York
In re Christopher, 662 N.Y.S.2d 366 (N.Y. Fam. Ct. 1997)

Oklahoma
In re Baby Boy L., 2004 OK 93, 103 P.3d 1099
Cherokee Nation v. Nomura, 2007 OK 40, 160 P.3d 967
In re J.T., 2002 OK CIV APP 2, 38 P.3d 245
In re Q.G.M., 808 P.2d 684 (Okla. 1991)
In re R.L.A., 2006 OK CIV APP 138, 147 P.3d 306

Oregon
Carson v. Carson, 13 P.3d 523 (Or. Ct. App. 2000)

South Dakota
In re Baade, 462 N.W.2d 485 (S.D. 1990)

Utah
In re Halloway, 732 P.2d 962 (Utah 1986)

19. APPLICATION OF OTHER FEDERAL LAWS

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*.

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Frequently Asked Questions

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19.1 What is Title IV-B of the Social Security Act?

Title IV-B, Subpart 1, 42 U.S.C. §§ 620 *et seq*. (2000), is a federally-funded grant program that provides money for child welfare services to states and tribes. Title IV-B, Subpart 2, 42 U.SC. §§ 629 *et seq*. (2000), is a supplemental funding program that provides funding for family preservation, community-based family support, time limited family reunification and adoption promotion and support services for states and tribes.

19.2 Are Indian tribes eligible for direct federal funding under Title IV-B?

Indian tribes are eligible for funding under both Subparts. Under Subpart 1, tribes are eligible for funding in an amount to be set by the Secretary of the Interior. 42 U.S.C. § 628 (2000); 45 C.F.R. § 1357.40 (2007). In Fiscal Year 2004, tribes received $5.2 million. Under Subpart 2, tribes receive a 3% set-aside. 42 U.S.C. §§ 629f(b)(3), 629g(b)(3) (2000). In Fiscal Year 2007, tribes received $11.823 million. Tribes are also eligible for competitive grants that would address the impact of methamphetamine abuse upon the child welfare system.

19.3 What must a state or tribe do to receive Title IV-B funding?

Both states and tribes must submit five year Child and Family Services Plans. Requirements for those Plans can be found in 45 C.F.R. § 1357.15 (2007).

19.4 Do Child and Family Service Plans address the Indian Child Welfare Act?

State plans must provide a description, developed in consultation with Indian tribes in the state, of the specific measures to be taken by the state to comply with the Indian Child Welfare Act (ICWA). 42 U.S.C. § 622(b)(11) (2000). Tribes are not required to address ICWA in their plans. It is also worth noting that state plans must provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the state for whom foster and adoptive homes are needed. 42 U.S.C. § 622(b)(9) (2000). Having an adequate number of Indian foster and adoptive homes is critical to a state's ability to comply with the placement preferences in the ICWA.

It is also worth noting that the Children's Bureau within the United States Department of Health and Human Services performs Child and Family Service Reviews (CFSR) of all state systems. The Children's Bureau considers tribes to be important "stakeholders" in this process and tribal representatives are encouraged to participate in the CFSR process through serving on Statement Assessment development teams, participating as consultant reviewers or in case-specific interviews, among other things. Involvement with the CFSR process may be a mechanism for tribes to determine whether states are complying with ICWA.

19.5 What is Title IV-E of the Social Security Act?

Title IV-E is an entitlement program for the states. 42 U.S.C. §§ 670 *et seq.* (2000). It reimburses states for payments to foster and adoptive families if the children in question come from a family below a certain income and the child meets other eligibility criteria. It also funds administrative and training costs associated with administering the foster care and adoptive assistance program for such children. Expenditures for the IV-E program ranged from $6.4 billion to $6.8 billion during Fiscal Years 2002-04.

19.6 Are tribes eligible for the Title IV-E program?

Not directly. Although some tribes have negotiated agreements with states pursuant to their inherent sovereign authority or pursuant to § 1919 which allow for the pass-through of federal funding to eligible tribal placements and activities. Although a few agreements are comprehensive, most provide only for payments to the foster parents themselves and do not provide tribes with money for training and administration.

An agreement under § 1919 is critical to the receipt of federal funding. In *Native Village of Stevens v. Smith*, 770 F.2d 1486 (9th Cir. 1985), the court held that Alaska was not required to reimburse a Native village for payments to a child placed by the village from federal funding received under Title IV-E. The court found that three requirements needed to be met for funding, and the village lacked one of those. First, the home must be state licensed, and the court found that that requirement was met by § 1931(b), which provides that "[f]or purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State." Second, the removal was required to be the result of a judicial determination. The ICWA requirement of full faith and credit to the public acts, records and judicial proceedings of Indian tribes applicable to child custody proceedings was held to meet that requirement. Third, there needed to be an agreement between the tribe and the state, and in this case there was none. Section 1919 authorizes such agreements, but does not mandate them. *Native Village of Stevens*, 770 F.2d at 1489.

Practice Tip: Title IV-E requires that the governmental entity administering the program must provide a match for the federal contribution. The amount of the match is based upon the Federal Medical Assistance Percentage (FMAP) which varies by state as it is based upon the per capita income of the state. In some cases where tribes and states have IV-E agreements, the state has agreed to provide funding to cover the match requirement and has not required the tribe to come up with the match.

19.7 Does Congress attach conditions to the receipt of Title IV-B and IV-E funds?

Yes. Title IV-B and IV-E are the bases for many of the basic statutory requirements of the child welfare system. Although it is beyond the scope of this

Practical Guide to describe all of the requirements, some of the most important are requirements for individual case plans and administrative and legal case review systems with specific timelines, and the establishment of various legal standards, such as the requirements that reasonable efforts be made to keep children in their homes and that a child who is removed must be placed in the least restrictive setting in close proximity to the home of the child's parents.

19.8 What is the Adoption and Safe Families Act (ASFA)?

The Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 673b, 678, 679b (2000), was an amendment to Titles IV-B and IV-E of the Social Security Act, approved in 1997. Its goal was to make the health and safety of children the paramount concern in child welfare systems. It sought to expedite permanent placements for children by providing for adoption subsidies, encouraging concurrent planning, mandating the filing of termination of parental rights petitions when certain criteria are met, creating exceptions to the reasonable efforts requirement, and requiring quicker permanency hearings. It also requires background checks of prospective foster and adoptive parents.

19.9 Are ASFA and ICWA in conflict?

While the philosophical bases for ASFA and ICWA are somewhat different, their provisions are capable of being successfully integrated.

Practice Tip: ASFA provides that a termination of parental rights (TPR) petition must be filed when a child has been in foster care for fifteen of the last twenty-two months, the child has been abandoned or the parent has been convicted of certain violent crimes. There are exceptions to this requirement, however, when the child is being cared for by a relative, the state has a compelling interest for concluding that it would not be in the child's best interests, or the state has not made adequate reunification services available to the family. Practitioners should be aware that Indian children frequently fall within one of the exceptions. Under the ICWA, extended family is a preferred placement which would place the child under the "relative" exception. Also, the ICWA legal standard is applicable to any TPR proceedings. If the state is unable to meet that standard, that would be a compelling reason not to file a petition. Finally, in evaluating the "failure to provide services" provision, necessary services to be provided to the family would be circumscribed by ICWA's active efforts requirement. Thus, failure to adequately utilize appropriate tribal, extended family and community resources could trigger this exception in ASFA.

Practice Tip: ASFA provides that an adoptive placement may not be delayed or denied when an approved family is available outside of the jurisdiction. However, searching for a family within a preferred ICWA category or a petition to transfer the case to tribal court should be considered legal prerequisites to the adoption of an Indian child and not the type of delay targeted by ASFA. It should also be noted that placements "outside of the jurisdiction of the state" would include placements within tribal jurisdiction and the state should not be permitted to delay or deny placement with a family that has been identified and approved by a tribe as an adoptive placement.

Practice Tip: While ASFA does not require reasonable efforts to reunify families in some circumstances, 42 U.S.C. § 471(15) (2000), it does not prohibit such efforts. Since the active efforts provision in ICWA, § 1912(d), would still apply to cases involving Indian children, services aimed at reunification should be provided in all ICWA cases.

For more information on the integration of ASFA and ICWA, see SIMMONS & TROPE, P.L. 105-89 ADOPTION AND SAFE FAMILIES ACT OF 1997: ISSUES FOR TRIBES AND STATES SERVING INDIAN CHILDREN (1999).

19.10 Does ASFA modify or supersede ICWA?

No. There is no provision in ASFA that indicates an intent to modify ICWA or any legislative history that identifies this intent and the preexisting ICWA compliance provision in Title IV-B was not changed by ASFA. The first state supreme court to rule on this issue has confirmed that ASFA does not implicitly modify ICWA. *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611.

19.11 What is the Multi-Ethnic Placement Act (MEPA) (also known as the Interethnic Adoption provision or IEPA)?

The Multi-Ethnic Placement Act (MEPA), 42 U.S.C. §§ 622, 1996b (2000), prohibits any person or government that is involved in adoption or foster care placements from delaying or denying the placement of a child on the basis of the race, color or national origin of the adoptive or foster parent or the child. 42

U.S.C. §§ 1996b(c)(1), 674(d)(4) (2000). It also requires that state plans provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the state for whom foster and adoptive homes are needed. 42 U.S.C. § 622(b)(9) (2000). Having an adequate number of Indian foster and adoptive homes is critical to a state's ability to comply with the placement preferences in the ICWA.

19.12 Does MEPA modify or supersede ICWA?

No. MEPA provides a specific exclusion for placements made pursuant to ICWA. 42 U.S.C. §§ 1996b(c)(3), 674(d)(4) (2000).

19.13 What is the Indian Child Protection and Family Violence Prevention Act?

The Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. §§ 3201 *et seq*. (2000), is intended to strengthen procedures pertaining to and identifies requirements for the investigation and reporting of child abuse and neglect in Indian country. It also requires character investigations and criminal background checks of all federal employees and tribal employees who are employed by tribes that receive funding under Public Law 93-638 (the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450f (2000)) that are employed in a position that involves regular contact with or control over Indian children. This provision has been interpreted to require criminal and character background checks for tribally-approved foster and adoptive homes.

19.14 What is the Interstate Compact for the Placement of Children (ICPC) and does it apply to ICWA proceedings?

The Interstate Compact for the Placement of Children (ICPC) is a law adopted by all fifty states, the District of Columbia and the United States Virgin Islands that provides for uniform legal and administrative procedures governing the interstate placement of children. *See, e.g.,* ALASKA STAT. §§ 47.70.010-.080 (2004); CAL. FAMILY CODE §§ 7900-12 (2005); COLO. REV. STAT. §§ 24-60-1801 to -1803 (2001); N.M. STAT. §§ 32A-11-1 to -7 (2005); OKLA. STAT. tit. 10, §§ 10-571 to -576 (2000). The purpose of ICPC is to ensure that children placed out of their home state receive the same protections and services that would be provided if they remained in their home state. Normally, in the case of transfers from one state system to another, the court order from the sending state cannot legally be supervised in the receiving state without obtaining approval through the compact. The ICPC applies to interstate placements under ICWA when the intent is to have the receiving state supervise the placement. However, tribes are not part of the ICPC and thus if a child is to be placed into tribal custody, the ICPC would not come into play.

Practice Tip: The ICPC is not required in order for a child to be transferred across state lines into tribal jurisdiction. However, if the tribe would like the sending state to continue making payments to the foster family located within tribal jurisdiction, it may contact the state within which it is located and request them to utilize the ICPC for the transfer.

19.15 Can a tribe designate a tribal placement in a state separate from tribal headquarters or the child's state of residency?

Yes.

19.16 When is an Indian child eligible for medical assistance under Title XIX of the Social Security Act?

In a child-only case, if the family from which the child is removed is eligible for Temporary Assistance for Needy Families (TANF) benefits or Title IV-E foster care assistance, the Indian child is eligible for medical assistance under Title XIX. If the family is intact, the children would be eligible if household is income-eligible or meets the Children's Health Insurance Program's eligibility according to each state's criteria.

19.17 How does foster placement of a child outside of the jurisdiction where he or she resides or is domiciled affect the child's eligibility for Indian Health Services contract care funds?

The child should have access to care as long as the Indian child's pre-removal address is within the "on-reservation" or "near-reservation" Indian Health Services contract health service area, the courts have awarded the foster family custody, and the child is a member or eligible for membership with an Indian tribe or has proof of descendant status. If the child is transferred back to the jurisdiction of the tribal court from an area outside the contract health service area the court needs to make the Indian child a ward of the tribal court and declare the child's residence to be on reservation to render the child eligible. The child is always eligible to receive direct services through any Public Health Service facility if Indian status is demonstrated.

19.18 Can funds from the Temporary Assistance for Needy Families Act (TANF) be used to pay for foster care placements?

If the foster care placement is a relative placement, the child and caretaker are eligible for Temporary Assistance for Needy Families Act (TANF) benefits either from the state or the tribe, if the tribe operates the TANF program and the family meets certain financial requirements.

19.19 What other funding may be available for Indian children placed by tribes into foster homes?

If a family is not TANF eligible, the placement may be funded by the Bureau of Indian Affairs (BIA) general assistance monies or tribal funds. Title IV-E or state funds may also be available if there is an agreement between the tribe and a state providing for the use of these funding sources.

**** Access to the full-text of opinions and additional materials is at 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.

FEDERAL CASES

Circuit Courts of Appeal
Doe v. Mann (*Mann II*), 415 F.3d 1038 (9th Cir. 2005)
Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985)
Native Village of Venetie I.R.A. Council v. Alaska, 155 F.3d 1150 (9th Cir. 1998)

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Navajo Nation v. Hodel, 645 F. Supp. 825 (D. Ariz. 1986)

STATE CASES

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J.S. v. State, 50 P.3d 388 (Alaska 2002)
State v. M.L.L., 61 P.3d 438 (Alaska 2002)

Arizona
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California
In re M.A., 40 Cal. Rptr. 3d 439 (Ct. App. 2006)

Michigan
In re Miller, 451 N.W.2d 576 (Mich. Ct. App. 1990)

Minnesota
In re T.T.B. (*T.T.B. II*), 724 N.W.2d 300 (Minn. 2006)

Montana
In re Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1

South Dakota
In re D.B., 2003 SD 13, 670 N.W.2d 67
In re J.S.B., Jr., 2005 SD 3, 691 N.W.2d 611

Utah
Searle v. Searle, 2001 UT App 367, 38 P.3d 307

20. ENFORCEMENT OF ICWA REQUIREMENTS

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25 U.S.C. § 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

Disclaimer: The above provision of the Indian Child Welfare Act is 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.

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Frequently Asked Questions

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20.1 Who may petition a court under § 1914?

The Indian Child Welfare Act (ICWA) provides that "any parent or Indian custodian" or "the Indian child's tribe" may petition a "court of competent jurisdiction" under § 1914. Although § 1914 uses the conjunctive "and," a tribe has independent standing to petition. *In re Phillip A.C., II*, 149 P.3d 51 (Nev. 2006). Likewise, any parent or Indian custodian has independent standing to petition. *In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986).

20.2 What is a "court of competent jurisdiction" under § 1914 of the ICWA?

The term is not defined in the Act or its legislative history, but generally a court of competent jurisdiction is one which has jurisdiction over the relevant subject matter under federal, state, or, in some cases, tribal law. Section 1914 does not create jurisdiction that does not already exist or preempt it when it exists. *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005). In *Slone v. Inyo County Juvenile Court*, 282 Cal. Rptr. 126 (Ct. App. 1991), the parents of an Indian child had their parental rights terminated by a California juvenile court in a dependency case. They instituted an action based on § 1914 in a California superior court to invalidate the juvenile court's decision. The court of appeals held that the ICWA did not preempt California's jurisdictional rules, which required a state court to have subject matter jurisdiction before it considered an action. It looked at § 1914 and found that given that the phrase "any court of competent jurisdiction" was not defined in the Act or its legislative history, Congress assumed that those state courts that

enforced the ICWA would already have subject matter jurisdiction over the action. Only the juvenile court had jurisdiction to hear the case, so the superior court was not a court of competent jurisdiction under § 1914.

Practice Tip:
To reduce the later need to resort to § 1914, the tribe is encouraged to immediately intervene when it receives notice of an ICWA proceeding. It should be noted that by intervening, the tribe is not automatically seeking a transfer of jurisdiction, which is separate procedure, although practitioners will often combine an intervention with a motion to transfer proceedings to the tribal court. The practitioner may also want to consider a transfer to tribal court where it appears that violations of the ICWA are occurring while the case is in state court. Also, the practitioner has the option of appealing a decision to a state appellate court.

The case law from the federal courts has been confusing and inconsistent. Some federal courts have foreclosed a petitioner from bringing a § 1914 action on the grounds that once the petitioner has participated in state court it is bound by that decision based on claim and issue preclusion law, s*ee, e.g., Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587 (10th Cir. 1985); *Comanche Indian Tribe of Okla. v. Hovis* (*Hovis II*), 53 F.3d 298 (10th Cir. 1995), or based on the abstention doctrine that forecloses a federal court from intruding in an on-going state proceeding. *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996).

Other federal courts have allowed a petitioner access. In *Mann II*, 415 F.3d 1038, the Ninth Circuit found no reason to foreclose a § 1914 action in federal court, even where the parties had participated in the state court proceeding. This accords with an earlier decision in the Tenth Circuit, *Roman-Nose v. New Mexico Dep't of Human Servs.*, 967 F.2d 435 (10th Cir. 1992), which found no reason to prevent a federal court action by parents who participated in a New Mexico state court ICWA proceeding. The court ruled that the federal court had subject matter jurisdiction under the ICWA to proceed, although it recognized the later possibility of defenses, such as res judicata, being raised by the opposing party.

Under these circumstances, it is difficult to recommend to a practitioner to forgo a state court proceeding because of uncertainty in the competing set of precedents. A petitioner (most likely the tribe or Indian custodian because the parent will already be a respondent in the state proceeding) is therefore placed in a difficult position because it may have to forgo participation in a state ICWA proceeding to file a § 1914 petition in federal court, yet some federal case law indicates that is not necessarily true.

20.3 Is there a time limit to petition under § 1914?

There is no time limit set forth in § 1914 in which to file a petition. As a result, some state courts have resorted to state statutes of limitations. As one court observed: "'When Congress does not establish . . . a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so.' The United States Supreme Court has mandated that courts 'borrow the most closely analogous state limitations period.' The limitations period will necessarily vary from state to state." *State v. Native Village of Curyung*, 151 P.3d 388, 411 (Alaska 2006) (citations omitted). As the court points out, however, the result of using state statutes of limitation is uncertainty and inconsistency. Thus, use of these statutes may very well be contrary to the intent of Congress to provide a uniform federal standard under the ICWA in terms of the basic applicability of the statute. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1987) (holding domicile to be defined by federal law, not individual state laws).

Even where a petition is timely filed, some state courts have ruled that their error preservation rules apply in an ICWA proceeding. *See, e.g., In re J.D.B.*, 584 N.W.2d 577 (Iowa Ct. App. 1998); *In re Pedro N.*, 41 Cal. Rptr. 2d 819 (Ct. App. 1995). But others disagree. *See, e.g., In re L.A.M.*, 727 P.2d 1057 (Alaska 1986). A party or practitioner is well-advised to object to any error based on the ICWA at the trial court level, otherwise a failure to timely object may be considered a waiver or harmless error even where the challenge is brought under § 1914.

20.4 Does § 1914 provide a basis to raise ICWA violations for the first time on appeal.

Yes. *In re S.M.H.*, 103 P.3d 976, 982 (Kan. Ct. App. 2005); *In re S.R.M.*, 153 P.3d 438 (Colo. Ct. App. 2006).

20.5 Is invalidation of a foster care placement or termination of parental rights mandatory under § 1914 upon a showing the Act has been violated?

Yes. *See, e.g., In re L.A.M.*, 727 P.2d 1057 (Alaska 1986); *In re Morgan*, 364 N.W.2d 754 (Mich. Ct. App. 1985); *In re H.D.*, 729 P.2d 1234 (Kan. Ct. App. 1986). Some courts have held that if a separate stage of the case is not tainted by the earlier proceeding invalidation is not necessarily required of a later, valid proceeding. *In re S.W.*, 727 N.W.2d 144 (Minn. Ct. App. 2007).

20.6 Is § 1914 available to invalidate a placement in violation of § 1915?

No. *Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999).

20.7 Does a claim for relief under 42 U.S.C. § 1983 to remedy an ICWA violation displace the remedy under § 1914?

No. In fact, § 1914 supplements the remedies under 42 U.S.C. § 1983. *State v. Native Village of Curyung*, 151 P.3d 388 (Alaska 2006).

20.8 What oversight is there for compliance?

To a very large extent, oversight has been left to the judicial system. For example, the judicial system has been used to enforce compliance through case law, court rules, and bench manuals (see the *Practical Guide*'s Federal and State Resources section).

Also, one court observed, "*every* attorney involved in matters concerning Indian children subject to the Indian Child Welfare Acts is under an affirmative duty to insure full and complete compliance with these Acts [federal and state ICWAs]." *In re Baby Girl B.*, 2003 OK CIV APP 24, ¶¶ 78-83, 67 P.3d 359, 374. Any failure of the attorney may result in finding of malpractice. *Doe v. Hughes*, 838 P.2d 804 (Alaska 1992).

20.9 What other mechanisms are available to ensure compliance with the Act?

One mechanism that could help ensure compliance with the ICWA is a tribal-state agreement under § 1919 of the Act. These agreements can place requirements upon states and institutionalize tribal involvement in the process in a manner which will improve overall compliance. In addition, from a practical point of view, practitioners are encouraged to work with state agencies, juvenile judges, etc., to educate and facilitate compliance with the ICWA and the initiation of routine procedures to assist in that compliance.

Another mechanism is for the tribe to become actively involved in the state child welfare planning and review processes. Title IV-B of the Social Security act mandates that states' plans developed pursuant to that act must provide a description, developed in consultation with Indian tribes in the state, of the specific measures to be taken by the state to comply with the Indian Child Welfare Act. 42 U.S.C. § 622(b)(11) (2000). In addition, the Children's Bureau within the United States Department of Health and Human Services performs Child and Family Service Reviews (CFSR) of all state systems. The Children's Bureau considers tribes to be important "stakeholders" in this process and tribal representatives are encouraged to participate in the CFSR process through serving on Statement Assessment development teams, participating as consultant reviewers or case-specific interviews, among other things.

20.10 What enforcement mechanisms are possible to ensure private agencies comply with the Act?

With respect to private agencies, parties involved in an ICWA proceeding may seek intercession by the public agency responsible for licensing the foster care facility or approving the adoptive home. Parties may also ask a court to enter compliance orders against private agencies.

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Native Village of Venetie I.R.A. Council v. Alaska, 155 F.3d 1150 (9th Cir. 1998)
Roman-Nose v. N.M. Dep't of Human Servs., 967 F.2d 435 (10th Cir. 1992)

District Courts
Doe v. Mann (*Mann I*), 285 F. Supp. 2d 1229 (N.D. Cal. 2003)
Navajo Nation v. Superior Court, 47 F. Supp. 2d 1233 (E.D. Wash. 1999)

STATE CASES

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Doe v. Hughes, 838 P.2d 804 (Alaska 1992)
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In re L.A.M., 727 P.2d 1057 (Alaska 1986)
State v. Native Vilage of Curyung, 151 P.3d 388 (Alaska 2006)
In re T.N.F., 781 P.2d 973 (Alaska 1989)

California
In re Daniel M., 1 Cal. Rptr. 3d 897 (Ct. App. 2003)
In re Desiree F., 99 Cal. Rptr. 2d 688 (Ct. App. 2000)
In re Jonathon S., 28 Cal. Rptr. 3d 495 (Ct. App. 2005) (certified for partial publication)
In re Krystle D., 37 Cal. Rptr. 2d 132 (Ct. App. 1994)
In re Pedro N., 41 Cal. Rptr. 2d 819 (Ct. App. 1995)
Slone v. Inyo County Juvenile Court, 282 Cal. Rptr. 126 (Ct. App. 1991)

Colorado
In re S.R.M., 153 P.3d 438 (Colo. Ct. App. 2006)

Iowa
In re J.D.B., 584 N.W.2d 577 (Iowa Ct. App. 1998)
In re J.W., 498 N.W.2d 417 (Iowa Ct. App. 1993)

Kansas
In re H.D., 729 P.2d 1234 (Kan. Ct. App. 1986)
In re S.M.H., 103 P.3d 976 (Kan. Ct. App. 2005)

Michigan
In re Kreft, 384 N.W.2d 843 (Mich. Ct. App. 1986)
In re Morgan, 364 N.W.2d 754 (Mich. Ct. App. 1985)

In re N.E.G.P., 626 N.W.2d 921 (Mich. Ct. App. 2001)

Minnesota
In re S.W., 727 N.W.2d 144 (Minn. Ct. App. 2007)

Nebraska
In re Enrique P., 709 N.W.2d 676 (Neb. Ct. App. 2006)

Nevada
In re Phillip A.C., II, 149 P.3d 51 (Nev. 2006)

New Jersey
In re Child of Indian Heritage (*Indian Child II*), 543 A.2d 925 (N.J. 1988)

New Mexico
In re Begay, 765 P.2d 1178 (N.M. Ct. App. 1988)

Oklahoma
In re Baby Girl B., 2003 OK CIV APP 24, 67 P.3d 359
In re M.D.R., 2002 OK CIV APP 74, 50 P.3d 1160

21. APPLICATION OF STANDARDS HIGHER THAN ICWA REQUIREMENTS

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25 U.S.C. § 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

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Frequently Asked Questions

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21.1. Do state and federal statutes that provide higher standards of protection to the rights of parents or an Indian custodian apply in ICWA cases?

Yes. The Indian Child Welfare Act (ICWA) § 1921 specifically provides that "where State or Federal law applicable to a child custody proceeding . . . provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter," that standard shall be applied. For example, where Michigan law contained a more stringent notice requirement than ICWA to ensure that inquiry and notification are performed, that standard applied. *In re Elliott*, 554 N.W.2d 32, 38 (Mich. Ct. App. 1996). Minnesota has enacted more stringent laws that an individual must meet to qualify as an expert witness possessing expertise in Indian child-rearing practices. *See* MINN. DEP'T OF HUMAN SERVS., MINNESOTA SOCIAL SERVICES MANUAL, XIII-3586 (1999); *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992). Thus, the practitioner should consult federal, state and tribal law to determine if it contains more stringent requirements, especially in a state that has enacted its own version of the ICWA, or parts of it.

21.2 Does the protection of § 1921 extend to a tribe?

Yes. Though not specifically mentioned in § 1921, at least one court has held that where higher standards are present in state statutes, such protection extends to tribes. *Cherokee Nation v. Nomura*, 2007 OK 40, 160 P.3d 967.

21.3 What if a state has its own state ICWA?

A number of states have enacted their own version of the requirements of ICWA and thus state law may provide higher standards of protections or notice provisions than contained in the ICWA. The practitioner should check state law in this regard.

21.4 Do a state's error preservation rules apply in an ICWA proceeding?

Some state courts have ruled that their error preservation rules apply in an ICWA proceeding. *See, e.g., In re J.D.B.*, 584 N.W.2d 577 (Iowa App. 1998); *In re Pedro N.*, 41 Cal. Rptr. 2d 819 (Ct. App. 1995). But others disagree. *See, e.g., In re L.A.M.*, 727 P.2d 1057 (Alaska 1986). A party or practitioner is well-advised to object to any error based on the ICWA at the trial court level, otherwise a failure to timely object may be considered a waiver or harmless error even where the challenge is brought under § 1914.

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In re Matthew Z., 95 Cal. Rptr. 2d 343 (Ct. App. 2000) (certified for partial publication)
In re Pedro N., 41 Cal. Rptr. 2d 819 (Ct. App. 1995)
Slone v. Inyo County Juvenile Court, 282 Cal. Rptr. 126 (Ct. App. 1991)

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In re K.B., 682 N.W.2d 81 (Iowa Ct. App. 2004) (unpublished table decision) *available at* No. 03-0530, 2004 WL 573793 (Iowa Ct. App. March 24, 2004)

Michigan
In re Elliott, 554 N.W.2d 32 (Mich. Ct. App. 1996)
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Montana
In re S.R., 2004 MT 227, 322 Mont. 424, 97 P.3d 559
In re Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1

New York
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Oklahoma
Cherokee Nation v. Nomura, 2007 OK 40, 160 P.3d 967

Oregon
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Wisconsin
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In re D.S.P., 480 N.W.2d 234 (Wis. 1992)
Kathy P. v. State, 532 N.W.2d 471 (Wis. Ct. App. 1995) (unpublished table decision) *available at* No. 95-0123, 1995 WL 97416 (Wis. Ct. App. March 10, 1995)

22. RESOURCES

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§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

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.

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Frequently Asked Questions

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22.1 What federal sources of funding are federally recognized tribes eligible for that can assist in providing child welfare related services?

Federally recognized tribes are eligible to receive funding from a variety of federal programs, including the following:

22.2 Indian Child Welfare Act, Title II Grants—All federally recognized tribes are eligible to receive these grant funds, which are distributed by the Bureau of Indian Affairs (BIA) under the authority of the Indian Child Welfare Act (ICWA). 25 U.S.C. § 1931(a). The grant program supports a wide variety of tribal child welfare services, as well as activities related to the implementation of the

ICWA. In Fiscal Year 2004, approximately $18 million was allocated to tribes. You can learn more about this grant program by contacting your regional BIA office.

Bureau of Indian Affairs Social Services Program Grants—The BIA, under authority provided by the Snyder Act, 25 U.S.C. § 13 (2000), provides grant funds to eligible tribes to support social services related programming, including General Assistance (income maintenance), Child Assistance (foster care, guardianship, adoption or residential/institutional placement) and Services to Children, Elderly, and Families (family functioning, child protection and case management). This grant funding is only available to tribes serving Indian children and families who do not have access to a comparable federal, tribal, state, county or local service. 25 C.F.R. § 20.102 (2007). This results in not all federally recognized tribes being able to access these funds. You can learn more about these grant programs by contacting your regional BIA office.

22.3 Title IV-A Temporary Assistance to Needy Families Block Grant—This federal program provides states and tribes funding to assist families with children when the parents or other responsible relatives cannot provide for the family's basic needs. 42 U.S.C. §§ 601 *et seq*. This includes services to assist needy families so that children may be cared for in their own homes or in the homes of relatives, promotion of job preparation and work, reduction of out-of-wedlock pregnancies and promotion of marriage. In Fiscal Year 2005 there were fifty tribal grantees serving two hundred and thirty-four tribal governments with federal expenditures of approximately $157.6 million. Some of the grantees also serve urban areas, such as Oakland, California or Anchorage, Alaska. For more information on this program contact your regional Administration for Children and Families (ACF) office (see question 22.8 below on contact information for regional ACF offices).

22.4 Title IV-B, Subpart One, Child Welfare Services—Title IV-B, Subpart 1, 42 U.S.C. §§ 620 *et seq*., is a federally funded grant program that provides money for child welfare services to tribes and states. The program is designed to support services that emphasize family preservation. A broad range of services can be supported including, child abuse prevention, child protection, family support, placement and staff training. In Fiscal Year 2004 tribes received approximately $5.2 million. For more information on this program contact your regional ACF office.

22.5 Title IV-B, Subpart Two, Promoting Safe and Stable Families—Title IV-B, Subpart 2, 42 U.SC. §§ 629 *et seq*., is a federal grant program that provides funding for family preservation, community-based family support, time limited family reunification and adoption promotion and support services for tribes and states. The statutory funding formula for tribes only allows tribes that would qualify for at least $10,000 to be eligible to receive funding. In Fiscal Year 2004 this resulted in approximately ninety-two tribal grantees being eligible to receive these funds with a total of $5 million allocated for distribution to eligible tribes (includes nine Alaskan Native Non-Profit Corporations and the tribes they serve). For more information on this program contact your regional ACF office.

22.6 Title IV-D Child Support Enforcement—This federal program provides reimbursement for services provided by tribes or states designed to promote family self-sufficiency and child well-being. 42 U.S.C. §§ 651 *et seq*. Some key eligible services include helping locate non-custodial parents, establishing paternity, establishing child support orders and collecting child support. Tribes may use the funding to also develop capacity towards establishing a comprehensive child support enforcement program. This could include code development, program policies and procedures, training/technical assistance and court procedures. Because children and families in the child welfare or welfare system are often eligible to receive child support assistance these programs are often closely linked. In Fiscal Year 2004 there were thirteen tribal grantees. For more information on this program contact your regional ACF office.

22.7 Family Violence Prevention and Services Grants—The purpose of these federal grants is to assist state and tribal governments in establishing, maintaining, and expanding programs and projects to prevent family violence and to provide immediate shelter and related assistance for victims of family violence and their dependents. Tribes received approximately $12.6 million in Fiscal Year 2004. Funds are distributed to eligible tribes via a formula and are used primarily for counseling, advocacy, and self-help services for victims of domestic violence and their children. For more information on this program contact your regional ACF office.

22.8 How do I contact my regional Administration for Children and Families office?

The ACF is a federal agency within the Department of Health and Human Services that administers a variety of human service programs that tribal governments may participate. These programs broadly serve children and families in a variety of settings. Below is a list of the regional offices that can be contacted for information on available program, policy and funding announcements.

Region 1 (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont)
Administration for Children and Families
Boston Regional Office
JFK Federal Building, Room 2000
Boston, MA 02203
Phone: 617-565-1020
Fax: 617-565-2493

Region 2 (New Jersey, New York, Puerto Rico, Virgin Islands)
Administration for Children and Families
New York Regional Office
26 Federal Plaza, Room 4114
New York, NY 10278
Phone: 212-264-2890
Fax: 212-264-4881

Region 3 (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia)
Administration for Children and Families
Philadelphia Regional Office
Public Ledger Building, Suite 864
150 S. Independence Mall West
Philadelphia, PA 19106
Phone: 215-861-4000
Fax: 215-861-4070

Region 4 (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee)
Administration for Children and Families
Atlanta Regional Office
61 Forsyth Street, Suite 4M60
Atlanta, GA 30303-8909
Phone: 404-562-2800
Fax: 404-562-2981

Region 5 (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin)
Administration for Children and Families
Chicago Regional Office
233 N. Michigan Avenue, Suite 400
Chicago, IL 60601-5519
Phone: 312-353-4237
Fax: 312-353-2204

Region 6 (Arkansas, Louisiana, New Mexico, Oklahoma, Texas)
Administration for Children and Families
Dallas Regional Office
1301 Young Street, Room 914
Dallas, TX 75202-5433
Phone: 214-767-9648
Fax: 214-767-3743

Region 7 (Iowa, Kansas, Missouri, Nebraska)
Administration for Children and Families
Kansas City Regional Office
601 E. 12th Street, Room 276
Kansas City, MO 64106-2808
Phone: 816-426-3981
Fax: 816-426-2888

Region 8 (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming)
Administration for Children and Families
Denver Regional Office
1961 Stout Street, Office 926
Denver, CO 80294-3538
Phone: 303-844-3100
Fax: 303-844-1188

Region 9 (Arizona, California, Hawaii, Nevada, American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Guam, Marshall Islands, Republic of Palau)
Administration for Children and Families
San Francisco Regional Office
50 United Nations Plaza, Room 450
San Francisco, CA 94102
Phone: 415-437-8400
Fax: 415-437-8444

Region 10 (Alaska, Idaho, Oregon, Washington)
Administration for Children and Families
Seattle Regional Office
2201 Sixth Avenue, MS-70
Seattle, WA 98121
Phone: 206-615-2547
Fax: 206-615-2574

22.9 Are there programs in urban areas that specialize in serving American Indian and Alaskan Native children and families?

There are organizations in some urban areas that have specialized knowledge and experience in assisting tribal children and families who are involved in the child welfare system. Some of these

organizations provide child welfare related services directly to American Indian and Alaskan Native families, including assisting tribal governments who have children in these urban settings, while others provide more general services or help families secure services from other agencies. You can find contact information on these organizations in the Resources section of this Guide.

22.10 Do all tribal governments operate child welfare services for their children and families?

All tribes provide some level of support or services to their member children and families, but the level can vary significantly from one tribe to another. Some tribes are able to provide a full compliment of services, similar to their state counterparts, with an emphasis on culturally specific services that most states do not offer. Other tribes may offer more limited services and complement their own services with those of a state, county or local private agency. In both these examples, the tribes may also operate a tribal juvenile court where child custody proceedings may be heard and adjudicated. In some cases a tribe may rely more heavily on non-tribal services and offer case advocacy or general support to the families while they are participating in state or county programs.

Available funding is the primary factor in determining what level of support or service is available. For example, the primary sources of funding that support foster care or adoption assistance services for American Indian and Alaskan Native children are available through either the federal Title IV-E Foster Care and Adoption Assistance program or the BIA Social Services programs. Tribal governments are not eligible to directly receive Title IV-E funds and can only receive these funds if they have an agreement with a state. These agreements are not mandatory and currently less than twenty percent of tribal governments have these agreements. The BIA offers discretionary funding to support foster payments of American Indian and Alaskan Native children, but only to a limited number of tribal governments throughout the United States. Many tribal governments have no access to either of these foster care and adoption assistance funding sources. These examples exemplify a common trend in tribal access to child welfare funding that are present in other areas of tribal child welfare services as well.

22.11 Do tribal governments serve only their member children and families or can they serve other children and families as well?

Tribal governments, like other sovereign governments, have the authority to determine their own service population and service area in most cases, notwithstanding individual federal program requirements that place restrictions on this authority. Tribal governments can choose to serve other American Indian and Alaskan Native children and families, and in some instances, non-Indian children and families living in their service area. Related to service responsibility and authority in child welfare is jurisdictional authority. While these two areas are often discussed simultaneously, they have distinct applications and legal frameworks and are not interchangeable terms.

22.12 Are American Indian and Alaskan Native children and families eligible for state services?

American Indian and Alaskan Native children and families are citizens of both their tribal governments and the states in which they reside. With respect to federally funded services, which form almost all state- or county-provided child welfare services, states are not allowed to discriminate in the provision of services based upon political subdivisions, geographic location or racial background. Tribal children and families, regardless of whether they live on or off tribal lands, are eligible to receive federally funded services as long as they meet the basic eligibility criteria for those services. These policies guide the service responsibility of the state or county in providing services to American Indian and Alaskan Native children. A related, but legally distinct concept is jurisdictional authority. A state may have service responsibility, but not have jurisdictional authority over child welfare legal proceedings. This can complicate the coordination of services, but many tribes and states have found an effective response through the development of intergovernmental agreements that specify the boundaries and protocol of service responsibility and jurisdictional authority.

**** Access to the full-text of opinions and additional materials is at www.narf.org/icwa ****

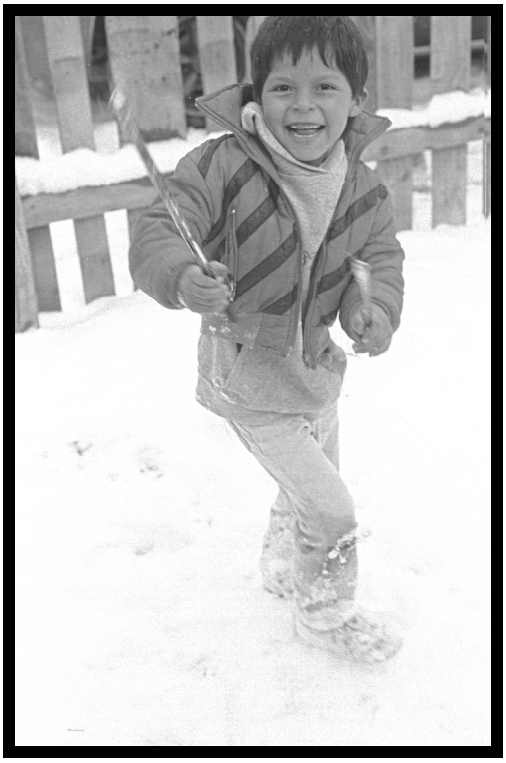
The following list is representative of cases that discuss the topic. The list is not exhaustive. The practitioner should conduct independent research.

FEDERAL CASES

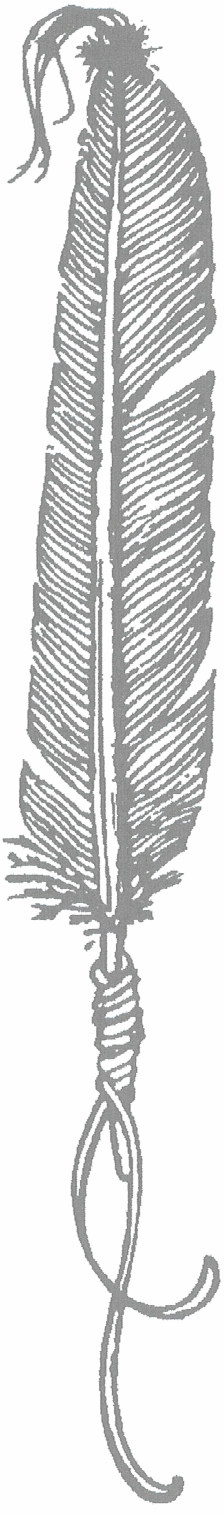
Circuit Courts of Appeals
Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985)

District Courts
Meyers ex rel. Meyers v. Bd. of Educ., 905 F. Supp. 1544 (D. Utah 1995)
Navajo Nation v. Hodel, 645 F. Supp. 825 (D. Ariz. 1986)

APPENDICES



APPENDICES



1. ICWA Legislative History—with full text of House Report No. 95-1386*
2. ICWA, 25 U.S.C. §§ 1901 *et seq.* (2000)
3. Federal ICWA Regulations, 25 C.F.R. Part 23
4. Bureau of Indian Affairs Indian Child Welfare Act Guidelines
5. *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30 (1989) court opinion
6. Flow Charts
7. Forms
8. Bibliography
9. NICWA Training materials

* Full text of all documents on the website at www.narf.org/icwa.

APPENDIX 1

ICWA LEGISLATIVE HISTORY—
WITH FULL TEXT OF
HOUSE REPORT NO. 95-1386

ICWA LEGISLATIVE HISTORY
CHRONOLOGICAL LISTING OF RELEVANT DOCUMENTS
WITH FULL TEXT OF HOUSE REPORT NO. 95-1386

1. Original Bills: 95 S. 928; 94 S. 3777; 95 H.R. 12533

2. Enacting Bill: Senate Bill 1214, P.L. 95-608, 92 Stat. 3069

3. Bill Summary: "To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes." The Indian Child Welfare Act of 1978 includes provisions to establish uniform standards for placement of Indian children in foster or adoptive homes, including provisions governing parental consent and intervention procedures, tribal court jurisdiction over child placement proceedings, and non-Indian agency priority placement of Indian children with extended family members. Also authorizes federal grants to Indian tribes for family development programs.

4. April 8, 9, 1974, Hearing: Indian Child Welfare Program, Committee on Interior and Insular Affairs. Senate, Apr. 8, 9, 1974, iv+531 p., (Library call number: Y4.In8/13:In2/33)

5. July 1976, Report: Report on Federal, State, and Tribal Jurisdiction, Child Custody and Indian Child Welfare Statistical Survey (pgs. 78-87, 176-241), American Indian Policy Review Commission, July 1976, vii+258 p., (Library call number: Y4.In2/10:F31/2)

6. June 27, 1977, Debate: Congressional Record Vol. 123 (1978): June 27, Indian Child Welfare Act of 1977

7. August 4, 1977, Hearing: Indian Child Welfare Act of 1977, Committee on Indian Affairs, Select. Senate, Aug. 4, 1977, v+603 p., (Library call number: Y4.In2/11:In2)

8. November 3, 1977, Senate report: Indian Child Welfare Act of 1977, Committee on Indian Affairs, Select. Senate, Report, S. Rpt. 95-597, Nov. 3, 1977, 58 p.

9. November 4, 1977, Debate: Congressional Record Vol. 123 (1977): Nov. 4, considered and passed Senate.

10. February 9 and March 9, 1978, Hearing: Indian Child Welfare Act of 1978, Committee on Interior and Insular Affairs, Feb. 9, Mar. 9, 1978, v+303 p., (Library call number: Y4.In8/14:96-42)

11. July 24, 1978, House report: Establishing Standards for the Placement of Indian Children In Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, Committee on Interior and Insular Affairs. House, Report, H. Rpt. 95-1386, July 24, 1978, 46 p.

12. October 14-15, 1978, Debate: Congressional Record Vol. 124 (1978): Oct. 14, H.R. 12533 considered and passed House; passage vacated, and S.1214, amended, passed in lieu. Oct. 15, Senate concurred in House amendments.

13. November 8, 1978, Legislative history: Legislative History of: P.L. 95-608, Indian Child Welfare Act of 1978, Nov. 8, 1978, Length: 10 p.

14. June 30, 1980, Hearing: Oversight of the Indian Child Welfare Act, Select Committee on Indian Affairs, June 30, 1980, iiv+148p., (Library call number: Y4.In2/11:In28)

15. April 24, 1984, Hearing: Oversight of the Indian Child Welfare Act of 1978, Select Committee on Indian Affairs, April 24, 1984, iii+432p., (Library call number: Y4.In2/11:S.hrg.98-952).

16. November 10, 1987, Hearing: Indian Child Welfare Act, Select Committee on Indian Affairs, Nov. 10, 1987, iii+438p., (Library call number: Y4.In2/11;S.hrg.100-574)

17. May 11, 1988, Hearing: Indian Child Welfare Act, Select Committee on Indian Affairs, May 11, 1988, iii+241p., (Library call number: Y4.In2/11:S.hrg.100-845)

18. Nov. 7, 2003, Statement: Congressional Record Vol. 161 (2003): Nov. 7, 25th Anniversary of Enactment of Indian Child Welfare Act.

19. Impact of the 1978 Indian Child Welfare Act and the 1980 adoption assistance and Child Welfare Act on the Out of Home Placement of American Indian Children by Cecelia Sudia, Children's Bureau, ACYF, July, 1987.

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No.–1386

ESTABLISHING STANDARDS FOR THE PLACEMENT OF INDIAN CHILDREN IN FOSTER OR ADOPTIVE HOMES, TO PREVENT THE BREAKUP OF INDIAN FAMILIES, AND FOR OTHER PURPOSES

JULY 24, 1978.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 12533]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 12533) to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, beginning on line 3, strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Indian Child Welfare Act of 1978".

SEC. 2. Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power*** To regulate Commerce*** with Indian tribes "and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

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

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

SEC. 3. The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibility and legal obligations to the American Indian people, to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

SEC. 4. For the purposes of this Act, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe;

(4) "Indian child" means 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) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contracts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 697), as amended;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code. In any case where it has been judicially determined that a reservation has been diminished or the boundaries disestablished, the term shall include the lands within the last recognized boundries of such diminished reservation prior to enactment of the statute which resulted in the diminishment or disestablishment;

(11) "Secretary" means the Secretary of the Iuterior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code of custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

TITLE I—CHILD CUSTODY PROCEEDINGS

SEC. 101. (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or prossession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and jusdicial proceedings of any other entity.

SEC. 102. (a) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

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

(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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.

SEC. 103. (a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

SEC. 104. Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section 101, 102, and 103 of this Act.

SEC. 105. (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in paragraph (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

SEC. 106(a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntary consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act, that such return of custody is not in the best interests of the child.

(b) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

SEC. 107. 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.

SEC. 108. (a) Any Indian tribe which became subject to State jurisdiction pursuant to the provision of the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b)(1) In considering the petition and feasibility of the plan of tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population on homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multi-tribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referal jurisdiction as provided in section 101(b) of this Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) over limited community or geographic areas without regard for the reservation status of the area affected.

(c) If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act.

Sec. 109. (a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdicton over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Such agreements may be revoked by either party upon one hundred and eighty days written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

SEC. 110. Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

SEC. 111. In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title, the State or Federal court shall apply the State or Federal standard.

SEC. 112. Nothing in this title shall be construed to prevent the emergency removal of an Indian child from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement continues only for a reaosnable time and shall expeditiously initiate a child custody proceeding subject to the provisions of this title, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

SEC. 113. None of the provisions of this title, except section 101(a), 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 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.

TITLE II—INDIAN CHILD AND FAMILY PROGRAMS

SEC. 201. (a) The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the construction, operation, and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, after-school care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children are provided the same support as Indian foster children; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV–B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act. The provision or possibility of assistance under this Act shall not be a basis for the

denial or reduction of any assistance otherwise authorized under titles IV–B and XX of the Social Security Act or any other federally-assisted program. For purposes of qualifying for assistance under a federally-assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

SEC. 202. The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children are provided the same support as Indian foster children;

(2) the construction, operation, and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, after-school care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

SEC. 203. (a) In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Funds for the purposes of this Act may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat. 208), as amended.

SEC. 204. For the purposes of sections 202 and 203 of this title, the term "Indian" shall include persons defined in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401).

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

SEC. 301. (a) Any State court entering a final decree or order in any Indian child adoptive placement after the date of 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 Freeodm of Information Act (80 Stat. 381).

(b) 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.

SEC. 302.(a)(1) Within six months from the date of this Act, the Secretary shall consult with Indian tribes, Indian organizations, and Indian interest groups in the consideration and formulation of rules and regulations to implement the provisions of this Act.

(2) Within seven months from the date of this Act, the Secretary shall present the proposed rules and regulations to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives.

(3) Within eight months from the date of this Act, the Secretary shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(4) Within ten months from the date of this Act, the Secretary shall promulgate rules and regulations to implement the provisions of this Act.

(b) The Secretary is authorized to revise and amend any rules and regulations promulgated pursuant to this section: *Provided*, That prior to any revisions or amendments to such rules and regulations, the Secretary shall present the proposed revision or amendment to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives and shall, to the extent practicable, consult with tribes, organizations, and groups specified in subsection (b)(1) of this section, and shall publish any proposed revisions or amendments in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and to receive comments from, other interested parties.

TITLE IV—PLACEMENT PREVENTION STUDY

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health, Education, and Welfare, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from the date of this Act. In developing this report the Secretary shall give particular consideration to the provisions of educational facilities for children in the elementary grades.

SEC. 402. Within sixty days after enactment of this Act, the Secretary shall send to the Governor, Chief Justice of the highest court of appeal, and the Attorney General of each State a copy of this Act, together with Committee reports and an explanation of the provisions of this Act.

SEC. 403. If any provision of this Act or the applicability thereof is held invalid, the remaining provisions of this Act shall not be affected thereby.

PURPOSE

The purpose of the bill (H.R. 12533), introduced by Mr. Udall et al.,[1] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs.

BACKGROUND

> * * * I can remember (the welfare worker) coming and taking some of my cousins and friends. I didn't know why and I didn't question it. It was just done and it had always been done * * *.[2]

[1] H.R. 12533 was introduced by Representatives Udall, Roncalio, Baucus, Bingham, Blouin, Burke of California, Phillip Burton, Carr, Dellums, Fraser, Miller of California, Risenhoover, Seiberling, Stark, Tsongas, Vento, and Weaver. A similar bill, S. 1214, has been approved by the Senate.

[2] Testimony of Valancia Thacker before Task Force 4 of the American Indian Policy Review Commission.

The wholesale separation of Indian children from their familieis is perhaps the most tragic and destructive aspect of American Indian life today.

Surveys of States with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25–35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some States the problem is getting worse: in Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and, in 1971–72, nearly one in every four Indian children under 1 year of age was adopted.

The disparity in placement rates for Indians and non-Indians is shocking. In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare since 1967–68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The number of South Dakota Indian children living in foster homes is per capita, nearly 16 times greater than the non-Indian rate. In the State of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 percent greater than it is for non-Indian children. Just as Indian children are exposed to these great hazards, their parents are too.

The Federal boarding school and dormitory programs also contribute to the destruction of Indian family and community life. The Bureau of Indian Affairs (BIA), in its school census for 1971, indicates that 34,538 children live in its institutional facilities rather than at home. This represents more than 17 percent of the Indian school age population of federally-recognized reservations and 60 percent of the children enrolled in BIA schools. On the Navajo Reservation, about 20,000 children or 90 percent of the BIA school population in grades K–12, live at boarding schools. A number of Indian children are also institutionalized in mission schools, training schools, etc.

In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social and cultural environment much different than their own. In 16 States surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes. In Minnesota today, according to State figures, more than 90 percent of nonrelated adoptions of Indian children are made by non-Indian couples. Few States keep as careful or complete child welfare statistics as Minnesota does, but informed estimates by welfare officials elsewhere suggest that this rate is the norm. In most Federal and mission boarding schools, a majority of the personnel is non-Indian.

It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.

Standards

The Indian child welfare crisis will continue until the standards for defining mistreatment are revised. Very few Indian children are removed from their families on the grounds of physical abuse. One study of a North Dakota reservation showed that these grounds were advanced in only 1 percent of the cases. Another study of a tribe in the Northwest showed the same incidence. The remaining 99 percent of the cases were argued on such vague grounds as "neglect" or "social deprivation" and on allegations of the emotional damage the children were subjected to by living with their parents. Indian communities are often shocked to learn that parents they regard as excellent caregivers have been judged unfit by non-Indian social workers.

In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.

For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

Because in some communities the social workers have, in a sense, become a part of the extended family, parents will sometimes turn to the welfare department for temporary care of their children, failing to realize that their action is perceived quite differently by non-Indians.

Indian child-rearing practices are also misinterpreted in evaluating a child's behavior and parental concern. It may appear that the child is running wild and that the parents do not care. What is labelled "permissiveness" may often, in fact, simply be a different but effective way of disciplining children. BIA boarding schools are full of children with such spurious "behavioral problems."

One of the grounds most frequently advanced for taking Indian children from their parents is the abuse of alcohol. However, this standard is applied unequally. In areas where rates of problem drinking among Indians and non-Indians are the same, it is rarely applied against non-Indian parents. Once again cultural biases frequently affect decisionmaking. The late Dr. Edward P. Dozier of Santa Clara Pueblo and other observers have argued that there are important cultural differences in the use of alcohol. Yet, by and large, non-Indian social workers draw conclusions about the meaning of acts or conduct in ignorance of these distinctions.

The courts tend to rely on the testimony of social workers who often lack the training and insights necessary to measure the emotional risk the child is running at home. In a number of cases, the AAIA has obtained evidence from competent psychiatrists who, after examining the defendants, have been able to contradict the allegations offered by the social workers. Rejecting the notion that poverty and cultural differences constitute social deprivation and psychological abuse, the Association argues that the State must prove that there is actual physical or emotional harm resulting from the acts of the parents.

The abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life and required a sharper definition of the standards of child abuse and neglect.

Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values. Recognizing that in some instances it is necessary to remove children from their homes, community leaders argue that there are Indian families within the tribe who could provide excellent care, although they are of modest means. While some progress is being made here and there, the figures cited above indicate that non-Indian parents continue to furnish almost all the foster and adoptive care for Indian children.

Due process

The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law. For example, it is rare for either Indian children or their parents to be represented by counsel to or have the supporting testimony of expert witnesses.

Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of the waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments. In a recent South Dakota entrapment case, an Indian parent in a time of trouble was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights. It is an unfortunate fact of life for many Indian parents that the primary service agency to which they must turn for financial help also exercises police powers over their family life and is, most frequently, the agency that initiates custody proceedings.

The conflict between Indian and non-Indian social systems operates to defeat due process. The extended family provides an example. By sharing the responsibility of child rearing, the extended family tends to strengthen the community's commitment to the child. At the same time, however, it diminishes the possibility that the nuclear family will be able to mobilize itself quickly enough when an outside agency acts to assume custody. Because it is not unusual for Indian children to spend considerable time away with other relatives, there is no immediate realization of what is happening—possibly not until the opportunity for due process has slipped away.

Economic incentives

In some instances, financial considerations contribute to the crisis. For example, agencies established to place children have an incentive to find children to place.

Indian community leaders charge that federally-subsidized foster care programs encourage some non-Indian families to start "baby farms" in order to supplement their meager farm income with foster care payments and to obtain extra hands for farmwork. The disparity between the ratio of Indian children in foster care versus the number of Indian children that are adopted seems to bear this out. For example,

in Wyoming in 1969, Indians accounted for 70 percent of foster care placements but only 8 percent of adoptive placements. Foster care payments usually cease when a child is adopted.

In addition, there are economic disincentives. It will cost the Federal and State Governments a great deal of money to provide Indian communities with the means to remedy their situation. But over the long run, it will cost a great deal more money not to. At the very least, as a first step, we should find new and more effective ways to spend present funds.

Social conditions

Low-income, joblessness, poor health, substandard housing, and low educational attainment—these are the reasons most often cited for the disintegration of Indian family life. It is not that clear-cut. Not all impoverished societies, whether Indian or non-Indian, suffer from catastrophically high rates of family breakdown.

Cultural disorientation, a person's sense of powerlessness, his loss of self-esteem—these may be the most potent forces at work. They arise, in large measure, from our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government.

One of the effects of our national paternalism has been to so alienate some Indian patents from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family. Another expression of it is the involuntary, arbitrary, and unwarranted separation of families.

It has already been noted that the harsh living conditions in many Indian communities may prompt a welfare department to make unwarranted placements and that they make it difficult for Indian people to qualify as foster or adoptive parents. Additionally, because these conditions are often viewed as the primary cause of family breakdown and because generally there is no end to Indian poverty in sight, agencies of government often fail to recognize immediate, practical means to reduce the incidence of neglect or separation.

As surely as poverty imposes severe strains on the ability of familes to function—sometimes the extra burden that is too much to bear—so too family breakdown contributes to the cycle of poverty.

CONSTITUTIONALITY

The Department of Justice, in its reports to the committee of February 9 and May 23, 1978, raises questions regarding the constitutionality of certain of the provisions of the legislation. While the committee did not agree with the Department on these issues, certain changes were made in the legislation which will meet some of the Department's concerns. Other issues remain, however. In view of the constitutional doubts of the Department, the committee feels compelled to respond.

Supremacy clause

Clause 2 of article VI of the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

When Congress legislates pursuant to its delegated powers, conflicting State law and policy must yield, *Gibbons* v. *Ogden*, 22 U.S. 1 (1824); *Hill* v. *Florida ex rel. Watson*, 325 U.S. 538 (1945); *Nash* v. *Florida Industrial Comm.*, 389 U.S. 235 (1967); *Lee* v. *Florida*, 392 U.S. 378 (1968); *Perez* v. *Campbell*, 402 U.S. 637 (1971).

The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. Their obligation "is imperative upon the State judges, in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the State, but according to the laws and treaties of the United States—'the supreme law of the land.'" *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816); State courts have both the power and duty to enforce obligations arising under Federal law. *Claflin* v. *Houseman*, 93 U.S. 130 (1876); *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Testa* v. *Katt*, 330 U.S. 386 (1947).

Plenary power of Congress over Indian affairs

The question is then: "Does Congress have power to legislate as proposed in the bill?" Clause 3, section 8, article I of the Constitution provides:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

In an unbroken line of Supreme Court decisions, beginning with Chief Justice John Marshall's decision in *Worcester* v. *Georgia*, 31 U.S. 515 (1832):

> (The Constitution) confers on Congress the powers of war and peace; of making treaties, and of regualting commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They (Congress) are not limited by any restrictions on their free actions.

And ending with *United States* v. *Wheeler*—U.S.—(March 22, 1978):

> (There is an) undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.

The Supreme Court has, time and again, upheld the sweeping power of Congress over Indian matters. The cases are far too numerous to cite, but two cases will serve to exemplify this position. In *U.S.* v. *Kagama*, 118 U.S. 375 (1886) the Court said:

> These Indian tribes are wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political

> rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

And in *United States* v. *Nice*, 241 U.S. 591 (1916), the Court held:

> The power of Congress to regulate or prohibit traffic with tribal Indians within a State whether upon or off an Indian reservation is well settled * * *. Its source is twofold; first, the clause of the Constitution expressly investing Congress with authority "to regulate Commerce * * * with the Indian tribes", and, second, the dependent relation of such tribes to the United States.

It cannot be questioned that Congress has broad, unique powers with respect to Indian tribes and affairs, There is only one caveat: While those powers may be plenary, the exercise may not be arbitrary. For example, Congress may not take Indian property without just compensation nor may it establish a religion for Indian tribes.

Plenary power and child welfare

The question then is: "Is the regulation of child custody proceedings and the imposition of minimum Federal standards an appropriate exercise of Congress plenary power over Indian affairs?"

We need only cite three cases to lay the foundation for the power of Congress to legislate in this area. In *U.S.* v. *Holliday*, 70 U.S. 407 (1866), the Court said:

> Commerce with foreign Nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments as individuals. And so commerce with Indians tribes means commerce with the individuals composing those tribes.

In *Dick* v. *U.S.*, 208 U.S. 340 (1908), the Court held:

> As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has power to say with whom, and on what terms, they shall deal * * *.

Knoepfler, in *Legal Status of American Indian & His Property* (1922), 7 Ia. L.B. 232, stated: "Commerce with the Indian tribes has been construed to mean practically every sort of intercourse with the Indians either in the tribes or as individuals."

Finally, the Maryland Court of Appeals, in a case involving the attempted adoption of an Indian child (*Wakefield* v. *Little Light*, 276 Md. 333, 347 A. 2d 228 (1975)), stated:

> We think it plain that child-rearing is an "essential tribal relation" within * * * (the test of) *Williams* v. *Lee* (358 U.S. 217 (1959)).

And again:

> * * *(C)onsidering that there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the * * * tribe to govern themselves than to interfere with tribal control over the custody of their children, we agree with the conclusion expressed in *Wisconsin Potowatomies* (*Wisconsin Potowatomies* v. *Houston*, 393 F. Supp. 719 (1973)) that in determining subject matter jurisdiction in such circumstances, the only rational approach is to determine the domicile of the Indian child. By using the Indian child's domicile as the State's jurisdictional basis, the Indian tribe is afforded significant protection from losing its essential rights of childrearing and maintenance of tribal identity.

Even this State court recognized that a tribe's children are vital to its integrity and future. Since the United States has the responsibility to protect the integrity of the tribes, we can say with the *Kagama* court, " * * * there arises the duty of protection, and with it the power."

Geographic scope of plenary power

Is the Congress limited to Indian lands or to the reservation in the exercise of its plenary power over Indian affairs? The answer is clearly, "No". Again, we need only cite one or two cases to support this conclusion.

In *U.S.* v. *Holliday*, supra, the Court said:

> If commerce, or traffic, or intercourse is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress; although within the limits of a State. The locality of the traffic *can have nothing to do with the power*. (Emphasis added.) The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or the member of the tribe with whom it is carried on.

In *Perrin* v. *U.S.*, 232 U.S. 487 (1914), the Court held:

> We come, then, to the objection that the prohibition in the act of 1894 confers an unnecessarily extensive territory and is not limited in duration, and so transcends the power of Congress. As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. * * * On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians Congress is invested with a wide discretion and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

We cite again *U.S.* v. *Nice*, supra: "The power of Congress to regulate or prohibit traffic with tribal Indians within a State *whether upon or off an Indian reservation* is well settled * * *." (Emphasis added.)

Membership and plenary power

The question occurs, as raised by the Department of Justice in its report: "Is the power of Congress limited, constitutionally, to only those individuals who are formally enrolled as members of an Indian tribe?" Again, the answer is negative.

In 1934, Congress enacted the Indian Reorganization Act of June 18, 1934 (48 Stat. 988). Section 19 defined "Indians" as:

> * * * all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Categories two and three of this definition are clearly not enrolled members of a tribe, by definition; yet Congress conferred the rights and benefits of the act upon this class of Indians, including the right to preference in Federal employment in the Bureau of Indian Affairs and the Indian Health Service. When the Supreme Court was called upon to construe the constitutionality of the Indian preference section of the Indian Reorganization Act in the case of *Morton* v. *Mancari*, 417 U.S. 535 (1974), it was aware that Indians who were not enrolled members of a tribe were made eligible for this preference by act of Congress, but did not strike the law down as invidiously discriminatory.

The reason it did not was because it was aware of its own past decisions with respect to congressional power over Indians not members of a tribe, Congress may disregard the existing membership rolls and direct that per capita distributions be made upon the basis of a new roll, even though such act may modify prior legislation, treaties, or agreements with the tribe. *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899). Thus, the Supreme Court in the case of *Sizemore* v. *Brady*, 235 U.S. 441 (1914), said:

> * * * Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it deemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe * * *.

In *Federal Indian Law*, at page 45 in note 10, it is said:

> It has been held that Congress is not bound by the tribal rule regarding membership and may determine for itself whether a person is an Indian from the standpoint of a Federal criminal statute. *United States* v. *Rogers*, 4 How. 567 (1846).

In the very recent case of *United States* v. *Antelope*, 45 U.S.L.W. 4361 (April 19, 1977), the Supreme Court said:

> It should be noted, however, that enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction. * * *

Federal District Court Judge Battin, in *Dillon* v. *Montana*, (1978), ordered:

> 2. That for purposes of applying this (Federal) exemption, the class of "Indian persons" * * * shall include persons possessing the following qualifications:
>
> (a) that the person possess some quantum of Indian blood;
>
> (b) that the person be recognized as an Indian by the community in which he or she lives, and that the putative taxpayer's wardship status has not been terminated by the government;
>
> (c) that the person be an enrolled member of a federally recognized Indian tribe *or otherwise eligible to be recognized as an Indian ward by the Federal Government.* (Emphasis added.)

If the courts have found that Congress has the power to act with respect to nonenrolled Indians in the foregoing kinds of circumstances, how much more is its power to act to protect the valuable rights of a minor Indian who is eligible for enrollment in a tribe? This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom. Obviously, Congress has power to act for their protection. The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.

Supremacy clause versus States' rights

From the foregoing, it is clear that Congress has full power to enact laws to protect and preserve the future and integrity of Indian tribes by providing minimal safeguards with respect to State proceedings for Indian child custody. The final question is, paraphrasing the Department of Justice; "Does Congress have power to control the incidents of child custody litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising jurisdiction over what is traditionally a State matter?"

First, let it be said that the provisions of the bill do not oust the State from the exercise of its legitimate police powers in regulating domestic relations.

The decisions of the Supreme Court will set to rest the principal objection. It is appropriate to begin with the landmark case of *McCulloch* v. *Maryland*, 17 U.S. 316 (1819), where the Court stated:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

In *Brown* v. *Western Ry. Co.*, 338 U.S. 294 (1949), the Court said:

> The argument is that while state courts are without power to detract from "substantive rights" granted by Congress * * * they are free to follow their own rules of "practice" and "procedure" * * *. A long series of cases previously decided, from which we see no reason to depart,

makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by forms of local practice. * * * Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by Federal laws.

In *Dice* v. *Akron, C.Y.Y. R.R. Co.*, 342 U.S. 359 (1952), the Court held:

> Congress * * * granted petitioner a right * * *. State laws are not controlling in determining what the incidents of this Federal right shall be."

Chief Justice Holmes, in *Davis* v. *Wechsler*, 263 U.S. 22 (1923), put it succinctly:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

We will quote merely two other cases to support the proposition that Congress may, constitutionally, impose certain procedural burdens upon State courts in order to protect the substantive rights of Indian children, Indian parents, and Indian tribes in State court proceedings for child custody.

The Court, in *American Railway Express Co.* v. *Levee*. 263 U.S. 19 (1923), held that:

> The laws of the United States cannot be evaded by the forms of local practice * * *. The local rules applied as to the burden of proof narrowed the protection that the defendant had secured (under Federal law), and therefore contravened the law.

And finally, in an extensive quote from the landmark decision of the Court in *Second Employers' Liability Cases*, 223 U.S. 1 (1912), we examine the duty of State courts, otherwise having jurisdiction over the subject matter, to enforce Federal substantive rights:

> We come next to consider whether rights arising from congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion * * *. (The State court was of the opinion that it could decline to enforce the Federal right) because * * * it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standard of right established by congressional act and in others the different standards recognized by the laws of the State. * * * It never has been supposed that courts are at liberty to decline cognizance of cases merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.
>
> We conclude that rights arising under the (Federal) act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion.

Conclusion

Under the rules of the House, this committee has been charged with the initial responsibility in implementing the plenary power over, and responsibility to, the Indians and Indian tribes. In the exercise of that responsibility, the committee has noted a growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming rate, with non-Indian foster or adoptive homes. Contributing to this problem has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.

While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

SECTION-BY-SECTION ANALYSIS

As amended by the committee, the legislation completely rewrites S. 1214 as passed by the Senate. In addition, the amendment in the nature of a substitute for H.R. 12533, as further amended, differs significantly from H.R. 12533 as introduced. The following is a section-by-section analysis of the bill as reported with appropriate explanations.

Section 1

Section 1 provides that the bill may be cited as the "Indian Child Welfare Act of 1978".

Section 2

Section 2 contains congressional findings. As amended, it lays the foundations for the power and responsibility of the Congress to legislate in the field of Indian child welfare.

Section 3

Section 3 contains a congressional declaration of policy. As amended, the section makes clear that the underlying principle of the bill is in the best interest of the Indian child. However, the committee notes that this legal principle is vague, at best. In a footnote on page 835 in the decision of *Smith* v. *OFFER*, 431 U.S. 820 (1977), the Supreme Court stated:

> Moreover, judges too may find it difficult, in utilizing vague standards like "the best interests of the child", to avoid decisions resting on subjective values."

SECTION 4

Section 4 defines various terms used in the bill.

Paragraph (1) defines the term "child custody placement" by defining four discrete legal proceedings included within the term. S. 1214 and H.R. 12533, as introduced, used the term "placement" which proved to be ambiguous with respect to the various provisions

of the bill. The terms may not be current in the legal lexicon of domestic relations and might have some different or overlapping meaning in normal usage. The terms are intended to have the meaning given to them in the paragraph.

Paragraph (2) defines the term "extended family member". The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing. Yet, many non-Indian public and private agencies have tended to view custody of an Indian child by a member of the extended family as prima facie evidence of parental neglect. It should be noted that the concept was not unknown in the non-Indian world. Justice Brennan, in his concurring opinion in *Moore* v. *East Cleveland,* 431 U.S. 494, 508 (1977), noted:

> In today's America, the "nuclear family" is the pattern so often found in much of white suburbia * * * . The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us white suburbia's preference in patterns of family living. The "extended family" * * * remains not merely still a pervasive living pattern, but under goad of brutal economic necessity, a prominent pattern—virtually a means of survivial—for large numbers of the poor and deprived minorities of our society.

Paragraph (3) defines "Indian" as any person who is a member of an Indian tribe.

Paragraph (4) defines "Indian child." The committee rejects the use of the term "merely" by the Department of Justice to qualify the eligibility of an Indian to be a member of an Indian tribe, particularly with respect to a minor. Blood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe. We do note that, for an adult Indian, there is an absolute right of expatiration from one's tribe. *U.S. ex rel. Standing Bear* v. *Crook*, 25 Fed. Cas. No. 14891 (1879). However, this right has no relevance to an Indian child who, because of his minority, does not have the capacity to make a reasoned decision about exercising his right to enroll in his tribe.

Paragraph (5) defines "Indian child's tribe." It is assumed that the appropriate official can make a reasonable judgment about which Indian tribe the Indian child has the more significant contacts in cases where the child is eligible for membership in more than one tribe.

Paragraph (6) defines "Indian custodian." Where the custody of an Indian child is lodged with someone other than the parents under formal custom or law of the tribe or under State law, no problem arises. But, because of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family member on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interests of the parents.

Paragraph (7) defines "Indian organization".

Paragraph (8) defines "Indian tribe".

Paragraph (9) defines "parent". It should be noted that the last sentence is not meant to conflict with the decision of the Supreme Court in *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Paragraph (10) defines the term "reservation". For the limited purpose of jurisdiction over Indian child custody proceedings, the last sentence of the paragraph addresses and varies the holding in cases such as *DeCoteau* v. *District Court,* 420 U.S. 425 (1975), and *Rosebud* v. *Kneip,* 97 S. Ct. 1361 (1977).

Paragraph (11) defines "Secretary" as the Secretary of the Interior.

Paragraph (12) defines "tribal court".

Section 101

Subsection (a) provides that an Indian tribe shall have exclusive jurisdiction over child custody proceedings where the Indian child is residing or domiciled on the reservation, unless Federal law has vested that jurisdiction in the State. It further provides that the domicile of an Indian child who is the ward of a tribal court is deemed to be that of the court, which is generally in accord with existing law. The provisions on exclusive tribal jurisdiction confirms the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation. *Wisconsin Potowatomies* v. *Houston,* 393 F. Supp. 719 (1973); *Wakefield* v. *Little Light,* 276 Md. 333 (1975); *In re Matter of Greybull,* 543 P. 2d 1079 (1975); *Duckhead* v. *Anderson et al.*, Wash. Sup. Ct., November 4, 1976.

Subsection (b) directs a State court, having jurisdiction over an Indian child custody proceeding to transfer such proceeding, absent good cause to the contrary, to the appropriate tribal court upon the petition of the parents or the Indian tribe. Either parent is given the right to veto such transfer. The subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected.

Subsection (c), for purposes of State proceedings for foster care placement or termination of parental rights, confers a right of intervention upon the Indian custodian and the Indian child's tribe. The committee is advised that the parents would have this right in any event.

Subsection (d) provides that the public acts, records, and judicial proceedings of an Indian tribe with respect to child custody proceedings shall be given full faith and credit by other jurisdictions to the same extent that such jurisdictions extend full faith and credit in other circumstances.

Section 102

Subsection (a) requires that, in an involuntary proceeding in State courts with respect to an Indian child, the moving party must provide certain notices to the parent or Indian custodian and the tribe. In lieu notice to the Secretary of the Interior is provided in cases where the location of the individual or tribe cannot reasonably be determined. The committee expects that the Secretary would make diligent efforts to relay such notice to the parent, custodian, and/or tribe. The subsection was amended to provide that the court would require such notice where it had actual or constructive knowledge of the Indian affiliation of the child.

Subsection (b) provides that an indigent parent or Indian custodian shall have a right to court-appointed counsel in any involuntary State proceeding for foster care placement or termination of parental rights. Where State law makes no provision for such appointment, the Secretary is authorized, subject to the availability of funds, to pay reasonable expenses and fees of such counsel. In adopting this amendment, the committee notes with approval the decision of the U.S. District Court for the Southern District of Florida in *Davis* v. *Page*, 442 F. Supp. 258 (1977), wherein the court held:

> Without benefit of counsel, Hilary Davis was little more than a spectator in the adjudicatory proceeding. She was ignorant of the law of evidence, and of the substantive law governing dependency proceedings. She sat silently through most of the hearing, and fearful of antagonizing the social workers, reluctantly consented to what she believed would be the placement of her child with the state for a few weeks. (p. 260.)
>
> The right to the integrity of the family is among the most fundamental rights under the Fourteenth Amendment. (p. 261.)
>
> The parent's interest in the custody and companionship of his child and the grievous nature of the loss which accompanies interference with that interest suffice to mandate the provision of counsel under a balance of interest test without further inquiry * * *. (T)he right to counsel inevitably emerges as an element of procedural due process. (p. 263.)

Subsection (c) provides that each party to a State court proceeding for foster care or termination of parental rights shall have a right to examine relevant documents filed with the court upon which it may base its decision. The committee was advised that, in many cases, Indian parents or custodians have been, practically, denied the right.

Subsection (d) provides that a party seeking foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide assistance designed to prevent the breakup of Indian families. The committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a Federal requirement in that regard with respect to Indian children and families.

Subsections (e) and (f) establish evidentiary standards for foster care placement or termination of parental rights. As introduced, H.R. 12533 required a "beyond a reasonable doubt" standard for both actions. While the committee feels that the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty, it amended the bill to reduce the standard to "clear and convincing" in the case of foster care where parental rights are not terminated. The phrase "qualified expert witnesses" is meant to apply to expertise beyond the normal social worker qualifications.

Section 103

Subsection (a) provides that consent to foster care placement or termination of parental rights must be executed in writing before a judge of a court of competent jurisdiction and that the judge must be satisfied the consequences of such consent was fully understood by the parent or custodian. Where the judge determines the parent or custodian does not have a sufficient command of the English language, it should be interpreted into a language such person does understand. The committee does not intend that the execution of the consent need be in open court where confidentiality is requested or indicated.

Subsection (b) permits a parent or Indian custodian to withdraw consent to a foster care placement at any time.

Subsection (c) authorizes a parent or Indian custodian to withdraw consent to termination of parental rights or adoptive placement of an Indian child at any time prior to the entry of a final decree.

Subsection (d) authorizes the setting aside of a final decree of adoption of an Indian child upon petition of the parent upon grounds that consent thereto was obtained through fraud or duress. This right is limited to 2 years after entry of the decree, unless a longer period is provided under State law. With respect to subsections (b), (c), and (d), the committee notes that nothing in those subsections prevents an appropriate party or agency from instituting an involuntary proceeding, subject to section 102, to prevent the return of the child, but does not wish to be understood as routinely inviting such actions.

Section 104

Section 104 authorizes the child, parent, or Indian custodian, or the tribe to move to set aside any foster care placement or termination of parental rights on the grounds that the rights secured under sections 101, 102, or 103 were violated.

Section 105

Section 105, as a whole, contemplates those instances where the parental rights of the Indian parent has already been terminated. The section seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.

Subsection (a) provides that, in the absence of good cause to the contrary, a preference shall be given to adoptive placement of an Indian child with the extended family; a member of the child's tribe; or another Indian family. This subsection and subsection (b) establish a Federal policy that, where possible, an Indian child should remain in the Indian community, but is not to be read as precluding the placement of an Indian child with a non-Indian family.

Subsection (b) establishes a similar preference for foster care or preadoptive placements of an Indian child. The language was amended to conform to language in H.R. 7200 of this Congress relative to foster care and adoptive placements in the least restrictive settings.

Subsection (c) provides that the tribe may establish a different order of preference which will be followed in lieu of the Federal standards as long as such order is consistent with the least restrictive setting standard in subsection (b). Where appropriate, the preference

of the child or parent shall be considered and a request for anonymity of a consenting parent shall be given weight in applying the preferences. While the request for anonymity should be given weight in determining if a preference should be applied, it is not meant to outweigh the basic right of the child as an Indian.

Subsection (d) provides that the standards to be used in meeting the preference shall be those prevailing in the relevant Indian community. All too often, State public and private agencies, in determining whether or not an Indian family is fit for foster care or adoptive placement of an Indian child, apply a white, middle-class standard which, in many cases, forecloses placement with the Indian family.

Subsection (e) requires the State to maintain records showing what efforts have been made to comply with the preference standards of this section and to make such records available to the tribe and Secretary.

Section 106

Subsection (a) authorizes a biological parent of an Indian child to petition for the return of the child when a previous adoption of such child fails. The child shall be returned to the parent upon such petition, unless there is a showing, in a proceeding subject to the provisions of section 102, that such return would not be in the best interests of the child.

Subsection (b) provides that when an Indian child is being removed from a foster care home for purposes of further foster care placement, preadoptive placement, or adoptive placement, such further placement shall be subject to the provisions of this act, unless the child is being returned to the parent or Indian custodian.

Section 107

Section 107 confers a right upon an adult Indian, who was the subject of adoption, to secure necessary information from the court which entered the decree to enable the person to protect and secure any rights he may have from his tribal affiliation. There appears to be a growing trend in State law, supported by developing psychology, that an adopted individual has an inherent right to know his genealogical background. However, this section and section 301 are not aimed at that right. These provisions are aimed at different, but no less valuable rights. One, these provisions will help protect the valuable rights an individual has as a member or potential member of an Indian tribe and any collateral benefits which may flow from the Federal Government because of such membership. Two, these provisions will help protect the rights and interests of an Indian tribe in having its children remain with or become a part of the tribe.

Section 108

Subsection (a) authorizes an Indian tribe, which became subject to State jurisdiction under Public Law 83–280 or any other Federal law, to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior including a suitable plan.

Subsection (b) authorizes the Secretary, in considering a petition for reassumption, to take into consideration various factors affecting the exercise of such jurisdiction, including membership rolls, size of reservation or former reservation, and population base. Depending on

such circumstances, the Secretary is given the flexibility to authorize partial retrocession based upon the referral authority under section 101(b) or to limit the geographic scope of the full exercise of 101(a) jurisdiction. The subsection was adopted as an amendment in order to take into consideration special circumstances, such as those occurring in Alaska and Oklahoma.

Subsection (c) provides for publication of notice of reassumption by the Secretary in the Federal Register and for the effective date of such reassumption.

Subsection (d) provides that reassumption shall not affect ongoing proceedings at the time of reassumption unless provided for in an agreement under section 109.

Section 109

Section 109 authorizes Indian tribes and States to enter into mutual agreements or compacts with respect to jurisdiction over Indian child custody proceedings and related matters. It also provides for revocation of such agreements by the parties.

Section 110

Section 110 establishes a "clean hands" doctrine with respect to petitions in State court for the custody of an Indian child by a person who improperly has such child in physical custody. It is aimed at those persons who improperly secure or improperly retain custody of the child without the consent of the parent or Indian custodian and without the sanction of law. It is intended to bar such person from taking advantage of their wrongful conduct in a subsequent petition for custody. The child is to be returned to the parent or Indian custodian by the court unless such return would result in substantial and immediate physical danger or threat of physical danger to the child. It is not intended that any such showing be by or on behalf of the wrongful petitioner.

Section 111

Section 111 provides that, where State law affords a higher degree of protection of the rights of the parent or Indian custodian, such standard will be applied by the State court in lieu of the related provision of this title. The section was amended by the committee to include any relevant protection or standard established under Federal law.

Section 112

Section 112 would permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of this title. Such emergency removal and/or placement is to continue only for a reasonable length of time and the committee expects that the appropriate State official or authority would take expeditious action to return the child to the parent or custodian; transfer jurisdiction to the appropriate tribe; or institute a proceeding subject to the provisions of this title.

Section 113

Section 113 provides for the orderly phasing in of the effect of the provisions of this title. As amended, it provides that none of the pro-

visions of this title, except section 101(a), would apply to any State action for foster care placement; for termination of parental rights; for preadoptive placement; or for adoptive placement which was initiated or completed prior to enactment of this act. However, it is intended that the provisions would apply to any subsequent discrete phase of the same matter or with respect to the same child initiated after enactment. For instance, if the foster care placement of an Indian child was initiated or completed prior to enactment and then, subsequent to enactment, the child was replaced for foster care, or an action for termination of parental rights was initiated, or the child was placed in a preadoptive situation, or he was placed for adoption, the provisions of the act would be applicable to those subsequent actions.

Section 201

Subsection (a) authorizes the Secretary to make grants to Indian tribes and organizations to fund Indian child and family service programs on or near the reservation and lists nonexclusionary services to be provided in such programs.

Subsection (b) permits tribes and organizations to use such grant money for non-Federal matching share with respect to titles IV–B and XX of the Social Security Act or other similar Federal programs. It would also recognize the licensing or approval of foster or adoptive homes or institutions by Indian tribes as equivalent to State licensing or approval.

Section 202

Section 202 authorizes the Secretary to make similar grants to Indian organizations for off-reservation programs.

Section 203

Section 203 authorizes the Secretary of the Interior and the Secretary of Health, Education, and Welfare to enter into joint funding agreements with respect to Indian child and family service programs, to the extent that funds are made available by appropriation acts for such purposes. The authority of the Snyder Act of November 2, 1921 (42 Stat. 208) is made available for the appropriation of funds for grants to tribes and organizations.

Section 204

Section 204 provides that, solely with respect to sections 202 and 203 of this act, "Indian" shall have the meaning assigned to it in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401).

Section 301

Subsection (a) provides that any State court entering a final decree of adoption of an Indian child after the date of enactment of this act shall provide a copy of such decree together with certain other basic information to the Secretary, including any affidavit of a parent requesting anonymity. The Secretary is required to maintain such information and records and to insure that such information is kept confidential. The subsection provides that such information shall not be subject to the Freedom of Information Act.

Subsection (b) provides that, upon request of an adopted Indian child over age 18; an adoptive or foster parent of an Indian child; or an Indian child's tribe, the Secretary shall release such information as may be necessary for enrollment of the child or for otherwise protecting the rights of the child as an Indian. Where the biological parent has requested anonymity, the Secretary is authorized to certify to an Indian tribe the eligibility of an Indian child under the tribe's membership criteria without disclosing the identity of the parents, if such certification is acceptable to the tribe.

Section 302

Section 302 establishes timetables and consulting requirements for the secretarial promulgation of regulations implementing this act.

Section 401

Section 401 directs the Secretary to submit a report to the Congress on the feasibility of providing Indian children with schools located near their homes. The committee was informed of the devastating impact of the Federal boarding school system on Indian family life and on Indian children, particularly those children in the elementary grades and considers that it is in the best interests of Indian children that they be afforded the opportunity to live at home while attending school. It is noted that more than 10,000 Navajo children in grades 1 to 8 are boarded.

Section 402

Section 402 requires the Secretary, within 60 days after enactment, to provide appropriate notice and information about this act and its provisions to appropriate State officials.

Section 403

Section 403 provides that if any provision of this act is held invalid, the remaining provisions shall not be affected thereby.

LEGISLATIVE HISTORY

The Indian child welfare legislation is the outgrowth of hearings and investigations conducted in the 93d, 94th, and 95th Congress. In 1974, the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, at the urging of Indian tribes and organizations, conducted oversight hearings on the removal of Indian children from their families and the placement of such children in foster and adoptive homes. Testimony was taken from a wide spectrum of public and private witnesses which tended to confirm reports of abuses of the rights of Indian tribes, parents, and children in the process.

During the 94th Congress, Task Force IV of the American Indian Policy Review Commission, established by the act of January 2, 1975 (88 Stat. 1910), addressed the issue of Indian child placements. After a series of hearings, the task force report and findings supported the findings of the Senate oversight hearings. In the latter part of 1976 and early 1977, the Commission considered the findings and recommendations of the task force on Indian child welfare matters. In its final report to the Congress, the Commission made a number of recommendations on the issue, many of which have been included in H.R. 12533.

On April 1, 1977, Senator Abourezk introduced S. 1214 which was referred to the Senate Select Committee on Indian Affairs. On August 4, 1977, the Senate committee held hearings on the bill, again, taking testimony from the broad spectrum of concerned parties, public and private, Indian and non-Indian. The committee adopted an amendment in the nature of a substitute and reported the amended bill to the Senate on November 3, 1977 (S. Rept. No. 95–597). The bill passed the Senate on November 4, 1977.

In the House, S. 1214 was referred to the Committee on Interior and Insular Affairs. On February 9 and March 9, 1978, the Subcommittee on Indian Affairs and Public Lands held hearings on the bill, hearing 8 hours of testimony from 34 witnesses. The subcommittee received comments on S. 1214, either by oral testimony or written communication, from 3 executive departments; 20 States; 22 non-Indian private organizations; 35 Indian organizations; and 38 Indian tribes.

On April 18, 1978, the subcommittee marked up S. 1214 and adopted an amendment in the nature of a substitute. This substitute was subsequently introduced by Mr. Udall et al. as a clean bill, H.R. 12533. On June 21, 1978, the full committee took up consideration of the legislation and proceeded to the markup of H.R. 12533 in lieu of S. 1214. The committee adopted an amendment in the nature of a substitute to H.R. 12533 which was further amended. H.R. 12533, as amended, was reported from the committee favorably, by voice vote.

COST AND BUDGET ACT COMPLAINCE

Title II of the bill directs the Secretary of the Interior to institute programs for child and family service assistance. These programs include authority to construct centers on and off reservations and to provide a variety of assistance programs directed toward the stability and integrity of the Indian family. CBO has projected a cost of approximately $125 million over the next 5 fiscal years. The committee feels that this estimate is high and is based upon assumptions which are probably not valid, but it agrees that the costs will not exceed a total of $125 million. For instance, it assumes construction of family service centers in every case in which an Indian reservation or urban area might be eligible for such center. In fact, existing facilities, both on the reservation and in the urban areas, would probably be used to house the various programs contemplated in the bill. The analysis of H.R. 12533 by the Congressional Budget Office follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 11, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 12533, the Indian Child Welfare Act of 1978.

Should the committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN,
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JULY 11, 1978.

1. Bill No.: H.R. 12533.
2. Bill title: Indian Child Welfare Act of 1978.
3. Bill status: As ordered reported from the House Committee on Interior and Insular Affairs, June 21, 1978.
4. Bill purpose: The purpose of this bill is to establish standards for placement of Indian children in foster or adoptive homes and to establish grants to Indian tribes and Indian organizations for the construction and operation of Indian family development centers. H.R. 12533 does not request any additional authorizations for the purposes of this bill. Rather, the act states that the new programs will be authorized under the act of November 2, 1921 (the Snyder Act). The Snyder Act provides permanent and open ended authorization for Indian programs. This bill is subject to subsequent appropriation action.
5. Cost estimate:

	Millions
Fiscal year 1979:	
Estimated additional authoriztaion	-----
Estimated costs	-----
Fiscal year 1980:	
Estimated additional authorization	27. 6
Estimated costs	6. 8
Fiscal year 1981:	
Estimated additional authorization	32. 3
Estimated costs	30. 4
Fiscal year 1982:	
Estimated additional authorization	42. 2
Estimated costs	38. 2
Fiscal year 1983:	
Estimated additional authorization	52. 4
Estimated costs	45. 0

The costs of this bill falls within budget function 500.

6. Basis for estimate: The projected cost for H.R. 12533 is based on programmatic information and assumptions supplied by the Bureau of Indian Affairs (BIA). Below are the specific assumptions for this estimate.

(1) There are 150 potential locations both on and off the reservations that would be eligible to build and operate a child development center as described in the bill. It was assumed by BIA that a maximum of 30 centers would be constructed annually at a cost in fiscal year 1980 of $658,000 per center.

(2) Once built, each center would be operated by a professional and support staff of 15. The first full year costs (fiscal year 1981) covering operating expenses for 30 centers is estimated to be $7.9 million.

(3) The building costs were inflated by the CBO projection for cost increases in the residential building industry. The other expenses were inflated by the CBO projection for increases in the CPI.

(4) The spendout on construction for the development center is spread over 3 years, while the spendout for operating expenses is spread over a 2-year period. The fiscal year 1980 spendout is relatively low reflecting a lagtime for planning and development of the centers.

(5) This cost estimate assumes an enactment for this bill of October 1978 with appropriation action completed and regulations issued by October 1979.

7. Estimate comparison: None.
8. Previous CBO estimate: On November 2, 1977, CBO prepared an estimate on S. 1214, the Indian Child Welfare Act of 1977. The Senate bill is essentially the same as H.R. 12533. However, S. 1214 did not assume the use of Snyder Act authorization and included additional authorization language to cover the provision of the bill setting an authorization level of $26 million for fiscal year 1979.
9. Estimate prepared by Deborah Kalcevic.
10. Estimate approved by James L. Blum, Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

At the level of funding estimated by the Congressional Budget Office, enactment of this legislation would have some minimal inflationary impact. This impact is lessened since the cost will be spread out over 5 fiscal years.

OVERSIGHT STATEMENT

Other than normal oversight responsibilities exercised in conjunction with these legislative operations, the committee conducted no specific oversight hearings and no recommendations were submitted to the committee pursuant to rule X, clause 2(b)2.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by a voice vote, recommends that the bill, as amended, be enacted.

DEPARTMENTAL REPORTS

The report of the Department of the Interior, dated June 6, 1978, and the reports of the Department of Justice, dated February 9, 1978, and May 23, 1978, are as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., June 6, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This Department would like to make its views known on H.R. 12533, the Indian Child Welfare Act of 1978, and urges the committee to make the recommended changes during markup of the bill. We understand the Department of Justice has communicated its concerns with the bill to the committee, and we urge the committee to amend the bill to address those concerns.

If H.R. 12533 is amended as detailed herein and as recommended by the Department of Justice's letter of May 23, 1978, we would recommend that the bill be enacted.

Title I of H.R. 12533 would establish nationwide procedures for the handling of Indian child placements. The bill would vest in tribal courts their already acknowledged right to exclusive jurisdiction over Indian child placements within their reservations. It would also provide for transfer of such a proceeding from a State court to a tribal court if the parent or Indian custodian so petitions or if the Indian tribe so petitions, and if neither of the parents nor the custodian objects.

Requirements dealing with notice to tribes and parents and consent to child placements are also a major element of the bill. Testimony on the problems with present Indian child placement proceedings repeatedly pointed out the lack of informed consent on the part of many Indian parents who have lost their children.

Title I would also impose on State courts evidentiary standards which would have to be met before an Indian child could be ordered removed from the custody of his parents or Indian custodian. Court-appointed counsel would be available to the parent or custodian upon a finding of indigency by the court.

State courts would also be required, under the provisions of H.R. 12533, to apply preference standards set forth in section 105 in the placing of an Indian child. These preferences would strengthen the chances of the Indian child staying within the Indian community and growing up with a consistent set of cultural values.

Title II of H.R. 12533, entitled "Indian Child and Family Programs," would authorize the Secretary of the Interior to make grants to Indian tribes and organizations for the establishment of Indian family service programs both on and off the reservation. Section 204 would authorize $26 million for that purpose.

Title III of H.R. 12533, entitled "Recordkeeping, Information Availability, and Timetables," would direct the Secretary of the Interior to maintain records, in a single central location, of all Indian child placements affected by the act. Those records would not be open, but information from them could be made available to an Indian child over age 18, to his adoptive or foster parent, or to an Indian tribe, for the purpose of assisting in the enrollment of that child in an Indian tribe.

Title IV of H.R. 12533, entitled "Placement Prevention Study," would direct the Secretary of the Interior to prepare and submit to Congress a plan, including a cost analysis statement, for the provision to Indian children of schools located near their homes.

Although we support the concept of promoting the welfare of Indian children, we urge that the bill be amended in the following ways.

Section 4(9) defines the term "placement." This definition is crucial to the carrying out of the provisions of title I. We believe that custody proceedings held pursuant to a divorce decree and delinquency proceedings where the act committed would be a crime if committed by an adult should be excepted from the definition of the term "placement". We believe that the protections provided by this act are not needed in proceedings between parents. We also believe that the standards and preferences have no relevance in the context of a delinquency proceeding.

Section 101(a) would grant to Indian tribes exclusive jurisdiction over Indian child placement proceedings. We believe that section 101(a) should be amended to make explicit that an Indian tribe has exclusive jurisdiction only if the Indian child is residing on the reservation with a parent or custodian who has legal custody. The bill does not address the situation where two parental views are involved. Therefore, the definition of domicile is inadequate and the use of the word "parent" as defined does not articulate the responsibilities of the courts to both parents.

We believe that reservations located in States subject to Public Law 83–280 should be specifically excluded from section 101(a), since the provisions of section 108, regarding retrocession of jurisdiction, deal with the reassumption of tribal jurisdiction in those States.

Section 101(b) should be amended to prohibit clearly the transfer of a child placement proceeding to a tribal court when any parent or child over the age of 12 objects to the transfer.

Section 101(e), regarding full faith and credit to tribal orders, should be amended to make clear that the full faith and credit intended is that which States presently give to other States.

Section 102(a) would provide that no placement hearing be held until at least 30 days after the parent and the tribe receive notice. We believe that in many cases 30 days is too long to delay the commencement of such a proceeding. We suggest that the section be amended to allow the proceeding to begin 10 days after such notice with a provision allowing the tribe or parent to request up to 20 additional days to prepare a case. This would allow cases where the parents or tribe do not wish a full 30 days' notice to be adjudicated quickly, while still affording time to the parent or tribe who needs that time to prepare a case. We also suggest that the section be amended to require the Secretary to make a good faith effort to locate the parent as quickly as possible and to provide for situations in which the parent or Indian custodian cannot be located.

We also believe that there is a need for specific emergency removal provisions in H.R. 12533. A section should be added allowing the removal of a child from the home without a court order when the physical or emotional well-being of the child is seriously and immediately threatened. That removal should not exceed 72 hours without an order from a court of competent jurisdiction.

Section 102(b) would provide the parent or Indian custodian of an Indian child the right to court-appointed counsel if the court determines that he or she is indigent.

We are opposed to the enactment of this section. We do not believe that there has been a significant demonstration of need for such a provision to justify the financial burden such a requirement would be to both the States and the Federal Government.

Section 102(c) would allow all parties to a placement to examine all documents and files upon which any decision with respect to that placement may be based. This provision conflicts with the Federal Child Abuse and Neglect Treatment Act, Public Law 93–247, which provides confidentiality for certain records in child abuse and neglect cases. We believe that such a broad opening of records would lead to less reporting of child abuse and neglect. However, we do recognize the right of the parent to confront and be given an opportunity to refute any evidence which the court may use in deciding the outcome of a child placement proceeding. We recommend that the Indian Child Welfare Act conform with the provisions of Public Law 93–247.

Section 102(e) of H.R. 12533 would require the State court to find beyond a reasonable doubt, before ordering the removal of the child from the home, that continued custody on the part of the parent or custodian will result in serious emotional or physical damage to the child. We believe that the burden of proof is too high. We would support the language found in section 101(b) of the Senate-passed

S. 1214, which would impose a burden of clear and convincing evidence and would set down certain social conditions which could not be considered by the court as prima facie evidence of neglect or abuse. We also believe that the language "will result" in serious damage to the child should be amended to read "is likely to result" in such damage. It is almost impossible to prove at such a high burden of proof that an act will definitely happen.

Section 105 of H.R. 12533 would impose on State courts certain preferences in placing an Indian child. Subsection (c) would substitute the preference list of the Indian child's tribe where the tribe has established a different order of preference by resolution.

Language should be included in that subsection which would require that resolution to be published in the Federal Register and later included in the Code of Federal Regulations. This would allow the State court easy access to the preferences of the various tribes.

It is also unclear what the last sentence in subsection (c) means in allowing the preference of the Indian child or parent to be considered "where appropriate". We believe that the preference of the child and the parent should be given due consideration by the court regardless of whether that court is following the preferences set forth in section 105(a) or 105(b), or whether it is following a preference list established by an Indian tribe. Therefore, we recommend that a separate subsection be added to section 105 stating that the preferences of the Indian child and of the parent be given due consideration by the court whenever an Indian child is being placed.

Section 106 deals with failed placements and requires that, whenever an Indian child is removed from a foster home or institution in which the child was placed for the purpose of further placement, such removal shall be considered a placement for purposes of the act. We see no reason for requiring a full proceeding every time a child is moved from one form of foster care to another. We do, however, recognize the need for notification of the parents and the tribe of such move and for applying the preferences set forth in section 105. Therefore, we recommend that subsection (b) of section 106 be amended to require the notice and preference provisions to apply when a child is moved from one form of foster care to another and to require the removal to be considered as a new placement only in the case where termination of parental rights is at issue.

Section 107 deals with the right of an Indian who has reached age 18 and who has been the subject of a placement to learn of his or her tribal affiliation. We believe that rather than apply to the court for such information, the individual involved should apply to the Secretary of the Interior. Under the provisions of title III, the Secretary would maintain a central file with the name and tribal affiliation of each child subject to the provisions of the act. Therefore, the Secretary would be more likely than the State court to have the information needed to protect any rights of the individual involved which may flow from his or her tribal affiliation.

Finally, with respect to title I, we believe that a section should be added which would state that the provisions of the act should apply only with respect to placement proceedings which begin 6 months after the date of the enactment of the act. This would allow States some time to familiarize themselves with the provisions of the act and

would thus avoid the chance of having large numbers of placements invalidated because of failure to follow the procedures of the act.

Such a section should also state that the intent of the act is not the pre-emption by the Federal Government of the whole area of Indian child welfare and placement. In any case where a state has laws which are more protective than the requirements of this act, e.g., with regard to notice and enforcement, those laws should apply.

We believe that many of the authorities granted by title II of the bill are unnecessary because they duplicate authorities in present law, and therefore, we recommend the deletion of title II.

We find especially objectionable in title II the following:

The authorization for an unlimited subsidy program for Indian adoptive children. We believe that any such program should be limited to hard-to-place children or children who are or would be eligible for foster care support from the Bureau of Indian Affairs. We also believe that the amount of any such support would have to be limited to the prevalent State foster care rate for maintenance and medical needs.

The authorization for grants to establish and operate off-reservation Indian child and family service programs.

The new separate authorization of $26 million in section 203(b) of title II.

The provisions of section 201(c) which would authorize every Indian tribe to construct, operate, and maintain family service facilities regardless of the size of the tribe or the availability of existing services and facilities.

The authorization for the use of Federal funds appropriated under title II to be used as the non-Federal matching share in connection with other Federal funds.

However, we believe that the last sentence of section 201(b), providing that licensing or approval by an Indian tribe should be deemed equivalent to that done by a State, should remain in the bill under title I as a separate section.

We have no objection to section 301 of title III of H.R. 12533. We believe that requiring the Secretary to maintain a central file on Indian child placements will better enable the Secretary to carry out his trust responsibility, especially when judgment funds are to be distributed.

However, we object to the provisions of section 302(c), which would require the Secretary to present any proposed revision or amendment of rules and regulations promulgated under that section to both Houses of Congress. Any such proposed revision or amendment would be published in the Federal Register and we believe that placing this additional responsibility on the Secretary is both burdensome and unnecessary.

We believe that section 401 of Title IV should be amended to read as follows:

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) The Secretary is authorized and directed to prepare and submit to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the U.S. House of Representatives within 1 year from the date of this act, a report on the feasibility of providing Indian children with schools located near their homes. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program, and that enactment of the House subcommittee's present version of H.R. 12533 would not be consistent with the administration's objectives.

Sincerely,

FORREST J. GERARD,
Assistant Secretary.

DEPARTMENT OF JUSTICE,
Washington, D.C., February 9, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is to bring to your attention several areas where the Department of Justice perceives potential problems with S. 1214, a bill to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes. In our view, certain provisions of the bill raise serious constitutional problems because they provide for differing treatment of certain classes of persons based solely on race. S. 1214 was passed by the Senate on November 4, 1977 and is now pending in the Interior and Insular Affairs Subcommittee on Indian Affairs and Public Lands.

This Department has not been involved in the hearings relating to the bill. Our comments therefore are based on a reading of the text of the bill rather than on a review of the testimony and legislative history which necessarily would be considered by a court which had to interpret its provisions and determine its constitutional validity.

As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83–280. It is our understanding that this legal principle is often ignored by local welfare organizations and foster homes in cases where they believe Indian children have been neglected, and that S. 1214 is designed to remedy this, and to define the Indian rights in such cases.

The bill would appear to subject family relations matters of certain classes of persons to the jurisdiction of tribal courts which are presently adjudicated in State courts. The bill would accomplish this result with regard to three distinct categories of persons, all possessing the common trait of having enough Indian blood to qualify for membership in a tribe. One class would be members of a tribe. Another class would be nontribal members living on reservations, and a third would be nonmembers living off reservations. These three classes would be

denied access to State courts for the adjudication of certain family relations matters unless "good cause" is shown under section 102(c) of the bill.

The general constitutional question raised by S. 1214 is whether the denial of access to State courts constitutes invidious racial discrimination violative of the fifth amendment. See *Bowling* v. *Sharp*, 347 U.S. 497 (1954). This question is most properly addressed by focusing on each of the three classes described above and contrasting each class with a similarly situated class of persons whose access to State courts is not affected by the bill.

The class of persons whose rights under the bill may, in our opinion, constitutionally be circumscribed by this legislation are the members of a tribe, whether living on or near a reservation. In *Fisher* v. *District Court*, 424 U.S. 382 (1976), the Supreme Court addressed an argument made by members of the Northern Cheyenne Tribe that denial to them of access to the Montana State courts to pursue an adoption did not involve impermissible racial discrimination. In that case, both the persons seeking to pursue adoption of the child in question and the natural mother of the child who contested the right of the Montana courts to entertain the adoption proceeding were residents of the reservation and members of the tribe. The Court stated that:

> The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under Federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton* v. *Mancari*, 417 U.S. 535, 551–555 (1974). 424 U.S., at 390–91.

In *Fisher*, the class to which the Court was apparently referring consisted of members of the Northern Cheyenne Tribe. This is so because of the Court's citation to *Morton* v. *Mancari*, in which the Court had upheld preferential treatment of Indians in certain employment situations by reasoning that the "preference, as applied, is granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities * * *." 417 U.S., at 554.

More recently, the Court has reentered this thicket in *United States* v. *Antelope*, 45 U.S.L.W. 4361 (U.S. April 19, 1977). In that case, enrolled Coeur d'Alese Indians contended that their Federal convictions for murder of a non-Indian on the Coeur d'Alese Reservations were products of invidious racial discrimination because a non-Indian participating in the same crime would have been tried in State court and would have had certain substantial advantages regarding the elements required to be proved for conviction.[1] The Court, in rejecting this claim, held that the Coeur d'Alese Indians "were not subjected to Federal criminal jurisdiction [under 18 U.S.C. § 1153] because they are of the Indian race but because they were enrolled members of the Coeur d'Alese Tribe." Id., at 4363.

[1] Specifically, the State of Idaho, in which the crime occurred, did not have a felony murder rule so that, in order to be convicted of first-degree murder, the State would have had to prove certain elements that were not required to be proven in the Federal trial because a felony-murder rule was in effect in the latter court.

We believe that *Mancari*, *Fisher*, and *Antelope* directly support the constitutionality of this bill as it affects the access of tribal members to State courts. At the same time, these cases do not resolve the constitutionality of S. 1214 as it would affect the rights of nontribal members living either on or off reservations. Indeed, they can be read to suggest that, absent tribal membership, Congress' freedom to treat differently persons having Indian blood is diminished.

With regard to nonmembers living on a reservation, a footnote in the *Antelope* case would appear indirectly to address, but not resolve, the question presented by this bill:

> "It should be noted, however, that enrollment in an official tribe has not been held to be an absolute requirement for Federal jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon.' *Ex Parte Pero*, 99 F. 2d 28, 30 (CA 7 1938). See also *United States* v. *Ives*, 504 F. 2d 935, 953 (CA 9 1974) (dicta). Since respondents are enrolled tribal members, we are not called on to decide whether nonenrolled Indians are subject to [Federal criminal jurisdiction] and we therefore intimate no views on the matter." [2]

In *Ex parte Pero, supra*, the seventh circuit affirmed the grant of a writ of habeas corpus to a nonenrolled Indian, who had been convicted of murder in a State court, holding that the Indian could only be tried in Federal court by virtue of what was then 18 U.S.C. § 548, the predecessor of 18 U.S.C. § 1153. The court appeared to base its holding on the fact that the Indian was the "child of one Indian mother and half-blood father, where both parents are recognized as Indians and maintain tribal relations, who himself lives on the reservation and, maintains tribal relations and is recognized as an Indian * * *." Id., at 31.

With regard to nonmembers who are otherwise eligible for tribal membership who live on reservations, *Pero* at least stands for the proposition that the federal interest in the "guardian-ward relationship" is sufficient to secure to a nonenrolled Indian the protection of a Federal criminal proceeding as opposed to tiral by a State court. *Pero* is, however, predicated on a Federal interest which would appear to us to differ in kind from the Federal interest identified in *Mancari*, *Fisher*, and *Antelope*. In those latter cases, the Federal interest in promoting Indian self-government was specifically identified as a touchstone of the Court's opinions. In our view, this weighty interest is present in S. 1214 in a more attenuated form with regard to nontribal members, even those living on reservations. An eligible Indian who has chosen, for whatever reasons, not to enroll in a tribe would be in a position to argue that depriving him of access to the State courts on matters related to family life would be invidious. Such an Indian presumably has, under the first amendment, the same right of association as do all citizens, and indeed would appear to be in no different situation from a non-Indian living on a reservation who, under S. 1214, would have access to State courts. The only difference between them would, in fact, be the racial characteristics of the former.

We also think that even *Pero* only marginally supports the constitutionality of this bill as applied to nonmembers living on reserva-

[2] 45 U.S.L.W., at 4363 n. 7.

tions. In *Pero*, the focus of the Court's inquiry was on the contacts between the convicted Indian and the Indian tribe and reservation. In S. 1214, the inquiry would appear to be solely directed to contacts between the Indian child and the Indian tribe, whereas the persons whose rights are most directly affected by the bill are the parents or guardians of the child.[3] Thus, there is little support for the constitutionality of this bill as applied to nontribal members living on reservations and the rationale applied by the Court in *Mancari*, *Fisher*, and *Antelope* would not save the bill. The simple fact is that the parents of an Indian child may find their substantive rights altered by virtue of their Indian blood and the simple fact of residence on a reservation. The Court has never sanctioned such a racial classification which denied substantive rights, and we are unable to find any persuasive reason to suggest that it would to so.

Our conclusion with regard to nonmembers living on reservations is even more certain in the context of nonmembers living off reservations. In such a situation, we are firmly convinced that the Indian or possible non-Indian parent may not be invidiously discriminated against under the fifth amendment and that the provisions of this bill would do so. Assuming a compelling governmental interest would otherwise justify this discrimination, we are unable to suggest what such an interest might be.

For reasons stated above, we consider that part of S. 1214 restricting access to State courts to be constitutional as applied to tribal members. However, we think that S. 1214 is of doubtful constitutionality as applied to nontribal members living on reservations and would almost certainly be held to be unconstitutional as applied to nonmembers living off reservations.[4]

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

DEPARTMENT OF JUSTICE,
Washington, D.C., May 23, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: We would like to take this opportunity to comment on the House Subcommittee on Indian Affairs version of S. 1214, the Indian Child Welfare Act of 1978.

[3] As we understand the bill, this denial of access to State courts would be predicated on the existence of "significant contacts" between the Indian child and an Indian tribe and that this issue would be "an issue of fact to be determined by the court on the basis of such considerations as: Membership in a tribe, family ties within the tribe, prior residency on the reservation for appreciable periods of time, reservation domicile, the statements of the child demonstrating a strong sense of self-identity as an Indian, or any other elements which reflect a continuing tribal relationship."

The bill is unclear as to whether this determination would be made by a tribal court or State court.

[4] We also note our concern with the language used in sections 2 and 3 of the bill regarding "the Federal responsibility for the care of the Indian people" and the "special responsibilities and legal obligations to American Indian people." The use of such language has been used by at least one court to hold the Federal Government responsible for the financial support of Indians even though Congress had not appropriated any money for such purposes. *White* v. *Califano, et al.*, Civ. No. 76-5031, USDC, S. Dak. (September 12, 1977). We fear the language in this bill could be used by a court to hold the United States liable for the financial support of Indian families far in excess of the provisions of title II of the bill and the intent of Congress.

As you know, the Department presented at some length its views on one constitutional issue raised by S. 1214 as it passed the Senate in a letter to you dated February 9, 1978.[1] Briefly, that constitutional issue concerned the fact that S. 1214 would have deprived parents of Indian children as defined by that bill of access to State courts for the adjudication of child custody and related matters based, at bottom, on the racial characteristics of the Indian child. We express in that letter our belief that such racial classification was suspect under the fifth amendment and that we saw no compelling reason which might justify its use in these circumstances. This problem has been, for the most part, eliminated in the subcommittee draft, which defines "Indian child" as "any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

We are still concerned, however, that exclusive tribal jurisdiction based on the "(b)" portion of the definition of "Indian child" may constitute racial discrimination. So long as a parent who is a tribal member has legal custody of a child who is merely eligible for membership at the time of a proceeding, no constitutional problem arises. Where, however, legal custody of a child who is merely eligible for membership is lodged exclusively with nontribal members, exclusive tribal jurisdiction cannot be justified because no one directly affected by the adjudication is an actual tribal member. We do not think that the blood connection between the child and a biological but noncustodial parent is a sufficient basis upon which to deny the present parents and the child access to State courts. This problem could be resolved either by limiting the definition of Indian child to children who are actually tribal members or by modifying the "(b)" portion to read, "eligible for membership in an Indian tribe and is in the custody of a parent who is a member of an Indian tribe."

A second constitutional question may be raised by § 101(e) of the House draft. That section could, in our view, be read to require Federal, State, and other courts to give "full faith and credit" to the "public acts, records and judicial proceedings of any Indian tribe applicable to Indian child placements" even though such proceedings might not be "final" under the terms of this bill itself. So read, the provision might well raise constitutional questions under several Supreme Court decisions. *E.g.*, *Halvey* v. *Halvey*, 330 U.S. 610 (1947). We think that problem can be resolved by amending that provision to make clear that the full faith and credit to be given to tribal court orders is no greater than the full faith and credit one State is required to give to the court orders of a sister State.

A third and more serious constitutional question is, we think, raised by section 102 of the House draft. That section, taken together with sections 103 and 104, deals generally with the handling of custody proceedings involving Indian children by State courts. Section 102 establishes a fairly detailed set of procedures and substantive standards which State courts would be required to follow in adjudicating the placement of an Indian child as defined by section 4(4) of the House draft.

[1] The views expressed in that letter were subsequently presented to the Subcommittee on Indian Affairs and Public Lands of your House committee in testimony by this Department on Mar. 9, 1978.

As we understand section 102, it would, for example, impose these detailed procedures on a New York State court sitting in Manhattan, where that court was adjudicating the custody of an Indian child and even though the procedures otherwise applicable in this State-court proceeding were constitutionally sufficient. While we think that Congress might impose such requirments on State courts exercising jurisdiction over reservation Indians pursuant to Public Law 83–280, we are not convinced that Congress' power to control the incidents of such litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter. It seems to us that the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by section 102. See Hart, "The Relations Between State and Federal Law," 54 Colum. L. Rev. 489, 508 (1954).[2]

Finally, we think that section 101(b) of the House draft should be revised to permit any parent or custodian of an Indian child or the child himself, if found competent by the State court, to object to transfer of a placement proceeding to a tribal court. Although the balancing of interests between parents, custodian, Indian children, and tribes is not an easy one, it is our view that the constitutional power of Congress to force any of the persons described above who are not in fact tribal members to have such matters heard before tribal courts is questionable under our analysis of section 102 above and the views discussed above in regard to section 4(4).

II. NONCONSTITUTIONAL PROBLEMS

There are, in addition, a number of drafting deficiencies in the House draft. First, we are concerned about some language used in sections 2 and 3 regarding "the Federal responsibility for the care of the Indian people" and the "special responsibilities and legal obligations to American Indian people." The use of such language has been relied on by at least one court to hold the Federal Government responsible for the financial support of Indians even though Congress has not appropriated any money for such purposes. *White* v. *Califano*, 437 F. Supp. 543 (D.S.D. 1977). We fear the language in this bill could be used by a court to hold the United States liable for the financial support of Indian families far in excess of the provisions of title II of the bill and the apparent intent of the drafters.

Second, section 101(a) of the House draft, if read literally, would appear to displace any existing State court jurisdiction over these matters based on Public Law 83–280. We doubt that is the intent of the draft because, inter alia, there may not be in existence tribal courts to assume such State-court jurisdiction as would apparently be obliterated by this provision.

[2] We note that we are aware of no congressional findings which would indicate the inadequacy of existing State-court procedures utilized in these custody cases, even assuming that such findings would strengthen Congress' hand in this particular matter. As a policy matter, it is clear to us that the views of the States should be solicited before Congress attempted to override State power in this fashion, a position this Department took in testimony before the Senate Select Committee on Indian Affairs on Senate Joint Resolution 102 on Feb. 27, 1978.

Third, the apparent intent of section 4(10) is, in effect, to reestablish the diminished or disestablished boundaries of Indian reservations for the limited purpose of tribal jurisdiction over Indian child placements. We think that such reestablishment, in order to avoid potential constitutional problems, should be done in a straightforward manner after the reservations potentially affected are identified and Congress has taken into account both the impact on the residents of the area to be affected and any other factors Congress may deem appropriate.

The Office of Management and Budget has advised that there is no objection to the presentation of this letter and that enactment of the House Subcommittee on Indian Affairs version of S. 1214 would not be consistent with the administration's objectives.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

DISSENTING VIEWS

H.R. 12533 should be sent back to the Subcommittee on Indian Affairs and Public Lands for additional consideration because of major defects in the bill and because of inadequate opportunity for affected States and agencies to testify on the bill.

I feel a special responsibility to the House of Representatives to submit this dissenting opinion because I was the only Member expressing grave concerns about many of the bill's provisions.

Largely because of my concerns about legal protection for the Indian child, the natural parents, and the adoptive parents, many changes were made at a staff level to improve the bill. These changes were many and substantive and much improvement was made in this regard. Amendments also helped improve the bill but major defects remain.

Among these numerous issues are the cost to the States to enforce the provisions, new layers of programs for Indian tribes, and basic constitutional issues like State-Indian jurisdiction. These were not carefully enough considered during markup.

I call these problems to the attention of my colleagues and urge that the bill be rejected until those issues can more carefully be discussed by both the Congress and the public. Below I detail the problems.

HISTORY OF H.R. 12533

H.R. 12533 is the outgrowth of S. 1214 which was passed by the Senate and assigned to the House Subcommittee on Indian Affairs and Public Lands. This bill was the markup vehicle in the subcommittee and was reported with very little discussion or participation by members.

Subsequent to the subcommittee markup, the subcommittee staff, apparently noting the major defects of S. 1214, drafted an entirely new bill, H.R. 12533, and circulated it as the markup vehicle for the full Interior and Insular Affairs Committee.

Markup was scheduled for 2 or 3 weeks during which time I raised objection and numerous questions which resulted in many of the changes being made to improve the legal protections now contained in the bill.

To my knowledge the new bill, H.R. 12533 and the subsequent drafts were never generally circulated to the States, juvenile judges, public and private welfare agencies, or even to the Indian tribes.

The bill should have been circulated for comment in light of the major revisions made and being considered.

MANY GROUPS SOUGHT ADDITIONAL TIME

It should be pointed out that many groups, including the Departments of Interior and Justice, expressed the need for either major changes or additional time to study the bill and comment.

For example the Justice Department in a letter dated May 23, 1978, for Assistant Attorney General Patricia Wald to the committee chairman expressed numerous practical and constitutional concerns with the language in S. 1214. While some of those problems may have been alleviated in H.R. 12533, I am unaware of any further review by the Justice Department. In that letter, discussing the House version, Ms. Wald raised some serious questions: (1) Whether the bill under *White* v. *Califano* might hold the Federal Government responsible for the financial support of Indians even though no money had been appropriated, (2) whether the bill might displace any existing State court jurisdiction on Indian child welfare matters in Public Law 280 States even where tribal courts did not exist, and (3) whether the bill might have the effect of reestablishing diminished or disestablished boundaries of Indian reservations for the limited purpose of tribal jurisdiction over Indian child placements.

In regard to (3) she wrote:

> We think that such reestablishment, in order to avoid potential constitutional problems, should be done in a straightforward manner after the reservations potentially affected are identified and Congress has taken into account both the impact on the residents of the area to be affected and any other factors Congress may deem appropriate.

To my knowledge this issue was never discussed.

The Department of Interior, in a seven-page letter dated June 6, 1978 from Assistant Secretary Forrest J. Gerard, raised numerous questions about H.R. 12533. Among other considerations Mr. Gerard said:

> We believe that many of the authorities granted by title II of the bill are unnecessary because they duplicate authorities in present law, and therefore, we recommend the deletion of title II.

I would point out that title II remains in the bill largely as drafted and that it even provides payment to adoptive parents of Indian children. In addition, it provides for construction of Indian family service facilities off of reservations regardless of the size of the tribe or the availability of existing services and facilities.

It should be noted that many of the concerns expressed by Mr. Gerard, who is a strong advocate of Indian, were not, in my opinion, properly addressed.

In a memorandum dated June 19, 1978, from the Congressional Research Service, additional points were raised which I believe should have been considered more thoroughly.

Aside from the above Federal concerns, I am even more distressed by objections raised by officials in my State of Montana after I forwarded a copy of the bill for review.

On June 20, 1978, the following telegram was received by the committee from Gov. Thomas L. Judge, of Montana.

> It has come to my attention that you have scheduled the markup on H.R. 12533, the Indian Child Welfare Act. This legislation identifies some real problems and we are in agreement with the intent of the bill. However, there may be some

ill effect. I urge you to hold hearings on the bill to allow us time to present our concern. I am sure you want to insure that problems are solved without creating new ones at the same time. Thank you very much for your consideration of this request.

That message was received just 1 day before reporting the bill and the request was not granted. I suspect the concerns of Governor Judge would have been reflected by other States, especially Public Law 280 States, had they been more aware of the provisions.

Below is a letter from the State of Montana attorney for social and rehabilitation services. The letter is unsigned because it was first transmitted to me by telecopier on the day before the markup and subsequently sent in the form below and not received in my office until 5 days after the markup. I suggest all Members will want to read this letter before voting on the bill.

STATE OF MONTANA,
SOCIAL AND REHABILITATION SERVICES,
Helena, Mont., June 20, 1978.

Hon. RON MARLENEE,
Congressman from Montana, U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN MARLENEE: In response to a request from Bob Ziemer of your staff, the Office of Legal Affairs of the Montana Department of Social and Rehabilitation Services has reviewed H.R. 12533—The Indian Child Welfare Act.

Our study of the bill has been hurried, but we can foresee numerous problems in the delivery of social services to Montana Indian children and families if the act is passed in its present form. For this reason we urge you to ask the Committee on Interior and Insular Affairs to defer further markup on the bill until affected States, and especially Montana, can more fully comment on its consequences.

Constitutional questions aside, several problems of implementation are readily apparent from reading the bill. For example, although the bill requires State courts to give preference to certain homes in placing Indian children based on evidence in the record, the bill does not provide any mechanism requiring the family or the tribe to present such evidence. Nor does it create a means by which already overburdened State courts can discover such evidence on their own.

But even more disturbing to the Montana Department of Social and Rehabilitation Services is the bill's lack of clarity on the issue of payment for social services for Indian children and families. Section 201(b) of title II of the bill states:

> The provision or possibility of assistance under this act shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other other federally assisted program.

This language suggests a strong possibility that a State whose courts had not exercised jurisdiction over an Indian child or family would be called upon to fund at least part of the social services delivered to that

Indian child or family. This office believes that in all cases in which an Indian tribal court exercises jurisdiction the financial burden for providing social services should fall exclusively upon the tribe and the Federal Government.

In addition, it appears that tribal courts may pick and choose those Indian children over which they will exercise jurisdiction, however State courts are allowed no choice. One potential result, of course, is that tribal courts will waive jurisdiction in all difficult or expensive cases while State courts and, hence, the State agencies administering title IV and title XX will have no choice but to accept those cases. Such a situation is clearly inequitable.

As can be seen from these comments the Indian Child Welfare Act leaves many issues unresolved. Although quick action on the bill may be politically expedient, the Montana Department of Social and Rehabilitation Services strongly recommends that full and deliberate consideration be given to all aspects of the bill.

If we can provide further assistance to you, please feel free to contact us.

Sincerely yours,

RICHARD A. WEBER,
Staff Attorney, Office of Legal Affairs,
Montana Department of Social and
Rehabilitation Services.

With regard to the above letter, Members will note the concern expressed about the possible financial burden. I need not remind my colleagues that one of the major costs of local and State governments are the courts. And in light of the Proposition 13 attitude across this country I question the wisdom of passing legislation which may have significant impact on State and county budgets without one iota of evidence in the record as to what that cost might be. On this issue alone the bill ought to be rejected and returned to committee for additional hearings.

It should be noted, in fairness, that many church groups urged passage of the bill. However, the National Conference of Catholic Charities raised many substantive questions. While many of those were resolved in the redrafting of the bill and the amendment process, others remain outstanding.

But perhaps one of the strongest arguments for defeating the bill came in a letter of June 12, 1978, from the National Council of State Public Welfare Administrators. The concluding paragraph of that letter said:

> The National Council of State Public Welfare Administrators believes that H.R. 12533 should not be enacted prior to a much broader consultation than has thus far been achieved by the responsible congressional committees. Enclosed is a resolution approved by representatives of 38 States and two jurisdictions present at the council meeting on June 7–8, 1978 in support of this recommendation.

Below is a copy of the resolution adopted by over two-thirds of the States public welfare administrators.

NATIONAL COUNCIL OF STATE
PUBLIC WELFARE ADMINISTRATORS
OF THE AMERICAN PUBLIC WELFARE ASSOCIATION,
Washington, D.C., June 7, 1978.

SOCIAL SERVICES COMMITTEE RECOMMENDATIONS [3]

Indian Child Welfare Act—H.R. 12533 (S. 1214)

1. Support objectives of proposed legislation to establish safeguards against separation of Indian children from their parents and inappropriate foster care or adoptive placements outside the cultural setting of the Indian child.

2. Recommend the council note that, while many constructive changes over the Senate-passed bill (S. 1214) have been incorporated in the House version, there remain a significant number of provisions whose impact on Indian families, tribal courts, State courts, and State and local child welfare services programs needs to be explored more extensively than has been done.

3. Express concern that the bill as written may work against its objective of achieving stability and permanency for the Indian child whose home situation is such that temporary or permanent placement becomes a necessity, and that the result may be many such children will be well served neither by the state/local public child welfare system or by the Indian community.

4. Recommend that H.R. 12533 in its June 7 version be widely disseminated for discussion among affected groups, including the more than 270 federally recognized governing bodies of Indian tribes, bands, and groups, as well as to representatives of State courts, juvenile judges, and public and private child welfare services agencies, before being debated by the full House.

In addition, it is my understanding that a telegram was received by the full committee just prior to markup from the National Council of Juvenile and Family Court Judges, or a similar organization, asking for additional time for review. I did not see a copy of that communication but I was advised it exists.

I apologize for this lengthy dissent because basically I agree that some legislation is needed to give Indian tribes greater voice in the placement of Indian children. However, this bill goes way beyond what is needed by authorizing a whole new layer of Indian programs both on and off the reservations, payments to adoptive parents of adopted children, a certain impact on State courts, and the possible upsetting of boundaries for jurisdictional questions. For these and the other reasons outlined above I urge my colleagues to defeat this bill.

RON MARLENEE.

[3] Approved by the National Council of State Public Welfare Administrators on June 7, 1978.

○

APPENDIX 2

ICWA, 25 U.S.C. §§ 1901 *et seq.* (2000)

CHAPTER 21—INDIAN CHILD WELFARE

Sec.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 941h, 1300j–7, 1653, 1727 of this title; title 42 sections 622, 674, 1996b.

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes[1]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies

[1] So in original. Probably should be capitalized.

and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

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

(Pub. L. 95–608, § 2, Nov. 8, 1978, 92 Stat. 3069.)

SHORT TITLE

Section 1 of Pub. L. 95–608 provided: "That this Act [enacting this chapter] may be cited as the 'Indian Child Welfare Act of 1978'."

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

(Pub. L. 95–608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43;

(4) "Indian child" means 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) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

(Pub. L. 95–608, § 4, Nov. 8, 1978, 92 Stat. 3069.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1727, 3202, 3653, 4302 of this title; title 12 section 4702; title 26 section 168.

SUBCHAPTER I—CHILD CUSTODY PROCEEDINGS

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

(Pub. L. 95–608, title I, § 101, Nov. 8, 1978, 92 Stat. 3071.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1914, 1918, 1923 of this title.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

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

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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.

(Pub. L. 95–608, title I, § 102, Nov. 8, 1978, 92 Stat. 3071.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1914, 1916 of this title.

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

(Pub. L. 95–608, title I, § 103, Nov. 8, 1978, 92 Stat. 3072.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1914 of this title.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

(Pub. L. 95–608, title I, § 104, Nov. 8, 1978, 92 Stat. 3072.)

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

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

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of

preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

(Pub. L. 95–608, title I, §105, Nov. 8, 1978, 92 Stat. 3073.)

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

(Pub. L. 95–608, title I, §106, Nov. 8, 1978, 92 Stat. 3073.)

§ 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.

(Pub. L. 95–608, title I, §107, Nov. 8, 1978, 92 Stat. 3073.)

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

(Pub. L. 95–608, title I, §108, Nov. 8, 1978, 92 Stat. 3074.)

REFERENCES IN TEXT

Act of August 15, 1953, referred to in subsec. (a), is act Aug. 15, 1953, ch. 505, 67 Stat. 588, as amended, which enacted section 1162 of Title 18, Crimes and Criminal Procedure, section 1360 of Title 28, Judiciary and Judicial Procedure, and provisions set out as notes under section 1360 of Title 28. For complete classification of this Act to the Code, see Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1727, 1923 of this title.

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respect-

ing care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

(Pub. L. 95–608, title I, § 109, Nov. 8, 1978, 92 Stat. 3074.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1918, 1923 of this title.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

(Pub. L. 95–608, title I, § 110, Nov. 8, 1978, 92 Stat. 3075.)

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

(Pub. L. 95–608, title I, § 111, Nov. 8, 1978, 92 Stat. 3075.)

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

(Pub. L. 95–608, title I, § 112, Nov. 8, 1978, 92 Stat. 3075.)

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 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 November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

(Pub. L. 95–608, title I, § 113, Nov. 8, 1978, 92 Stat. 3075.)

SUBCHAPTER II—INDIAN CHILD AND FAMILY PROGRAMS

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV–B and XX of the Social Security Act [42 U.S.C. 620 et seq., 1397 et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV–B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

(Pub. L. 95–608, title II, § 201, Nov. 8, 1978, 92 Stat. 3075.)

REFERENCES IN TEXT

The Social Security Act, referred to in subsec. (b), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Titles IV–B and XX of the Social Security Act are classified generally to part B (§ 620 et seq.) of subchapter IV and subchapter XX (§ 1397 et seq.) of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

(Pub. L. 95–608, title II, § 202, Nov. 8, 1978, 92 Stat. 3076.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1934 of this title.

§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

(Pub. L. 95–608, title II, § 203, Nov. 8, 1978, 92 Stat. 3076; Pub. L. 96–88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

CHANGE OF NAME

"Secretary of Health and Human Services" and "Department of Health and Human Services" substituted for "Secretary of Health, Education, and Welfare" and "Department of Health, Education, and Welfare", respectively, in subsec. (a) pursuant to section 509(b) of Pub. L. 96–88, which is classified to section 3508(b) of Title 20, Education.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1934 of this title.

§ 1934. "Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

(Pub. L. 95–608, title II, § 204, Nov. 8, 1978, 92 Stat. 3077.)

SUBCHAPTER III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

§ 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 November 8, 1978, 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.

(Pub. L. 95–608, title III, § 301, Nov. 8, 1978, 92 Stat. 3077.)

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

(Pub. L. 95–608, title III, § 302, Nov. 8, 1978, 92 Stat. 3077.)

SUBCHAPTER IV—MISCELLANEOUS PROVISIONS

§ 1961. Locally convenient day schools

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

(Pub. L. 95–608, title IV, § 401, Nov. 8, 1978, 92 Stat. 3078; Pub. L. 96–88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

CHANGE OF NAME

"Department of Health and Human Services" substituted for "Department of Health, Education, and Welfare" in subsec. (b), pursuant to section 509(b) of Pub. L. 96–88 which is classified to section 3508(b) of Title 20, Education.

Select Committee on Indian Affairs of the Senate redesignated Committee on Indian Affairs of the Senate by section 25 of Senate Resolution No. 71, Feb. 25, 1993, One Hundred Third Congress.

Committee on Interior and Insular Affairs of the House of Representatives changed to Committee on Natural Resources of the House of Representatives on Jan. 5, 1993, by House Resolution No. 5, One Hundred Third Congress. Committee on Natural Resources of House of Representatives treated as referring to Committee on Resources of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress.

§ 1962. Copies to the States

Within sixty days after November 8, 1978, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter.

(Pub. L. 95–608, title IV, § 402, Nov. 8, 1978, 92 Stat. 3078.)

§ 1963. Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

(Pub. L. 95–608, title IV, § 403, Nov. 8, 1978, 92 Stat. 3078.)

APPENDIX 3

FEDERAL ICWA REGULATIONS, 25 C.F.R. PART 23

PART 23—INDIAN CHILD WELFARE ACT

Subpart A—Purpose, Definitions, and Policy

Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel in State Courts

Subpart C—Grants to Indian Tribes for Title II Indian Child and Family Service Programs

Subpart D—Grants to Off-Reservation Indian Organizations for Title II Indian Child and Family Service Programs

Subpart E—General and Uniform Grant Administration Provisions and Requirements

Subpart F—Appeals

Subpart G—Administrative Provisions

Subpart H—Assistance to State Courts

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

SOURCE: 59 FR 2256, Jan. 13, 1994, unless otherwise noted.

Subpart A—Purpose, Definitions, and Policy

§ 23.1 Purpose.

The purpose of the regulations in this part is to govern the provision of funding for, and the administration of Indian child and family service programs as authorized by the Indian Child Welfare Act of 1978 (Pub. L. 95–608, 92 Stat. 3069, 25 U.S.C. 2, 9, 1901–1952).

§ 23.2 Definitions.

Act means the Indian Child Welfare Act (ICWA), Pub. L. 95–608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.*

Assistant Secretary means the Assistant Secretary—Indian Affairs, the Department of the Interior.

Bureau of Indian Affairs (BIA) means the Bureau of Indian Affairs, the Department of the Interior.

Child custody proceeding includes:

(1) Foster care placement, which shall mean any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(2) Termination of parental rights, which shall mean any action resulting in the termination of the parent-child relationship;

(3) Preadoptive placement, which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement;

(4) Adoptive placement, which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption; and

(5) Other tribal placements made in accordance with the placement preferences of the Act, including the temporary or permanent placement of an Indian child in accordance with tribal children's codes and local tribal custom or tradition;

(6) The above terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime in the jurisdiction where the act occurred or upon an award, in a divorce proceeding, of custody to one of the parents.

Consortium means an association or partnership of two or more eligible applicants who enter into an agreement to administer a grant program and to provide services under the grant to Indian residents in a specific geographical area when it is administratively feasible to provide an adequate level of services within the area.

Extended family member shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

Grant means a written agreement between the BIA and the governing body of an Indian tribe or Indian organization wherein the BIA provides funds to the grantee to plan, conduct or administer specific programs, services, or activities and where the administrative and programmatic provisions are specifically delineated.

Grantee means the tribal governing body of an Indian tribe or Board of Directors of an Indian organization responsible for grant administration.

Grants officer means an officially designated officer who administers ICWA grants awarded by the Bureau of Indian Affairs, the Department of the Interior.

Indian means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

Indian child means any unmarried person who is under age 18 and is either a member of an Indian tribe, or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

Indian child's tribe means the Indian tribe in which an Indian child is a member or is eligible for membership or, in the case of an Indian child who is a member of or is eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts, to be determined in accordance with the BIA's

"Guidelines for State Courts—Indian Child Custody Proceedings."

Indian custodian means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody and control has been transferred by the parent of such child.

Indian organization, solely for purposes of eligibility for grants under subpart D of this part, means any legally established group, association, partnership, corporation, or other legal entity which is owned or controlled by Indians, or a majority (51 percent or more) of whose members are Indians.

Indian preference means preference and opportunities for employment and training provided to Indians in the administration of grants in accordance with section 7 (b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450).

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3 (c) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602 (c).

Off-reservation ICWA program means an ICWA program administered in accordance with 25 U.S.C. 1932 by an off-reservation Indian organization.

Parent means the biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. The term does not include the unwed father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C. 1151 and any lands not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

Secretary means the Secretary of the Interior.

Service areas solely for newly recognized or restored Indian tribes without established reservations means those service areas congressionally established by Federal law to be the equivalent of a reservation for the purpose of determining the eligibility of a newly recognized or restored Indian tribe and its members for all Federal services and benefits.

State court means any agent or agency of a state, including the District of Columbia or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

Subgrant means a secondary grant that undertakes part of the obligations of the primary grant, and assumes the legal and financial responsibility for the funds awarded and for the performance of the grant-supported activity.

Technical assistance means the provision of oral, written, or other relevant information and assistance to prospective grant applicants in the development of their grant proposals. Technical assistance may include a preliminary review of an application to assist the applicant in identifying the strengths and weaknesses of the proposal, ongoing program planning, design and evaluation, and such other program-specific assistance as is necessary for ongoing grant administration and management.

Title II means title II of Public Law 95–608, the Indian Child Welfare Act of 1978, which authorizes the Secretary to make grants to Indian tribes and off-reservation Indian organizations for the establishment and operation of Indian child and family service programs.

Tribal Court means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Tribal government means the federally recognized governing body of an Indian tribe.

Value means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

§ 23.3 Policy.

In enacting the Indian Child Welfare Act of 1978, Pub. L. 95–608, the Congress has declared that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and Indian families by the establishment of minimum Federal standards to prevent the arbitrary removal of Indian children from their families and tribes and to ensure that measures which prevent the breakup of Indian families are followed in child custody proceedings (25 U.S.C. 1902). Indian child and family service programs receiving title II funds and operated by federally recognized Indian tribes and off-reservation Indian organizations shall reflect the unique values of Indian culture and promote the stability and security of Indian children, Indian families and Indian communities. It is the policy of the Bureau of Indian Affairs to emphasize and facilitate the comprehensive design, development and implementation of Indian child and family service programs in coordination with other Federal, state, local, and tribal programs which strengthen and preserve Indian families and Indian tribes.

§ 23.4 Information collection.

(a) The information collection requirements contained in § 23.13 of this part have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.*, and assigned clearance number 1076–0111.

(1) This information will be used to determine eligibility for payment of legal fees for indigent Indian parents and Indian custodians, involved in involuntary Indian child custody proceedings in state courts, who are not eligible for legal services through other mechanisms. Response to this request is required to obtain a benefit.

(2) Public reporting for this information collection is estimated to average 10 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any aspect of this information collection should be mailed or hand-delivered to the Bureau of Indian Affairs, Information Collection Clearance Officer, Room 336–SIB, 1849 C Street, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs Paperwork Reduction Project—1076–0111, Office of Management and Budget, Washington, DC 20503.

(b) The information collection requirements contained in §§ 23.21; 23.31; 23.46; 23.47, and 23.71 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1076–0131. The information collection requirements under §§ 23.21 and 23.31 are collected in the form of ICWA grant applications from Indian tribes and off-reservation Indian organizations. A response to this request is required to obtain grant funds. The information collection requirements under § 23.46 are collected in compliance with applicable OMB circulars on financial management, internal and external controls and other fiscal assurances in accordance with existing Federal grant administration and reporting requirements. The grantee information collection requirements under § 23.47 are collected in the form of quarterly and annual program performance narrative reports and statistical data as required by the grant award document. Pursuant to 25 U.S.C. 1951, the information collection requirement under § 23.71 is collected from state courts entering final adoption decrees for any Indian child and is provided to and maintained by the Secretary.

(1) Public reporting for the information collection at §§ 23.21 and 23.31 is estimated to average 32 hours per response, including the time for reviewing the grant application instructions, gathering the necessary information and data, and completing the grant application. Public reporting for the information collection at §§ 23.46 and 23.47 is estimated to average a combined total of 16 annual hours per grantee, including the time for gathering the necessary information and data, and completing the required forms and reports. Public reporting for the information collection at § 23.71 is estimated to average 4 hours per response, including the time for obtaining and preparing the final adoption decree for transmittal to the Secretary.

(2) Direct comments regarding any of these burden estimates or any aspect of these information collection requirements should be mailed or hand-delivered to the Bureau of Indian Affairs, Information Collection Clearance Officer, room 336–SIB, 1849 C Street, NW., Washington, DC, 20240; and the Office of Information and Regulatory Affairs Paperwork Reduction Project—1076–0131, Office of Management and Budget, Washington, DC 20503.

Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel in State Courts

§ 23.11 Notice.

(a) In any involuntary proceeding in a state court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's Indian parents or custodians or tribe is known, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall directly notify the Indian parents, Indian custodians, and the child's tribe by certified mail with return receipt requested, of the pending proceedings and of their right of intervention. Notice shall include requisite information identified at paragraphs (d)(1) through (4) and (e)(1) through (6) of this section, consistent with the confidentiality requirement in paragraph (e)(7) of this section. Copies of these notices shall be sent to the Secretary and the appropriate Area Director listed in paragraphs (c)(1) through (12) of this section.

(b) If the identity or location of the Indian parents, Indian custodians or the child's tribe cannot be determined, notice of the pendency of any involuntary child custody proceeding involving an Indian child in a state court shall be sent by certified mail with return receipt requested to the appropriate Area Director listed in paragraphs (c)(1) through (12) of this section. In order to establish tribal identity, it is necessary to provide as much information as is known on the Indian child's direct lineal ancestors including, but not limited to, the information delineated at paragraph (d)(1) through (4) of this section.

(c)(1) For proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia or any territory or possession of the United States, notices shall be sent to the following address: Eastern Area Director, Bureau of Indian Affairs, 3701 N. Fairfax Drive, Suite 260, Arlington, Virginia 22201.

(2) For proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices shall be sent to the following address: Minneapolis Area Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401–2241.

(3) For proceedings in Nebraska, North Dakota, or South Dakota, notices shall be sent to the following address: Aberdeen Area Director, Bureau of Indian Affairs, 115 Fourth Avenue, SE, Aberdeen, South Dakota 57401.

(4) For proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), and the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods and Woodward, notices shall be sent to the following address: Anadarko Area Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo of El Paso County, Texas shall be sent to the Albuquerque Area Director at the address listed in paragraph (c)(6) of this section.

(5) For proceedings in Wyoming or Montana (except for notices to the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana), notices shall be sent to the following address: Billings Area Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the

Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, shall be sent to the Portland Area Director at the address listed in paragraph (c)(11) of this section.

(6) For proceedings in the Texas counties of El Paso and Hudspeth and proceedings in Colorado or New Mexico (exclusive of notices to the Navajo Tribe from the New Mexico counties listed in paragraph (c)(9) of this section), notices shall be sent to the following address: Albuquerque Area Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Tribe shall be sent to the Navajo Area Director at the address listed in paragraph (c)(9) of this section.

(7) For proceedings in Alaska (except for notices to the Metlakatla Indian Community, Alaska), notices shall be sent to the following address: Juneau Area Director, Bureau of Indian Affairs, 709 West 9th Street, Juneau, Alaska 99802–1219. Notices to the Metlakatla Indian Community of the Annette Islands Reserve, Alaska, shall be sent to the Portland Area Director at the address listed in paragraph (c)(11) of this section.

(8) For proceedings in Arkansas, Missouri, and the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Wagoner, Washington, Stephens, and Tulsa, notices shall be sent to the following address: Muskogee Area Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi and San Juan Paiute Tribes) and Navajo (except for notices to the Hopi Tribe); the New Mexico counties of McKinley (except for notices to the Zuni Tribe), San Juan, and Socorro; and the Utah county of San Juan, notices shall be sent to the following address: Navajo Area Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Paiute Tribes shall be sent to the Phoenix Area Director at the address listed in paragraph (c)(10) of this section. Notices to the Zuni Tribe shall be sent to the Albuquerque Area Director at the address listed in paragraph (c)(6) of this section.

(10) For proceedings in Arizona (exclusive of notices to the Navajo Tribe from those counties listed in paragraph (c)(9) of this section), Nevada or Utah (exclusive of San Juan county), notices shall be sent to the following address: Phoenix Area Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For proceedings in Idaho, Oregon or Washington, notices shall be sent to the following address: Portland Area Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish & Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, shall also be sent to the Portland Area Director.

(12) For proceedings in California or Hawaii, notices shall be sent to the following address: Sacramento Area Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

(d) Notice to the appropriate Area Director pursuant to paragraph (b) of this section may be sent by certified mail with return receipt requested or by personal service and shall include the following information, if known:

(1) Name of the Indian child, the child's birthdate and birthplace.

(2) Name of Indian tribe(s) in which the child is enrolled or may be eligible for enrollment.

(3) All names known, and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information.

(4) A copy of the petition, complaint or other document by which the proceeding was initiated.

(e) In addition, notice provided to the appropriate Area Director pursuant to paragraph (b) of this section shall include the following:

(1) A statement of the absolute right of the biological Indian parents, the child's Indian custodians and the child's tribe to intervene in the proceedings.

(2) A statement that if the Indian parent(s) or Indian custodian(s) is (are) unable to afford counsel, and where a state court determines indigency, counsel will be appointed to represent the Indian parent or Indian custodian where authorized by state law.

(3) A statement of the right of the Indian parents, Indian custodians and child's tribe to be granted, upon request, up to 20 additional days to prepare for the proceedings.

(4) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

(5) A statement of the right of the Indian parents, Indian custodians and the child's tribe to petition the court for transfer of the proceeding to the child's tribal court pursuant to 25 U.S.C. 1911, absent objection by either parent: Provided, that such transfer shall be subject to declination by the tribal court of said tribe.

(6) A statement of the potential legal consequences of the proceedings on the future custodial and parental rights of the Indian parents or Indian custodians.

(7) A statement that, since child custody proceedings are conducted on a confidential basis, all parties notified shall keep confidential the information contained in the notice concerning the particular proceeding. The notices shall not be handled by anyone not needing the information contained in the notices in order to exercise the tribe's rights under the Act.

(f) Upon receipt of the notice, the Secretary or his/her designee shall make reasonable documented efforts to locate and notify the child's tribe and the child's Indian parents or Indian custodians. The Secretary or his/her designee shall have 15 days, after receipt of the notice from the persons initiating the proceedings, to notify the child's tribe and Indian parents or Indian custodians and send a copy of the notice to the court. If within the 15-day time period the Secretary or his/her designee is unable to verify that the child meets the criteria of an Indian child as defined in 25 U.S.C. 1903, or is unable to locate the Indian parents or Indian custodians, the Secretary or his/her designee shall so inform the court prior to initiation of the proceedings and state how much more time, if any, will be needed to complete the search. The Secretary or his/her designee shall complete all research efforts, even if those efforts cannot be completed before the child custody proceeding begins.

(g) Upon request from a party to an Indian child custody proceeding, the Secretary or his/her designee shall make a reasonable attempt to identify and locate the child's tribe, Indian parents or Indian custodians to assist the party seeking the information.

§ 23.12 Designated tribal agent for service of notice.

Any Indian tribe entitled to notice pursuant to 25 U.S.C. 1912 may designate by resolution, or by such other form as the tribe's constitution or current practice requires, an agent for service of notice other than the tribal chairman and send a copy of the designation to the Secretary or his/her designee. The Secretary or his/her designee shall update and publish as necessary the names and addresses of the designated agents in the FEDERAL REGISTER. A current listing of such agents shall be available through the area offices.

§ 23.13 Payment for appointed counsel in involuntary Indian child custody proceedings in state courts.

(a) When a state court appoints counsel for an indigent Indian party in an involuntary Indian child custody proceeding for which the appointment of counsel is not authorized under state law, the court shall send written notice of the appointment to the BIA Area Director designated for that state in § 23.11. The notice shall include the following:

(1) Name, address, and telephone number of attorney who has been appointed.

(2) Name and address of client for whom counsel is appointed.

(3) Relationship of client to child.

(4) Name of Indian child's tribe.

(5) Copy of the petition or complaint.

(6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.

(7) Certification by the court that the Indian client is indigent.

(b) The Area Director shall certify that the client is eligible to have his or her appointed counsel compensated by the BIA unless:

(1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C. 1903 (1);

(2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903 (4);

(3) The client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903 (9), nor the child's Indian custodian as defined in 25 U.S.C. 1903 (6);

(4) State law provides for appointment of counsel in such proceedings;

(5) The notice to the Area Director of appointment of counsel is incomplete; or

(6) Funds are not available for the particular fiscal year.

(c) No later than 10 days after receipt of the notice of appointment of counsel, the Area Director shall notify the court, the client, and the attorney in writing whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the BIA. If certification is denied, the notice shall include written reasons for that decision, together with a statement that complies with 25 CFR 2.7 and that informs the applicant that the decision may be appealed to the Assistant Secretary. The Assistant Secretary shall consider appeals under this subsection in accordance with 25 CFR 2.20 (c) through (e). Appeal procedures shall be as set out in part 2 of this chapter.

(d) When determining attorney fees and expenses, the court shall:

(1) Determine the amount of payment due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in state juvenile delinquency proceedings; and

(2) Submit approved vouchers to the Area Director who certified eligibility for BIA payment, together with the court's certification that the amount requested is reasonable under the state standards considering the work actually performed in light of criteria that apply in determining fees and expenses for appointed counsel in state juvenile delinquency proceedings.

(e) The Area Director shall authorize the payment of attorney fees and expenses in the amount requested in the voucher approved by the court unless:

(1) The amount of payment due the state-appointed counsel is inconsistent with the fees and expenses specified in §23.13 (d)(1); or

(2) The client has not been certified previously as eligible under paragraph (c) of this section; or

(3) The voucher is submitted later than 90 days after completion of the legal action involving a client certified as eligible for payment of legal fees under paragraph (b) of this section.

(f) No later than 15 days after receipt of a payment voucher, the Area Director shall send written notice to the court, the client, and the attorney stating the amount of payment, if any, that has been authorized. If the payment has been denied, or the amount authorized is less than the amount requested in the voucher approved by the court, the notice shall include a written statement of the reasons for the decision together with a statement that complies with 25 CFR 2.7 and that informs the client that the decision may be appealed to the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (e); 43 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.340.

(g) Failure of the Area Director to meet the deadline specified in paragraphs (c) and (f) of this section may be treated as a denial for purposes of appeal under paragraph (f) of this section.

(h) Payment for appointed counsel does not extend to Indian tribes involved in state court child custody proceedings or to Indian families involved in Indian child custody proceedings in tribal courts.

Subpart C—Grants to Indian Tribes for Title II Indian Child and Family Service Programs

§ 23.21 Noncompetitive tribal government grants.

(a) *Grant application information and technical assistance.* Information on grant application procedures and related information may be obtained from the appropriate Agency Superintendent or Area Director. Pre-award and ongoing technical assistance to tribal governments shall be provided in accordance with § 23.42 of this part.

(b) *Eligibility requirements for tribal governments.* The tribal government(s) of any Indian tribe or consortium of tribes may submit a properly documented application for a grant to the appropriate Agency Superintendent or Area Director. A tribe may neither submit more than one application for a grant nor be the beneficiary of more than one grant under this subpart.

(1) Through the publication of a FEDERAL REGISTER announcement at the outset of the implementation of the noncompetitive grant award process during which tribal applications will be solicited, the Assistant Secretary will notify eligible tribal applicants under this subpart of the amount of core funds available for their ICWA program. The funding levels will be based on the service area population to be served. Upon the receipt of this notice from the Agency Superintendent or appropriate Area Director, tribal applicants shall submit a completed ICWA application no later than 60 days after the receipt of this notice.

(2) A grant to be awarded under this subpart shall be limited to the tribal governing body(ies) of the tribe(s) to be served by the grant.

(3) For purposes of eligibility for newly recognized or restored Indian tribes without established reservations, such tribes shall be deemed eligible to apply for grants under this subpart to provide ICWA services within those service areas legislatively identified for such tribes.

(4) A grantee under this subpart may make a subgrant to another Indian tribe or an Indian organization subject to the provisions of § 23.45.

(c) *Revision or amendment of grants.* A grantee under this subpart may submit a written request and justification for a post-award grant modification covering material changes to the terms and conditions of the grant, subject to the approval of the grants officer. The request shall include a narrative description of any significant additions, deletions, or changes to the approved program activities or budget in the form of a grant amendment proposal.

(d) Continued annual funding of an ICWA grant under this subpart shall be contingent upon the fulfillment of the requirements delineated at § 23.23(c).

(e) Monitoring and program reporting requirements for grantees under this subpart are delineated at §§ 23.44 and 23.47.

§ 23.22 Purpose of tribal government grants.

(a) Grants awarded under this subpart are for the establishment and operation of tribally designed Indian child and family service programs. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and to ensure that the permanent removal of an Indian child from the custody of his or her Indian parent or Indian custodian shall be a last resort. Such child and family service programs may include, but need not be limited to:

(1) A system for licensing or otherwise regulating Indian foster and adoptive homes, such as establishing tribal standards for approval of on-reservation foster or adoptive homes;

(2) The operation and maintenance of facilities for counseling and treatment of Indian families and for the temporary custody of Indian children with the goal of strengthening Indian families and preventing parent-child separations;

(3) Family assistance, including homemaker and home counselors, protective day care and afterschool care, recreational activities, respite care, and employment support services with the goal of strengthening Indian families and contributing to family stability;

(4) Home improvement programs with the primary emphasis on preventing the removal of children due to

unsafe home environments by making homes safer, but not to make extensive structural home improvements;

(5) The employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters, but not to establish tribal court systems;

(6) Education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) A subsidy program under which Indian adoptive children not eligible for state or BIA subsidy programs may be provided support comparable to that for which they could be eligible as foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(8) Guidance, legal representation and advice to Indian families involved in tribal, state, or Federal child custody proceedings; and

(9) Other programs designed to meet the intent and purposes of the Act

(b) Grants may be provided to tribes in the preparation and implementation of child welfare codes within their jurisdiction or pursuant to a tribal-state agreement.

(c) Grantees under this subpart may enhance their capabilities by utilizing ICWA funds as non-Federal matching shares in connection with funds provided under titles IV-B, IV-E and XX of the Social Security Act or other Federal programs which contribute to and promote the intent and purposes of the Act through the provision of comprehensive child and family services in coordination with other tribal, Federal, state, and local resources available for the same purpose.

(d) Program income resulting from the operation of programs under this subpart, such as day care operations, may be retained and used for purposes similar to those for which the grant was awarded.

§ 23.23 Tribal government application contents.

(a) The appropriate Area Director shall, subject to the tribe's fulfillment of the mandatory application requirements and the availability of appropriated funds, make a grant to the tribal governing body of a tribe or consortium of tribes eligible to apply for a grant under this subpart.

(b) The following mandatory tribal application requirements must be submitted to the appropriate Agency Superintendent or Area Director in accordance with the timeframe established in § 23.21 (b) of this subpart:

(1) A current tribal resolution requesting a grant by the Indian tribe(s) to be served by the grant. If an applicant is applying for a grant benefiting more than one tribe (consortium), an authorizing resolution from each tribal government to be served must be included. The request must be in the form of a current tribal resolution by the tribal governing body and shall include the following information:

(i) The official name of tribe(s) applying for the grant and who will directly benefit from or receive services from the grant;

(ii) The proposed beginning and ending dates of the grant;

(iii) A provision stating that the resolution will remain in effect for the duration of the program or until the resolution expires or is rescinded; and

(iv) The signature of the authorized representative of the tribal government and the date thereof.

(2) A completed Application for Federal Assistance form, SF–424.

(3) A narrative needs assessment of the social problems or issues affecting the resident Indian population to be served; the geographic area(s) to be served; and estimated number of resident Indian families and/or persons to receive benefits or services from the program.

(4) A comprehensive developmental multi-year plan in narrative form describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include:

(i) The program goals and objectives, stated in measurable terms, to be achieved through the grant;

(ii) A narrative description of how Indian families and communities will benefit from the program; and

(iii) The methodology, including culturally defined approaches, and procedures by which the tribe(s) will accomplish the identified goals and objectives.

(5) An internal monitoring system to measure progress and accomplishments, and to assure that the quality and quantity of actual performance conforms to the requirements of the grant.

(6) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services.

(i) The plan must include proposed key personnel; their qualifications, training or experience relevant to the services to be provided; responsibilities; Indian preference criteria for employment; and position descriptions.

(ii) In accordance with 25 U.S.C. 3201 *et seq.* (Pub. L. 101–630), title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute. Grantees must initiate character and background investigations of said personnel prior to their actual employment, and complete the investigations in a timely manner.

(7) A program budget and budget narrative justification submitted on an annual basis for the amount of the award and supported by the proposed plan, appropriate program services and activities for the applicable grant year.

(8) Identification of any consultants and/or subgrantees the applicant proposes to employ; a description of the consultant and/or subgrantee services to be rendered; the qualifications and experience in performing the identified services; and the basis for the cost and amount to be paid for such services.

(9) A certification by a licensed accountant that the bookkeeping and accounting procedures which the tribe(s) uses or intends to use meet existing Federal standards for grant management and administration specified at § 23.46.

(10) A system for managing property and recordkeeping which complies with subpart D of 43 CFR part 2 implementing the Privacy Act (5 U.S.C. 552a) and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant.

(11) A listing of equipment, facilities, and buildings necessary to carry out the grant program. Liability insurance coverage for buildings and their contents is recommended for grantees under this subpart.

(12) Pursuant to the Drug-Free Workplace Act of 1988, tribal programs shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) Continued annual funding of an ICWA program under this subpart shall be contingent upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation must be submitted together with an annual budget and budget narrative justification in accordance with paragraph (b)(7) of this section. Minimum standards for receiving a satisfactory evaluation shall include:

(1) The timely submission of all fiscal and programmatic reports;

(2) A narrative program report indicating work accomplished in accordance with the applicant's approved multi-year plan and, if applicable, a description of any modification in programs or activities to be funded in the next fiscal year; and

(3) The implementation of mutually determined corrective action measures, if applicable.

Subpart D—Grants to Off-Reservation Indian Organizations for Title II Indian Child and Family Service Programs

§ 23.31 Competitive off-reservation grant process.

(a) Grant application procedures and related information may be obtained from the Area Director designated at § 23.11 for processing ICWA notices for the state in which the applicant is located. Pre-award and ongoing technical assistance of off-reservation Indian organization grantees shall be provided in accordance with § 23.42.

(b) Prior to the beginning of or during the applicable year(s) in which grants for off-reservation programs will be awarded competitively, the Assistant Secretary—Indian Affairs shall publish in the FEDERAL REGISTER an announcement of the grant application process for the year(s), including program priorities or special considerations (if any), applicant eligibility criteria, the required application contents, the amount of available funding and evaluation criteria for off-reservation programs.

(c) Based on the announcement described in paragraph (b) of this section, an off-reservation applicant shall prepare a multi-year developmental application in accordance with § 23.33 of this subpart. To be considered in the area competitive review and scoring process, a complete application must be received by the deadline announced in the FEDERAL REGISTER by the Area Director designated at § 23.11 for processing ICWA notices for the state in which the applicant is located.

(d) Eligibility requirements for off-reservation Indian organizations. The Secretary or his/her designee shall, contingent upon the availability of funds, make a multi-year grant under this subpart for an off-reservation program when officially requested by a resolution of the board of directors of the Indian organization applicant, upon the applicant's fulfillment of the mandatory application requirements and upon the applicant's successful competition pursuant to § 23.33 of this subpart.

(e) A grant under this subpart for an off-reservation Indian organization shall be limited to the board of directors of the Indian organization which will administer the grant.

(f) Continued annual funding of a multi-year grant award to an off-reservation ICWA program under this subpart shall be contingent upon the grantee's fulfillment of the requirements delineated at § 23.33 (e).

(g) Monitoring and program reporting requirements for grants awarded to off-reservation Indian organizations under this subpart are delineated at §§ 23.44 and 23.47.

§ 23.32 Purpose of off-reservation grants.

The Secretary or his/her designee is authorized to make grants to off-reservation Indian organizations to establish and operate off-reservation Indian child and family service programs for the purpose of stabilizing Indian families and tribes, preventing the breakup of Indian families and, in particular, to ensure that the permanent removal of an Indian child from the custody of his/her Indian parent or Indian custodian shall be a last resort. Child and family service programs may include, but are not limited to:

(a) A system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(b) The operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children with the goal of strengthening and stabilizing Indian families;

(c) Family assistance (including homemaker and home counselors), protective day care and afterschool care, employment support services, recreational activities, and respite care with the goal of strengthening Indian families and contributing toward family stability; and

(d) Guidance, legal representation and advice to Indian families involved in state child custody proceedings.

§ 23.33 Competitive off-reservation application contents and application selection criteria.

(a) An application for a competitive multi-year grant under this subpart shall be submitted to the appropriate Area Director prior to or on the announced deadline date published in the FEDERAL REGISTER. The Area Director shall certify the application contents pursuant to § 23.34 and forward the application within five working days to the area review committee, composed

of members designated by the Area Director, for competitive review and action. Modifications and/or information received after the close of the application period, as announced in the FEDERAL REGISTER, shall not be reviewed or considered by the area review committee in the competitive process.

(b) Mandatory application requirements for Indian organization applicants shall include:

(1) An official request for an ICWA grant program from the organization's board of directors covering the duration of the proposed program;

(2) A completed Application for Federal Assistance form, SF 424;

(3) Written assurances that the organization meets the definition of Indian organization at § 23.2;

(4) A copy of the organization's current Articles of Incorporation for the applicable grant years;

(5) Proof of the organization's nonprofit status;

(6) A copy of the organization's IRS tax exemption certificate and IRS employer identification number;

(7) Proof of liability insurance for the applicable grant years; and

(8) Current written assurances that the requirements of Circular A–128 for fiscal management, accounting, and recordkeeping are met.

(9) Pursuant to the Drug-Free Workplace Act of 1988, all grantees under this subpart shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) *Competitive application selection criteria.* The Area Director or his/her designated representative shall select those proposals which will in his/her judgment best promote the proposes of the Act. Selection shall be made through the area review committee process in which each application will be scored individually and ranked according to score, taking into consideration the mandatory requirements as specified above and the following selection criteria:

(1) The degree to which the application reflects an understanding of the social problems or issues affecting the resident Indian client population which the applicant proposes to serve;

(2) Whether the applicant presents a narrative needs assessment, quantitative data and demographics of the client Indian population to be served;

(3) Estimates of the number of Indian people to receive benefits or services from the program based on available data;

(4) Program goals and objectives to be achieved through the grant;

(5) A comprehensive developmental multi-year narrative plan describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include a narrative description of the program; the program goals and objectives, stated in measurable terms, to be achieved through the grant; and the methodology, including culturally defined approaches, and procedures by which the grantee will accomplish the identified goals and objectives;

(6) An internal monitoring system the grantee will use to measure progress and accomplishments, and to ensure that the quality and quantity of actual performance conforms to the requirements of the grant;

(7) Documentation of the relative accessibility which the Indian population to be served under a specific proposal already has to existing child and family service programs emphasizing the prevention of Indian family breakups, such as mandatory state services. Factors to be considered in determining accessibility include:

(i) Cultural barriers;

(ii) Discrimination against Indians;

(iii) Inability of potential Indian clientele to pay for services;

(iv) Technical barriers created by existing public or private programs;

(v) Availability of transportation to existing programs;

(vi) Distance between the Indian community to be served under the proposal and the nearest existing programs;

(vii) Quality of services provided to Indian clientele; and

(viii) Relevance of services provided to specific needs of the Indian clientele.

(8) If the proposed program duplicates existing Federal, state, or local

child and family service programs emphasizing the prevention of Indian family breakups, proper and current documented evidence that repeated attempts to obtain services have been unsuccessful;

(9) Evidence of substantial support from the Indian community or communities to be served, including but not limited to:

(i) Tribal support evidenced by a tribal resolution or cooperative service agreements between the administrative bodies of the affected tribe(s) and the applicant for the duration of the grant period, or

(ii) Letters of support from social services organizations familiar with the applicant's past work experience;

(10) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services. The plan must include proposed key personnel, their qualifications, training or experience relevant to the services to be provided, responsibilities, Indian preference criteria for employment and position descriptions. In accordance with 25 U.S.C. 3201 et seq. (Pub. L. 101–630), title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute prior to their actual employment;

(11) The reasonableness and relevance of the estimated overall costs of the proposed program or services and their overall relation to the organization's funding base, activities, and mission;

(12) The degree to which the detailed annual budget and justification for the requested funds are consistent with, and clearly supported by, the proposed plan and by appropriate program services and activities for the applicable grant year;

(13) The applicant's identification of any consultants and/or subgrantees it proposes to employ; description of the services to be rendered; the qualifications and experience of said personnel, reflecting the requirements for performing the identified services; and the basis for the cost and the amount to be paid for such services;

(14) Certification by a licensed accountant that the bookkeeping and accounting procedures that the applicant uses or intends to use meet existing Federal standards for grant administration and management specified at § 23.46;

(15) The compliance of property management and recordkeeping systems with subpart D of 43 CFR part 2 (the Privacy Act, 5 U.S.C. 552a), and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant;

(16) A description of the proposed facilities, equipment, and buildings necessary to carry out the grant activities; and

(17) Proof of liability insurance coverage for the applicable grant year(s).

(d) Two or more applications receiving the same competitive score will be prioritized in accordance with announcements made in the FEDERAL REGISTER pursuant to § 23.31 (b) for the applicable year(s).

(e) Continued annual funding of a multi-year grant award to an off-reservation ICWA program under this subpart shall be contingent upon the availability of appropriated funds and upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation shall be submitted together with an annual budget and budget narrative justification in accordance with paragraph (c)(10) of this section. Minimum standards for receiving a satisfactory evaluation shall include the timely submission of all fiscal and programmatic reports; a narrative program report indicating work accomplished in accordance with the initial approved multi-year plan; and the implementation of mutually determined corrective action measures, if applicable.

§ 23.34 Review and decision on off-reservation applications by Area Director.

(a) *Area office certification.* Upon receipt of an application for a grant by an off-reservation Indian organization

at the area office, the Area Director shall:

(1) Complete and sign the area office certification form. In completing the area certification form, the Area Director shall assess and certify whether applications contain and meet all the application requirements specified at § 23.33. Area Directors shall be responsible for the completion of the area office certification forms for all applications submitted by off-reservation Indian organizations.

(2) Acknowledge receipt of the application to the applicant and advise the applicant of the disposition of the application within 10 days of receipt; and

(3) Transmit all applications within five working days of receipt to the area review committee for competitive review and subsequent approval or disapproval of the applications.

(b) *Area office competitive review and decision for off-reservation applications.* Upon receipt of an application for an off-reservation grant under this part requiring the approval of the Area Director, the Area Director shall:

(1) Establish and convene an area review committee, chaired by a person qualified by knowledge, training and experience in the delivery of Indian child and family services.

(2) Review the area office certification form required in paragraph (a) of this section.

(3) Review the application in accordance with the competitive review procedures prescribed in § 23.33. An application shall not receive approval for funding under the area competitive review and scoring process unless a review of the application determines that it:

(i) Contains all the information required in § 23.33 which must be received by the close of the application period. Modifications of the grant application received after the close of the application period shall not be considered in the competitive review process.

(ii) Receives at least the established minimum score in an area competitive review, using the application selection criteria and scoring process set out in § 23.33. The minimum score shall be established by the Central Office prior to each application period and announced in the FEDERAL REGISTER for the applicable grants year(s).

(4) Approve or disapprove the application and promptly notify the applicant in writing of the approval or disapproval of the application. If the application is disapproved, the Area Director shall include in the written notice the specific reasons therefore.

(c) The actual funding amounts for the initial grant year shall be subject to appropriations available nationwide and the continued funding of an approved off-reservation grant application under subpart D of this part shall be subject to available funds received by the respective area office for the applicable grant year. Initial funding decisions and subsequent decisions with respect to funding level amounts for all approved grant applications under this part shall be made by the Area Director.

§ 23.35 Deadline for Central Office action.

Within 30 days of the receipt of grant reporting forms from the Area Directors identifying approved and disapproved applications pursuant to subpart D of this part and recommended funding levels for approved applications, the Secretary or his/her designee shall process the Area Directors' funding requests.

Subpart E—General and Uniform Grant Administration Provisions and Requirements

§ 23.41 Uniform grant administration provisions, requirements and applicability.

The general and uniform grant administration provisions and requirements specified at 25 CFR part 276 and under this subpart are applicable to all grants awarded to tribal governments and off-reservation Indian organizations under this part, except to the extent inconsistent with an applicable Federal statute, regulation or OMB circular.

§ 23.42 Technical assistance.

(a) Pre-award and ongoing technical assistance may be requested by an Indian tribe or off-reservation Indian organization from the appropriate agency

or area office to which the tribe or organization will be submitting an application for funds under subparts C and D of this part. A request for pre-award technical assistance by an off-reservation Indian organization must be received by the Area Director designated at § 23.11 for the state in which the applicant is located no later than 10 days prior to the application deadline to assure sufficient time for area response.

(b) Pre-award and ongoing technical assistance may be provided by the appropriate BIA agency or area office for purposes of program planning and design, assistance in establishing internal program monitoring and evaluation criteria for ongoing grant administration and management, and for other appropriate assistance requested.

(c) The area social services staff shall provide technical assistance to grantees upon receipt of an authorized request from the grantee or when review of the grantee's quarterly performance reports shows that:

(1) An ICWA program is yielding results that are or will be detrimental to the welfare of the intended Indian beneficiaries of the program;

(2) A program has substantially failed to implement its goals and objectives;

(3) There are serious irregularities in the fiscal management of the grant; or

(4) The grantee is otherwise deficient in its program performance.

(5) Upon receiving an authorized request from the grantee, the area social services staff and/or grants officer shall provide the necessary technical assistance to arrive at mutually determined corrective action measures and their actual implementation, if necessary, and the timeframes within which said corrective actions will be implemented.

§ 23.43 Authority for grant approval and execution.

(a) *Tribal government programs.* The appropriate Agency Superintendent or Area Director may approve a grant application and its subsequent execution under subpart C when the intent, purpose and scope of the application pertains solely to reservations located within the service area jurisdiction of the agency or area office.

(b) *Off-reservation programs.* The appropriate Area Director may approve a grant application and its subsequent execution under subpart D when the intent, purpose and scope of the grant proposal pertains to off-reservation Indian service populations or programs.

§ 23.44 Grant administration and monitoring.

All grantees under this part shall be responsible for managing day-to-day program operations to ensure that program performance goals are being achieved and to ensure compliance with the provisions of the grant award document and other applicable Federal requirements. Unless delegated to the Agency Superintendent, appropriate area office personnel designated by the Area Director shall be responsible for all grant program and fiscal monitoring responsibilities.

§ 23.45 Subgrants.

A tribal government grantee may make a subgrant under subpart C of this part, provided that such subgrants are for the purpose for which the grant was made and that the grantee retains administrative and financial responsibility over the activity and the funds.

§ 23.46 Financial management, internal and external controls and other assurances.

Grantee financial management systems shall comply with the following standards for accurate, current and complete disclosure of financial activities.

(a) OMB Circular A-87 (Cost principles for state and local governments and federally recognized Indian tribal governments).

(b) OMB Circular A-102 (Common rule 43 CFR part 12).

(c) OMB Circular A-128 (Single Audit Act).

(d) OMB Circular A-110 or 122 (Cost principles for non-profit organizations and tribal organizations, where applicable).

(e) *Internal control.* Effective control and accountability must be maintained for all grants. Grantees must adequately safeguard any property and must ensure that it is used solely for authorized purposes.

(i) *Budget control.* Actual expenditures must be compared with budgeted amounts for the grant. Financial information must be related to program performance requirements.

(g) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, grant documents, or other information required by the grantee's financial management system. The Secretary or his/her designee may review the adequacy of the financial management system of an Indian tribe(s) or off-reservation Indian organization applying for a grant under this part.

(h) Pursuant to 18 U.S.C. 641, whoever embezzles, steals, purloins, or knowingly converts to his or her use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or whoever receives, conceals, or retains the same with intent to convert it to his or her use or gain, knowing it to have been embezzled, stolen, purloined, or converted shall be fined not more than $10,000 or imprisoned not more than 10 years, or both; but if the value of such property does not exceed the sum of $100, he or she shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 23.47 Reports and availability of information to Indians.

(a) Any tribal government or off-reservation Indian organization receiving a grant under this part shall make general programmatic information and reports concerning that grant available to the Indian people it serves or represents. Access to this information may be requested in writing and shall be made available within 10 days of receipt of the request. Except as required by title IV of Pub. L. 101–630, the Indian Child Protection and Family Violence Prevention Act, grantees shall hold confidential all information obtained from persons receiving services from the program, and shall not release such information without the individual's written consent. Information may be disclosed in a manner which does not identify or lead to the identification of particular individuals.

(b) Grantees shall submit Standard Form 269 or 269A on a quarterly and an annual basis to report their status of funds by the dates specified in the grant award document.

(c) Grantees shall furnish and submit the following written quarterly and annual program reports by the dates specified in the award document:

(1) Quarterly and annual statistical and narrative program performance reports which shall include, but need not be limited to, the following;

(i) A summary of actual accomplishments and significant activities as related to program objectives established for the grant period;

(ii) The grantee's evaluation of program performance using the internal monitoring system submitted in their application;

(iii) Reports on all significant ICWA direct service grant activities including but not limited to the following information:

(A) Significant title II activities;

(B) Data reflecting numbers of individuals referred for out-of-home placements, number of individuals benefiting from title II services and types of services provided, and

(C) Information and referral activities.

(iv) Child abuse and neglect statistical reports and related information as required by 25 U.S.C. 2434, Pub. L. 99–570, the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986;

(v) A summary of problems encountered or reasons for not meeting established objectives;

(vi) Any deliverable or product required in the grant; and

(vii) Additional pertinent information when appropriate.

(2) The BIA may negotiate for the provision of other grant-related reports not previously identified.

(d) Events may occur between scheduled performance reporting dates which have significant impact on the grant-supported activity. In such cases, the grantee must inform the awarding

agency as soon as problems, delays, adverse conditions, or serious incidents giving rise to liability become known and which will materially impair its ability to meet the objectives of the grant.

§ 23.48 Matching shares and agreements.

(a) Grant funds provided to Indian tribes under subpart C of this part may be used as non-Federal matching shares in connection with funds provided under titles IV-B, IV-E and XX of the Social Security Act or such other Federal programs which contribute to and promote the purposes of the Act as specified in §§ 23.3 and 23.22 (25 U.S.C. 1931).

(b) Pursuant to 25 U.S.C. 1933, in furtherance of the establishment, operation, and funding of programs funded under subparts C and D of this part, the Secretary may enter into agreements with the Secretary of Health and Human Services. The latter Secretary is authorized by the Act to use funds appropriated for the Department of Health and Human Services for programs similar to those funded under subparts C and D of this part (25 U.S.C. 1931 and 1932), provided that authority to make payment pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

§ 23.49 Fair and uniform provision of services.

(a) Grants awarded under this part shall include provisions assuring compliance with the Indian Civil Rights Act; prohibiting discriminatory distinctions among eligible Indian beneficiaries; and assuring the fair and uniform provision by the grantees of the services and assistance they provide to eligible Indian beneficiaries under such grants. Such procedures must include criteria by which eligible Indian beneficiaries will receive services, recordkeeping mechanisms adequate to verify the fairness and uniformity of services in cases of formal complaints, and an explanation of what rights will be afforded an individual pending the resolution of a complaint.

(b) Indian beneficiaries of the services to be rendered under a grant shall be afforded access to administrative or judicial bodies empowered to adjudicate complaints, claims, or grievances brought by such Indian beneficiaries against the grantee arising out of the performance of the grant.

§ 23.50 Service eligibility.

(a) Tribal government Indian child and family service programs. Any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in § 23.2 is eligible for services provided under 25 U.S.C. 1931 of the Act. Tribal membership status shall be determined by tribal law, ordinance, or custom. The tribe may, under subpart C, extend services to nontribal family members related by marriage to tribal members, provided such services promote the intent and purposes of the Act. A tribe may also, within available resources, extend services under this part to individuals who are members of, or are eligible for membership in other Indian tribes, and who reside within the tribe's designated service area.

(b) Off-reservation Indian child and family service programs and agreements with the Secretary of Health and Human Services pursuant to 25 U.S.C. 1933. For purposes of eligibility for services provided under 25 U.S.C. 1932 and 1933 of the Act, any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in § 23.2, or the definition of Indian as defined in 25 U.S.C. 1603(c), shall be eligible for services. Tribal membership status shall be determined by tribal law, ordinance, or custom.

§ 23.51 Grant carry-over authority.

Unless restricted by appropriation, and contingent upon satisfactory program evaluations from the appropriate area or agency office for an existing program, grantees are authorized to carry over unliquidated grant funds which remain at the end of a budget period. Such funds may be carried over for a maximum period of two years beyond the initial grant funding period

and must be utilized only for the intent, purpose and scope of the original grant. These carry-over grant funds shall not be reprogrammed into other appropriation activities or subactivities. Funds carried over into another fiscal year will be added to the grantee's new fiscal year funding amount.

§ 23.52 Grant suspension.

(a) When a grantee has materially failed to comply and remains out of compliance with the terms and conditions of the grant, the grants officer may, after reasonable notice to the grantee and the provision of requested technical assistance, suspend the grant. The notice preceding the suspension shall include the effective date of the suspension, the corrective measures necessary for reinstatement of the grant and, if there is no immediate threat to safety, a reasonable timeframe for corrective action prior to actual suspension.

(b) No obligation incurred by the grantee during the period of suspension shall be allowable under the suspended grant, except that the grants officer may at his/her discretion allow necessary and proper costs which the grantee could not reasonably avoid during the period of suspension if such costs would otherwise be allowable under the applicable cost principles.

(c) Appropriate adjustments to the payments under the suspended grant will be made either by withholding the payments or by not allowing the grantee credit for disbursements which the grantee may make in liquidation of unauthorized obligations the grantee incurs during the period of suspension.

(d) Suspension shall remain in effect until the grantee has taken corrective action to the satisfaction of the grants officer, or given assurances satisfactory to the grants officer that corrective action will be taken, or until the grants officer cancels the grant.

§ 23.53 Cancellation.

(a) The grants officer may cancel any grant, in whole or in part, at any time before the date of completion whenever it is determined that the grantee has:

(1) Materially failed to comply with the terms and conditions of the grant;

(2) Violated the rights as specified in § 23.49 or endangered the health, safety, or welfare of any person; or

(3) Been grossly negligent in, or has mismanaged the handling or use of funds provided under the grant.

(b) When it appears that cancellation of the grant will become necessary, the grants officer shall promptly notify the grantee in writing of this possibility. This written notice shall advise the grantee of the reason for the possible cancellation and the corrective action necessary to avoid cancellation. The grants officer shall also offer, and shall provide, if requested by the grantee, any technical assistance which may be required to effect the corrective action. The grantee shall have 60 days in which to effect this corrective action before the grants officer provides notice of intent to cancel the grant as provided for in paragraph (c) of this section.

(c) Upon deciding to cancel for cause, the grants officer shall promptly notify the grantee in writing of that decision, the reason for the cancellation, and the effective date. The Area Director or his/her designated official shall also provide a hearing for the grantee before cancellation. However, the grants officer may immediately cancel the grant, upon notice to the grantee, if the grants officer determines that continuance of the grant poses an immediate threat to safety. In this event, the Area Director or his/her designated official shall provide a hearing for the grantee within 10 days of the cancellation.

(d) The hearing referred to in paragraph (c) of this section shall be conducted as follows:

(1) The grantee affected shall be notified, in writing, at least 10 days before the hearing. The notice should give the date, time, place, and purpose of the hearing.

(2) A written record of the hearing shall be made. The record shall include written statements submitted at the hearing or within five days following the hearing.

Subpart F—Appeals

§23.61 Appeals from decision or action by Agency Superintendent, Area Director or Grants Officer.

A grantee or prospective applicant may appeal any decision made or action taken by the Agency Superintendent, Area Director, or grants officer under subpart C or E of this part. Such an appeal shall be made to the Assistant Secretary who shall consider the appeal in accordance with 25 CFR 2.20 (c) through (e). Appeal procedures shall be as set out in part 2 of this chapter.

§23.62 Appeals from decision or action by Area Director under subpart D.

A grantee or applicant may appeal any decision made or action taken by the Area Director under subpart D that is alleged to be in violation of the U.S. Constitution, Federal statutes, or the regulations of this part. These appeals shall be filed with the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (e); 43 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.340. However, an applicant may not appeal a score assigned to its application or the amount of grant funds awarded.

§23.63 Appeals from inaction of official.

A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, may make the official's inaction the subject of an appeal under part 2 of this chapter.

Subpart G—Administrative Provisions

§23.71 Recordkeeping and information availability.

(a)(1) Any state court entering a final decree or adoptive order for any Indian child shall provide the Secretary or his/her designee within 30 days a copy of said decree or order, together with any information necessary to show:

(i) The Indian child's name, birthdate and tribal affiliation, pursuant to 25 U.S.C. 1951;

(ii) Names and addresses of the biological parents and the adoptive parents; and

(iii) Identity of any agency having relevant information relating to said adoptive placement.

(2) To assure and maintain confidentiality where the biological parent(s) have by affidavit requested that their identity remain confidential, a copy of such affidavit shall be provided to the Secretary or his/her designee. Information provided pursuant to 25 U.S.C. 1951(a) is not subject to the Freedom of Information Act (5 U.S.C. 552), as amended. The Secretary or his/her designee shall ensure that the confidentiality of such information is maintained. The address for transmittal of information required by 25 U.S.C. 1951(a) is: Chief, Division of Social Services, Bureau of Indian Affairs, 1849 C Street, NW., Mail Stop 310-SIB, Washington, DC 20240. The envelope containing all such information should be marked "Confidential." This address shall be sent to the highest court of appeal, the Attorney General and the Governor of each state. In some states, a state agency has been designated to be repository for all state court adoption information. Where such a system is operative, that agency may assume reporting responsibilities for the purposes of the Act.

(b) The Division of Social Services, Bureau of Indian Affairs, is authorized to receive all information and to maintain a central file on all state Indian adoptions. This file shall be confidential and only designated persons shall have access to it. Upon the request of an adopted Indian individual over the age of 18, the adoptive or foster parents of an Indian child, or an Indian tribe, the Division of Social Services shall disclose such information as may be necessary for purposes of tribal enrollment or determining any rights or benefits associated with tribal membership, except the names of the biological parents where an affidavit of confidentiality has been filed, to those persons eligible under the Act to request such information. The chief tribal enrollment officer of the BIA is authorized to disclose enrollment information relating to an adopted Indian child where the biological parents have by affidavit

requested anonymity. In such cases, the chief tribal enrollment officer shall certify the child's tribe, and, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment consideration under the criteria established by the tribe.

Subpart H—Assistance to State Courts

§ 23.81 Assistance in identifying witnesses.

Upon the request of a party in an involuntary Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying qualified expert witnesses. Such requests for assistance shall be sent to the Area Director designated in § 23.11(c). The BIA is not obligated to pay for the services of such expert witnesses.

§ 23.82 Assistance in identifying language interpreters.

Upon the request of a party in an Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying language interpreters. Such requests for assistance should be sent to the Area Director designated in § 23.11(c). The BIA is not obligated to pay for the services of such language interpreters.

§ 23.83 Assistance in locating biological parents of Indian child after termination of adoption.

Upon the request of a child placement agency, the court or an Indian tribe, the Secretary or his/her designee shall assist in locating the biological parents or prior Indian custodians of an adopted Indian child whose adoption has been terminated pursuant to 25 U.S.C. 1914. Such requests for assistance should be sent to the Area Director designated in § 23.11(c).

APPENDIX 4

BUREAU OF INDIAN AFFAIRS
INDIAN CHILD WELFARE ACT
GUIDELINES

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Guidelines for State Courts; Indian Child Custody Proceedings

This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

There was published in the Federal Register, Vol. 44, No. 79/Monday, April 23, 1979 a notice entitled Recommended Guidelines for State Courts—Indian Child Custody Proceedings. This notice pertained directly to implementation of the Indian Child Welfare Act of 1978, Pub. L. 95–608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.* A subsequent Federal Register notice which invited public comment concerning the above was published on June 5, 1979. As a result of comments received, the recommended guidelines were revised and are provided below in final form.

Introduction

Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect. Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. To the extent that the Department's interpretations of the Act are correct, contrary interpretations by the courts would be violations of the Act. If procedures different from those recommended in these guidelines are adopted by a state, their adequacy to protect rights guaranteed by the Act will have to be judged on their own merits.

Where Congress expressly delegates to the Secretary the primary responsibility for interpreting a statutory term, regulations interpreting that term have legislative effect. Courts are not free to set aside those regulations simply because they would have interpreted that statute in a different manner. Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance. *Batterton* v. *Francis,* 432 U.S. 416, 424–425 (1977).

In other words, when the Department writes rules needed to carry out responsibilities Congress has explicity imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding. Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Portions of the Indian Child Welfare Act do expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language. For example, under 25 U.S.C. 1918, the Secretary is directed to determine whether a plan for reassumption of jurisdiction is "feasible" as that term is used in the statute. This and other areas where primary responsibility for implementing portions of the Act rest with this Department, are covered in regulations promulgated on July 31, 1979, at 44 FR 45092.

Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S. Rep. No. 95–597, 95th Cong., 1st Sess. 17 (1977). The Department's interpretation of statutory language of this type is published in these guidelines.

Some commenters asserted that Congressional delegation to this Department of authority to promulgate regulations with binding legislative effect with respect to all provisions of the Act is found at 25 U.S.C. 1952, which states, "Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.

Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.

Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act. Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect.

Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court. That approach has not been adopted because the Department has an obligation not to assert authority that it concludes it does not have.

Each section of the revised guidelines is accompanied by commentary explaining why the Department believes states should adopt that section and to provide some guidance where the guidelines themselves may need to be interpreted in the light of specific circumstances.

The original guidelines used the word "should" instead of "shall" in most provisions. The term "should" was used to communicate the fact that the guidelines were the Department's interpretations of the Act and were not intended to have binding legislative effect. Many commenters, however, interpreted the use of "should" as an attempt by this Department to make statutory requirements themselves optional. That was not the intent. If a state adopts those guidelines, they should be stated in mandatory terms. For that reason the word "shall" has replaced "should" in the revised guidelines. The status of these guidelines as interpretative rather than legislative in nature is adequately set out in the introduction.

In some instances a state may wish to establish rules that provide even greater protection for rights guaranteed by the Act than those suggested by these guidelines. These guidelines are not intended to discourage such action. Care should be taken, however, that the

provision of additional protections to some parties to a child custody proceeding does not deprive other parties of rights guaranteed to them by the Act.

In some instances the guidelines do little more than restate the statutory language. This is done in order to make the guidelines more complete so that they can be followed without the need to refer to the statute in every instance. Omission of any statutory language, of course, does not in any way affect the applicability of the statute.

A number of commenters recommended that special definitions of residence and domicile be included in the guidelines. Such definitions were not included because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act. Recommending special definitions for the purpose of this Act alone would simply provide unnecessary complications in the law.

A number of commenters recommended that the guidelines include recommendations for tribal-state agreements under 25 U.S.C. 1919. A number of other commenters, however, criticized the one provision in the original guidelines addressing that subject as tending to impose on such agreements restrictions that Congress did not intend should be imposed. Because of the wide variation in the situations and attitudes of states and tribes, it is difficult to deal with that issue in the context of guidelines. The Department is currently developing materials to aid states and tribes with such agreements. The Department hopes to have those materials available later this year. For these reasons, the provision in the original guidelines concerning tribal-state agreements has been deleted from the guidelines.

The Department has also received many requests for assistance from tribal courts in carrying out the new responsibilities resulting from the passage of this Act. The Department intends to provide additional guidance and assistance in that area also in the future. Providing guidance to state courts was given a higher priority because the Act imposes many more procedures on state courts than it does on tribal courts.

Many commenters have urged the Department to discuss the effect of the Act on the financial responsibilities of states and tribes to provide services to Indian children. Many such services are funded in large part by the Department of Health, Education, and Welfare. The policies and regulations of that Department will have a significant impact on the issue of financial responsibility. Officials of Interior and HEW will be discussing this issue with each other. It is anticipated that more detailed guidance on questions of financial responsibility will be provided as a result of those consultations.

One commenter recommended that the Department establish a monitoring procedure to exercise its right under 25 U.S.C. 1915(e) to review state court placement records. HEW currently reviews state placement records on a systematic basis as part of its responsibilities with respect to statutes it administers. Interior Department officials are discussing with HEW officials the establishment of a procedure for collecting data to review compliance with the Indian Child Welfare Act.

Inquiries concerning these recommended guidelines may be directed to the nearest of the following regional and field offices of the Solicitor for the Interior Department:

Office of the Regional Solicitor, Department of the Interior, 510 L Street, Suite 408, Anchorage, Alaska 99501, (907) 265-5301.

Office of the Regional Solicitor, Department of the Interior, Richard B. Russell Federal Building, 75 Spring St., SW., Suite 1328, Atlanta, Georgia 30303, (404) 221-4447.

Office of the Regional Solicitor, Department of the Interior, c/o U.S. Fish & Wildlife Service, Suite 306, 1 Gateway Center, Newton Corner, Massachusetts 02158, (617) 829-9258.

Office of the Field Solicitor, Department of the Interior, 686 Federal Building, Fort Snelling, Twin Cities, Minnesota 55111, (612) 725-3540.

Office of the Regional Solicitor, Department of the Interior, P.O. Box 25007, Denver Federal Center, Denver, Colorado 80225, (303) 234-3175.

Office of the Field Solicitor, Department of the Interior, P.O. Box 549, Aberdeen, South Dakota 57401, (605) 225-7254.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1538, Billings, Montana 59103, (406) 245-6711.

Office of the Regional Solicitor, Department of the Interior, Room E-2753, 2800 Cottage Way, Sacramento, California 95825, (916) 484-4331.

Office of the Field Solicitor, Department of the Interior, Valley Bank Center, Suite 280, 201 North Central Avenue, Phoenix, Arizona 85073, (602) 261-4756.

Office of the Field Solicitor, Department of the Interior, 3610 Central Avenue, Suite 104, Riverside, California 92506, (714) 787-1560.

Office of the Field Solicitor, Department of the Interior, Window Rock, Arizona 86515, (602) 871-5151.

Office of the Regional Solicitor, Department of the Interior, Room 3068, Page Belcher Federal Building, Tulsa, Oklahoma 74103, (918) 581-7501.

Office of the Field Solicitor, Department of the Interior, Room 7102, Federal Building & Courthouse, 500 Gold Avenue, S.W., Albuquerque, New Mexico 87101, (505) 766-2547.

Office of the Field Solicitor, Department of the Interior, P.O. Box 387, W.C.D. Office Building, Route 1, Anadarko, Oklahoma 73005, (405) 247-6673.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1508, Room 319, Federal Building, 5th and Broadway, Muskogee, Oklahoma 74401, (918) 683-3111.

Office of the Field Solicitor, Department of the Interior, c/o Osage Agency, Grandview Avenue, Pawhuska, Oklahoma 74056, (918) 287-2431.

Office of the Regional Solicitor, Department of the Interior, Suite 6201, Federal Building, 125 South State Street, Salt Lake City, Utah 84138, (801) 524-5677.

Office of the Regional Solicitor, Department of the Interior, Lloyd 500 Building, Suite 607, 500 N.E. Multnomah Street, Portland, Oregon 97232, (503) 231-2125.

Guidelines for State Courts

A. Policy

[1] Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own

families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

(2) In any child custody proceeding where applicable state or other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

A. Commentary

The purpose of this section is to apply to the Indian Child Welfare Act the canon of construction that remedial statutes are to be liberally construed to achieve their purpose. The three major purposes are derived from a reading to the Act itself. In order to fully implement the Congressional intent the rule shall be applied to all implementing rules and state legislation as well.

Subsection A.(2) applies to canon of statutory construction that specific language shall be given precedence over general language. Congress has given certain specific rights to tribes and Indian children. For example, the tribe has a right to intervene in involuntary custody proceedings. The child has a right to learn of tribal affiliation upon becoming 18 years old. Congress did not intend 25 U.S.C. 1921 to have the effect of eliminating those rights where a court concludes they are in derogation of a parental right provided under a state statute. Congress intended for this section to apply primarily in those instances where a state provides greater protection for a right accorded to parents under the Act. Examples of this include State laws which: impose a higher burden of proof than the Act for removing a child from a home, give the parents more time to prepare after receiving notice, require more effective notice, impose stricter emergency removal procedure requirements on those removing a child, give parents greater access to documents, or contain additional safeguard to assure the voluntariness of consent.

B. Pretrial requirements

B.1. Determination That Child Is an Indian

(a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's indentity to become publicly known.

(b)(i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.

(ii) Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

(c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:

(i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.

(ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.

(iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.

(iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.

(v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

B.1. Commentary

This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets those criteria. *Cohen, Handbook of Federal Indian Law* 133 (1942). Because of the Bureau of Indian Affairs' long experience in determining who is an Indian for a variety of purposes, its determinations are also entitled to great deference. *See, e.g., United States* v. *Sandoval,* 231, U.S. 28, 27 (1913).

Although tribal verification is preferred, a court may want to seek verification from the BIA in those voluntary placement cases where the parent has requested anonymity and the tribe does not have a system for keeping child custody matters confidential.

Under the Act confidentially is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 U.S.C. § 1912 with 25 U.S.C. § 1913. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. § 1915(c) The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless.

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative. *United States* v. *Broncheau,* 597 F.2d 1260, 1263 (9th Cir. 1979).

The guidelines also list several circumstances which shall trigger an inquiry by the court and petitioners to determine whether a child is an Indian for purposes of this Act. This listing is not intended to be complete, but it does list the most common circumstances giving rise to a reasonable belief that a child may be an Indian.

B.2. Determination of Indian Child's Tribe

(a) Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.

(b) The court shall send the notice specified in recommended guideline B.4. to each such tribe. The notice shall

specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.

(c) In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:

(i) length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;

(ii) child's participation in activities of each tribe;

(iii) child's fluency in the language of each tribe;

(iv) whether there has been a previous adjudication with respect to the child by a court of one of the tribes;

(v) residence on or near one of the tribes' reservation by the child's relatives;

(vi) tribal membership of custodial parent or Indian custodian;

(vii) interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these guidelines; and

(viii) the child's self identification.

(d) The court's determination together with the reasons for it shall be set out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.

(e) If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even though the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

B.2. Commentary

This guideline requires the court to notify all tribes that are potentially the Indian child's tribe so that each tribe may assert its claim to that status and the court may have the benefit of the views of each tribe. Notification of all the tribes is also necessary so the court can consider the comparative interest of each tribe in the child's welfare in making its decision. That factor has long been regarded an important consideration in making child custody decisions.

The significant factors listed in this section are based on recommendations by tribal officials involved in child welfare matters. The Act itself and the legislative history make it clear that tribal rights are to be based on the existence of a political relationship between the family and the tribe. For that reason, the guidelines make actual tribal membership of the child conclusive on this issue.

The guidelines do provide, however, that previous decisions of a court made on its own determination of the Indian child's tribe are not invalidated simply because the child becomes a member of a different tribe. This provision is included because of the importance of stability and continuity to a child who has been placed outside the home by a court. If a child becomes a member before a placement is made or before a change of placement becomes necessary for other reasons, however, then that membership decision can be taken into account without harm to the child's need for stable relationships.

We have received several recommendations that "Indian child's tribe" status be accorded to all tribes in which a child is eligible for membership. The fact that Congress, in the definition of "Indian child's tribe," provided a criterion for determining which is *the* Indian child's tribe, is a clear indication of legislative intent that there be only one such tribe for each child. For purposes of transfer of jurisdiction, there obviously can be only one tribe to adjudicate the case. To give more than one tribe "Indian child's tribe" status for purposes of the placement preferences would dilute the preference accorded by Congress to the tribe with which the child has the more significant contacts.

A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe had proved unsuccessful. So long as the special rights of *the* Indian child's tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act.

Determinations of the Indian child's tribe for purposes of this Act shall not serve as any precedent for other situations. The standards in this statute and these guidelines are designed with child custody matters in mind. A different determination may be entirely appropriate in other legal contexts.

B.3. Determination That Placement Is Covered by the Act

(a) Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.

(b) Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.

(c) Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

B.3. Commentary

The purpose of this section is to deal with some of the questions the Department has been receiving concerning the coverage of the Act.

The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child—whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses.

Placements based on status offenses (actions that are not a crime when committed by an adult), however, are usually premised on the conclusion that the present custodian of the child is not providing adequate care or supervision. To the extent that a status offense poses any immediate danger to society, it is usually also punishable as an offense which would be a crime if committed by an adult. For that reason status offenses are treated the same as dependency proceedings and are covered by the Act and these guidelines, while other juvenile delinquency placements are excluded.

While the Act excludes *placements* based on an act which would be a crime if committed by an adult, it does cover terminations of parental rights even

where they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed.

The Act excludes from coverage an award of custody to one of the parents "in a divorce proceeding." If construed narrowly, this provision would leave custody awards resulting from proceedings between husband and wife for separate maintenance, but not for dissolution of the marriage bond within the coverage of the Act. Such a narrow interpretation would not be in accord with the intent of Congress. The legislative history indicates that the exemption for divorce proceedings, in part, was included in response to the views of this Department that the protections provided by this Act are not needed in proceedings between parents. In terms of the purposes of this Act, there is no reason to treat separate maintenance or similar domestic relations proceedings differently from divorce proceedings. For that reason the statutory term "divorce proceeding" is construed to include other domestic relations proceedings between spouses.

The Act also excludes from its coverage any placements that do not deprive the parents or Indian custodians of the right to regain custody of the child upon demand. Without this exception a court appearance would be required every time an Indian child left home to go to school. Court appearances would also be required for many informal caretaking arrangements that Indian parents and custodians sometimes make for their children. This statutory exemption is restated here in the hope that it will reduce the instances in which Indian parents are unnecessarily inconvenienced by being required to give consent in court to such informal arrangements.

Some private groups and some states enter into formal written agreements with parents for temporary custody (*See e.g.* Alaska Statutes § 47.10.230). The guidelines recommend that the parties to such agreements explicitly provide for return of the child upon demand if they do not wish the Act to apply to such placements. Inclusion of such a provision is advisable because courts frequently assume that when an agreement is reduced to writing, the parties have only those rights specifically written into the agreement.

B.4. Determination of Jurisdiction

(a) In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section B.7. of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.

(b) If the Indian child has previously resided or been domiciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Section B.7. of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.

B.4. Commentary

The purpose of this section is to remind the state court of the need to determine whether it has jurisdiction under the Act. The action is dismissed as soon as it is determined that the court lacks jurisdiction except in emergency situations. The procedures for emergency situations are set out in Section B.7.

B.5. Notice Requirements

(a) In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.

(b) In any involuntary Indian child custody proceeding, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:

(i) The name of the Indian child.

(ii) His or her tribal affiliation.

(iii) A copy of the petition, complaint or other document by which the proceeding was initiated.

(iv) The name of the petitioner and the name and address of the petitioner's attorney.

(v) A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.

(vi) A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them.

(vii) A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.

(viii) The location, mailing address and telephone number of the court.

(ix) A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.

(x) The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.

(xi) A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

(c) The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which the notice was received to prepare for the proceeding.

(d) The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.

9e) Notice may be personnally served on any person entitled to receive notice in lieu of mail service.

(f) If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

(g) If the court or a petitioniing party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau of Indian Affairs personnel arrange to have the notice explained to that person in the language that he or she best understands.

B.5. Commentary

This section recommends that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian. If anyone asserts that the child is an Indian or that there is reason to believe the child may be an Indian, then the court shall contact the tribe or the Bureau of Indian Affairs for verification. Refer to sections B.1 and B.2 of these guidelines.

This section specifies the information to be contained in the notice. This information is necessary so the persons who receive notice will be able to exercise their rights in a timely manner. Subparagraph (xi) provides that tribes shall be requested to assist in maintaining the confidentiality of the proceeding. Confidentiality may be difficult to maintain—especially where small tribes are involved and the likelihood that the family involved is well known by tribal officials is great. Although Congress was concerned with confidentiality, it concluded that the interest of tribes in the welfare of their children justified taking some risks with confidentiality—especially in involuntary proceedings. It is reasonable, however, to ask tribal officials to maintain as much confidentiality as possible consistent with the exercise of tribal rights under the Act.

The time limits are minimum ones required by the Act. In many instances, more time may be available under state court procedures or because of the circumstances of the particular case. In such instances, the notice shall state that additional time is available.

The Act requires notice to the parent *or* Indian custodian. At a minimum, parents must be notified if termination of parental rights is a potential outcome since it is their relationship to the child that is at stake. Similarly, the Indian custodians must be notified of any action that could lead to the custodians' losing custody of the child. Even where only custody is an issue, noncustodial parents clearly have a legitimate interest in the matter. Although notice to both parents and Indian custodians may not be required in all instances by the Act or the Fourteenth Amendment to the U.S. Constitution, providing notice to both is in keeping with the spirit of the Act. For that reason, these guidelines recommend notice be sent to both.

Subsection (d) requires filing the notice with the court so there will be a complete record of efforts to comply with the Act.

Subsection (e) authorizes personal services since it is superior to mail services and provides greater protection or rights as authorized by 25 U.S.C. 1921. Since serving the notice does not involve any assertion of jurisdiction over the person served, personal notice may be served without regard to state or reservation boundaries.

Subsections (f) and (g) provide procedures to increase the likelihood that rights are understood by parents and Indian custodians.

B.6. Time Limits and Extensions

(a) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional twenty days from the date upon which notice was received to prepare for participation in the proceeding.

(b) The proceeding may not begin until all of the following dates have passed:

(i) ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;

(ii) ten days after the Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;

(iii) thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding; and

(iv) Thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.

(c) The time limits listed in this section are the minimum time periods required by the Act. The court may grant more more time to prepare where state law permits.

B.6. Commentary

This section attempts to clarify the waiting periods required by the Act after notice has been received of an involuntary Indian child custody proceeding. Two independent rights are involved—the right of the parents or Indian custodians and the right of the Indian child's tribe. The proceeding may not begin until the waiting periods to which both are entitled have passed.

This section also makes clear that additional extensions of time may be granted beyond the minimum required by the Act.

B.7. Emergency Removal of an Indian Child

(a) Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.

(b) When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:

(i) The name, age and last known address of the Indian child.

(ii) The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.

(iii) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.

(iv) The tribal affiliation of the child and of the parents and/or Indian custodians.

(v) A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.

(vi) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.

(vii) A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

(c) If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case—whichever is earlier.

(d) Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness.

that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

B.7. Commentary

Since jurisdiction under the Act is based on domicile and residence rather than simple physical presence, there may be instances in which action must be taken with respect to a child who is physically located off a reservation but is subject to exclusive tribal jurisdiction. In such instances the tribe will usually not be able to take swift action to exercise its jurisdiction. For that reason Congress authorized states to take temporary emergency action.

Since emergency action must be taken without the careful advance deliberation normally required, procedures must be established to assure that the emergency actions are quickly subjected to review. This section provides procedures for prompt review of such emergency actions. It presumes the state already has such review procedures and only prescribes additional procedures that shall be followed in cases involving Indian children.

The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end. State action shall also end as soon as the tribe is ready to take over the case.

Subsection (d) refers primarily to the period between when the petition is filed and when the trial court renders its decision. The Act requires that, except for emergencies, Indian children are not to be removed from their parents unless a court finds clear and convincing evidence that the child would be in serious danger unless removed from the home. Unless there is some kind of time limit on the length of an "emergency removal" (that is, any removal not made pursuant to a finding by the court that there is clear and convincing evidence that continued parental custody would make serious physical or emotional harm likely), the safeguards of the Act could be evaded by use of long-term emergency removals.

Subsection (d) recommends what is, in effect, a speedy trial requirement. The court shall be required to comply with the requirements of the Act and reach a decision within 90 days unless there are "extraordinary circumstances" that make additional delay unavoidable.

B.8. Improper Removal From Custody

(a) If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

(b) If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

B.8. Commentary

This section is designed to implement 25 U.S.C. § 1920. Since a finding of improper removal goes to the jurisdiction of the court to hear the case at all, this section provides that the court will decide the issue as soon as it arises before proceeding further on the merits.

C. Requests for Transfer to Tribal Court

C.1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.

C.1. Commentary

Reference is made to 25 U.S.C. 1911(b) in the title of this section in order to clarify that this section deals only with transfers where the child is not domiciled or residing on an Indian reservation.

So that transfers can occur as quickly and simply as possible, requests can be made orally.

This section specifies that requests are to be made promptly after receiving notice of the proceeding. This is a modification of the timeliness requirement that appears in the earlier version of the guidelines. Although the statute permits proceedings to be commenced even before actual notice is received by parties entitled to notice, those parties do not lose their right to request a transfer simply because neither the petitioner nor the Secretary was able to locate them earlier.

Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions.

The Department received a number of comments objecting to any timeliness requirement at all. Commenters pointed out that the statute does not explicitly require transfer requests to be timely. Some commenters argued that imposing such a requirement violated tribal and parental rights to intervene at any point in the proceedings under 25 U.S.C. § 1911(c) of the Act.

While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention.

Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

C.2. Criteria and Procedures for Ruling on 25 U.S.C. § 1911(b) Transfer Petitions

(a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

(b) If the court believes or any party asserts that good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer. The petitioners shall have the opportunity to provide the

court with their views on whether or not good cause to deny transfer exists. C.2. Commentary

Subsection (a) simply states the rule provided in 25 U.S.C. § 1911(b).

Since the Act gives the parents and the tribal court of the Indian child's tribe an absolute veto over transfers, there is no need for any adversary proceedings if the parents or the tribal court opposes transfer. Where it is proposed to deny transfer on the grounds of "good cause," however, all parties need an opportunity to present their views to the court.

C.3. Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.3. Commentary

All five criteria that were listed in the earlier version of the guidelines were highly controversial. Comments on the first two criteria were almost unanimously negative. The first criterion was whether the parents were still living. The second was whether an Indian custodian or guardian for the child had been appointed. These criteria were criticized as irrelevant and arbitrary. It was argued that children who are orphans or have no appointed Indian custodian or guradian are no more nor less in need of the Act's protections that other children. It was also pointed out that these criteria are contrary to the decision in *Wisconsin Potawatomies of the Hannahville Indian Community* v. *Houston*, 397 F. Supp. 719 (W.D. Mich 1973), which was explicitly endorsed by the committee that drafted that Act. The court in that case found that tribal jurisdiction existed even through the children involved were orphans for whom no guardian had been appointed.

Although there was some support for the third and fourth criteria, the preponderance of the comment concerning them was critical. The third criteria was whether the child had little or no contact with his or her Indian tribe for a significant period of time. The fourth was whether the child had ever resided on the reservation for a significant period of time. These criteria were criticized, in part, because they would virtually exclude from transfers infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant previous contact with the tribe or the reservation. Some also argued that these criteria invited the state courts to be making the kind of cultural decisons that the Act contemplated should be made by tribes. Some argued that the use of vague words in these criteria accorded state courts too much discretion.

The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more evenly divided and many of the critics were ambivalent. They worried that young teenagers could be too easily influenced by the judge or by social workers. They also argued that fear of the unknow would cuase many teenagers to make an ill-considered decision against transfer.

The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe is not advised. The circumstances under which it may be proper for the state court to take such considerations into account are set out in the revised subsection (iv).

It is recommended that in most cases state court judges not be called upon to determined whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.

This reasoning does not apply, however, where there is no parent available to make that decision. The guidelines recommend that state courts be authorized to make such determinations only in those cases where there is no parent available to make it.

State court authority to make such decisions is limited to those cases where the child is over five years of age. Most children younger than five years can be expected to adjust more readily to a change in cultural environment.

The fifth criterion has been retained. It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives.

The existence of a tribal court is made an absolute requirement for transfer of a case. Clearly, the absence of a tribal court is good cause not to ask the tribe to try the case.

Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "The subsection is intended to permit a State court to apply to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation. This problem may be alleviated in some instances by having the court come to the witnesses. The Department is aware of one case under that Act where transfer was conditioned on having the tribal court meet in the city where the family lived. Some cities hav substantial populations of members of tribes from distant reservations. In such situations some tribes may wish to appoint members who live in those cities as tribal judges.

The timeliness of the petition for transfer, discussed at length in the commentary to section C.1, is listed as a factor to be considered. Inclusion of this criterion is designed to encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays. Long periods of uncertainty concerning the future are

generally regarded as harmful to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings.

Almost all commenters favored retention of the paragraph stating that reservation socio-economic conditions and the perceived adequacy of tribal institutions are not to be taken into account in making good cause determinations. Some commenters did suggest, however, that a case not be transferred if it is clear that a particular disposition of the case that could only be made by the state court held especially great promise of benefiting the child.

Such considerations are important but they have not been listed because the Department believes such judgments are best made by tribal courts. Parties who believe that state court adjudication would be better for such reasons can present their reasons to the tribal court and urge it to decline jurisdiction. The Department is aware of one case under the Act where this approach is being used and believes it is more in keeping with the confidence Congress has expressed in tribal courts.

Since Congress has established a policy of preferring tribal control over custody decisions affecting tribal members, the burden of proving that an exception to that policy ought to be made in a particular case rests on the party urging that an exception be made. This rule is reflected in subsection (d).

C.4. Tribal Court Declination of Transfer

(a) A tribal court to which transfer is requested may decline to accept such transfer.

(b) Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.

(c) Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties.

(d) If the case is transferred the state court shall provide the tribal court with all available information on the case.

C.4. Commentary

The previous version of this section provided that the state court should presume the tribal court has declined to accept jurisdiction unless it hears otherwise. The comments on this issue were divided. This section has been revised to require the tribal court to decline the transfer affirmatively if it does not wish to take the case. This approach is in keeping with the apparent intent of Congress. The language in the Act providing that transfers are "subject to declination by the tribal court" indicates that affirmative action by the tribal court is required to decline a transfer.

The recommended time limit for a decision has been extended from ten to twenty days. The additional time is needed for the court to become apprised of factors it may want to consider in determining whether or not to decline the transfer.

A new paragraph has been added recommending that the parties assist the tribal court in making its decision on declination by giving the tribal court their views on the matter.

Transfers ought to be arranged as simply as possible consistent with due process. Transfer procedures are a good subject for tribal-state agreements under 25 U.S.C. § 1919.

D. Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Rights

D.1. Access to Reports

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. No decision of the court shall be based on any report or other document not filed with the court.

D.1. Commentary

The first sentence merely restates the statutory language verbatim. The second sentence makes explicit the implicit assumption of Congress—that the court will limit its considerations to those documents and reports that have been filed with the court.

D.2. Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

D.2. Commentary

This section elaborates on the meaning of "breakup of the Indian family" as used in the Act. "Family breakup" is sometimes used as a synonym for divorce. In the context of this statute, however, it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health.

This section also recommends that the petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home for the child. The term "individual Indian care givers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed.

One commenter recommended that detailed procedures and criteria be established in order to determine whether family support efforts had been adequate. Establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not comtemplate such a role for the courts and they generally lack the expertise to make such judgments.

D.3. Standards of Evidence

(a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one of more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents of Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.

D.3. Commentary

The first two paragraphs are essentially restatement of the statutory language. By imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be shown that it is shown that it is dangerous for the child to remain with his or her present custodians. Evidence of that must be "clear and convincing" for placements and "beyond a reasonable doubt" for terminations.

The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be—without any testing of the implicit assumption that only a family that conformed to that stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress. The focus must be on whether the particular conditions are likely to cause serious damage.

D.4. Qualified Expert Witnesses

(a) Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.

(b) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty.

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

D.4 Commentary

The first subsection is intended to point out that the issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically two questions are involved. First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?

The party presenting an expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by nonexperts.

The second subsection makes clear that knowledge of tribal culture and childrearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior—which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.

Indian tribes and Bureau of Indian Affairs personnel frequently know persons who are knowledgeable concerning the customs and cultures of the tribes they serve. Their assistance is available in helping to locate such witnesses.

E. Voluntary Proceedings

E.1. Execution of Consent

To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

E.1. Commentary

This section provides that consent may be executed before either a judge or magistrate. The addition of magistrates was made in response to a suggestion from Alaska where magistrates are found in most small communities but "judges" are more widely scattered. The term "judge" as used in the statute is not a term of art and can certainly be construed to include judicial officers who are called magistrates in some states. The statement that consent need not be in open court where confidentiality is desired or indicated was taken directly from the House Report on the Act. A recommendation that the guideline list the consequences of consent that must be described to the parent or custodian has not been adopted because the consequences can vary widely depending on the nature of the proceeding, state law and the particular facts of individual cases.

E.2. Content of Consent Document

(a) The consent document shall contain the name and birthdate of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.

(b) A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

(c) A consent to termination of parental rights or adoption shall contain,

in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

E.2. Commentary

This section specifies the basic information about the placement or termination to which the parent or Indian custodian is consenting to assure that consent is knowing and also to document what took place.

E.3. Withdrawal of Consent to Placement

Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing, in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.

E.3. Commentary

This section specifies that withdrawal of consent shall be filed in the same court where the consent document itself was executed.

E.4. Withdrawal of Consent to Adoption

A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a *final decree of voluntary termination or adoption* by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.

E.4. Commentary

This provision recommends that the clerk of the court be responsible for notifying the family with whom the child has been placed that consent has been withdrawn. The court's involvement frequently may be necessary since the biological parents are often not told who the adoptive parents are.

F. Dispositions

F.1. Adoptive Placements

(a) In any adoptive placement of an Indian child under state law preference must be given (in the order listed below) absent good cause to the contrary, to placement of the child with:

(i) A member of the child's extended family;

(ii) Other members of the Indian child's tribe; or

(iii) Other Indian families, including families of single parents.

(b) The Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed so long as placement is the least restrictive setting appropriate to the child's needs.

(c) Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

F.1. Commentary

This section makes clear that preference shall be given in the order listed in the Act. The Act clearly recognizes the role of the child's extended family in helping to raise children. The extended family should be looked to first when it becomes necessary to remove the child from the custody of his or her parents. Because of differences in cultures among tribes, placement within the same tribe is preferable.

This section also provides that single parent families shall be considered for placements. The legislative history of the Act makes it clear that Congress intended custody decisions to be made based on a consideration of the present or potential custodian's ability to provide the necessary care, supervision and support for the child rather than on preconceived notions of proper family composition.

The third subsection recommends that the court or agent make an active effort to find out if there are families entitled to preference who would be willing to adopt the child. This provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities.

F.2. Foster Care or Preadoptive Placements

In any foster care or preadoptive placement of an Indian child:

(a) The child must be placed in the least restrictive setting which

(i) most approximates a family;

(ii) in which his or her special needs may be met; and

(iii) which is in reasonable proximity to his or her home.

(b) Preference must be given in the following order, absent good cause to the contrary, to placement with:

(i) A member of the Indian child's extended family;

(ii) A foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation;

(iii) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed so long as the criteria enumerated in subsection (a) are met.

F.2. Commentary

This guideline simply restates the provisions of the Act.

F.3. Good Cause To Modify Preferences

(a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:

(i) The request of the biological parents or the child when the child is of sufficient age.

(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

(b) The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.

F.3. Commentary

The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph (i) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons. The wishes of an older child are important in making an effective placement.

In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Paragraph (ii) recommends that such considerations be considered as good cause to the contrary.

Paragraph (iii) recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

Since Congress has established a clear preference for placements within the tribal culture, it is recommended in subsection (b) that the party urging an exception be made be required to bear the burden of proving and exception is necessary.

G. Post-Trial Rights

G.1. Petition To Vacate Adoption

(a) Within two years after a final decree of adoption of any Indian child by a state court, or within any longer period of time permitted by the law of the state, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such consent was obtained by fraud or duress.

(b) Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

G.1. Commentary

This section recommends that the petition to vacate an adoption be brought in the same court in which the decree was entered, since that court clearly has jurisdiction, and witnesses on the issue of fraud or duress are most likely to be within its jurisdiction.

G.2. Adult Adoptee Rights

(a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

(b) The section applies regardless of whether or not the original adoption was subject to the provisions of the Act.

(c) Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

G.2. Commentary

Subsection (b) makes clear that adoptions completed prior to May 7, 1979, are covered by this provision. The Act states that most portions of Title I do not "affect a proceeding under State law" initiated or completed prior to May 7, 1979. Providing information to an adult adoptee, however, cannot be said to affect the proceeding by which the adoption was ordered.

The legislative history of the Act makes it clear that this Act was not intended to supersede the decision of state legislatures on whether adult adoptees may be told the names of their biological parents. The intent is simply to assure the protection of rights deriving from tribal membership. Where a state law prohibits disclosure of the identity of the biological parents, tribal rights can be protected by asking the BIA to check confidentially whether the adult adoptee meets the requirements for membership in an Indian tribe. If the adoptee does meet those requirements, the BIA can certify that fact to the appropriate tribe.

G.3. Notice of Change in Child's Status

(a) Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.

(b) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.

G.3. Commentary

This section provides guidelines to aid courts in applying the provisions of Section 106 of the Act. Section 106 gives legal standing to a biological parent or prior Indian custodian to petition for return of a child in cases of failed adoptions or changes in placement in situations where there has been a termination of parental rights. Section 106(b) provides the whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, such placement is to be in accordance with the provisions of the Act—which requires notice to the biological parents.

The Act is silent on the question of whether a parent or Indian custodian can waive the right to further notice. Obviously, there will be cases in which the biological parents will prefer not to receive notice once their parental rights have been relinquished or terminated. This section provides for such waivers but, because the Act establishes an absolute right to participate in any future proceedings and to petition the court for return of the child, the waiver is revocable.

G.4. Maintenance of Records

The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

G.4. Commentary

This section of the guidelines provides a procedure for implementing the provisions of 25 U.S.C. § 1915(e). This section has been modified from the previous version which required that all records be maintained in a single location within the state. As revised this section provides only that the records be retrievable by a single office that would make them available to the requester within seven days of a request. For some states (especially Alaska) centralization of the records themselves would create major administrative burdens. So long as the records can be promptly made available at a single location, the intent of this section that the records be readily available will be satisfied.

Forrest J. Gerard,

Assistant Secretary, Indian Affairs.

November 16, 1979.

[FR Doc. 79-36231 Filed 11-23-79; 8:45 am]

BILLING CODE 4310-02-M

APPENDIX 5

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (court opinion)

Briefs and Other Related Documents

Supreme Court of the United States
MISSISSIPPI BAND OF CHOCTAW INDIANS, Appellant
v.
Orrey Curtiss HOLYFIELD, et ux., J.B., Natural Mother and W.J., Natural Father.
No. 87-980.

Argued Jan. 11, 1989.
Decided April 3, 1989.

Petition was filed for adoption of twin illegitimate babies whose parents were enrolled members of Choctaw Indian Tribe and residents and domiciliaries of tribal reservation in Mississippi. Indian band moved to vacate and set aside decree of adoption awarding those children to adoptive parents. The Chancery Court, Harrison County, Jason H. Floyd, Jr., Chancellor, overruled motion to vacate and set aside decree of adoption. On appeal, the Mississippi Supreme Court, Griffin, J., 511 So.2d 918, affirmed. Plenary review was granted. The Supreme Court, Justice Brennan, held that: (1) though term "domicile" in key jurisdictional provision of Indian Child Welfare Act was not statutorily defined, Congress did not intend for state courts to define that term as matter of state law, and (2) children were "domiciled" on reservation within meaning of Act's exclusive tribal jurisdiction provision even though they were never physically present on reservation themselves, and Chancery Court was without jurisdiction to enter adoption decree even though children were "voluntarily surrendered" for adoption.

Reversed and remanded.

Justice Steven dissented and filed opinion in which Chief Justice Rehnquist and Justice Kennedy joined.

West Headnotes

[1] Federal Courts 417
170Bk417 Most Cited Cases
(Formerly 209k6(2))
Though term "domicile" in key jurisdictional provision of Indian Child Welfare Act is not statutorily defined, Congress clearly intended uniform federal law of domicile for Act and did not consider definition of that term to be matter of state law. Indian Child Welfare Act of 1978, § § 2-403, 101(a), 25 U.S.C.A. § § 1901-1963, 1911(a).

[2] Domicile 2
135k2 Most Cited Cases
"Domicile" is not necessarily synonymous with "residence" and one can reside in one place but be domiciled in another.

[3] Domicile 1
135k1 Most Cited Cases
For adults, "domicile" is established by physical presence in place in connection with certain state of mind concerning one's intent to remain there.

[4] Domicile 3
135k3 Most Cited Cases

[4] Domicile 4(1)
135k4(1) Most Cited Cases
One acquires "domicile of origin" at birth and that domicile continues until new one ("domicile of choice") is acquired.

[5] Domicile 5
135k5 Most Cited Cases
Most minors are legally incapable of forming requisite intent to establish domicile, and their domicile is thus determined by that of their parents; illegitimate child's domicile is traditionally that of its mother.

[6] Domicile 5
135k5 Most Cited Cases

[6] Indians 6.10
209k6.10 Most Cited Cases
(Formerly 209k32(7))
Children born out-of-wedlock to parents who were enrolled members of Choctaw Indian Tribe and residents and domiciliaries of Choctaw reservation in Mississippi were "domiciled" on that reservation

within meaning of Indian Child Welfare Act's exclusive tribal jurisdiction provision even though they themselves were never physically present on reservation, and Mississippi Chancery Court thus lacked jurisdiction to enter adoption decree even though children were "voluntarily surrendered" for adoption. Indian Child Welfare Act of 1978, § § 2-403, 101(a), 25 U.S.C.A. § § 1901-1963, 1911(a).

*****1598** Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***30** On the basis of extensive evidence indicating that large numbers of Indian children were being separated from their families and tribes and were being placed in non-Indian homes through state adoption, foster care, and parental rights termination proceedings, and that this practice caused serious problems for the children, their parents, and their tribes, Congress enacted the Indian Child Welfare Act of 1978 (ICWA), which, *inter alia*, gives tribal courts exclusive jurisdiction over custody proceedings involving an Indian child "who resides or is domiciled within" a tribe's reservation. This case involves the status of twin illegitimate babies, whose parents were enrolled members of appellant Tribe and residents and domiciliaries of its reservation in Neshoba County, Mississippi. After the twins' births in Harrison County, some 200 miles from the reservation, and their parents' execution of consent-to-adoption forms, they were adopted in that county's Chancery Court by the appellees Holyfield, who were non-Indian. That court subsequently overruled appellant's motion to vacate the adoption decree, which was based on the assertion that under the ICWA exclusive jurisdiction was vested in appellant's tribal court. The Supreme Court of Mississippi affirmed, holding, among other things, that the twins were not "domiciled" on the reservation under state law, in light of the Chancery Court's findings (1) that they had never been physically present there, and (2) that they were "voluntarily surrendered" by their parents, who went to some efforts to see that they were born outside the reservation and promptly arranged for their adoption. Therefore, the court said, the twins' domicile was in Harrison County, ****1599** and the Chancery Court properly exercised jurisdiction over the adoption proceedings.

Held: The twins were "domiciled" on the Tribe's reservation within the meaning of the ICWA's exclusive tribal jurisdiction provision, and the Chancery Court was, accordingly, without jurisdiction to enter the adoption decree. Pp. 1604-1611.

(a) Although the ICWA does not define "domicile," Congress clearly intended a uniform federal law of domicile for the ICWA and did not consider the definition of the word to be a matter of state law. The ICWA's purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings. In fact, ***31** the statutory congressional findings demonstrate that Congress perceived the States and their courts as partly responsible for the child separation problem it intended to correct. Thus, it is most improbable that Congress would have intended to make the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law. Moreover, Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of "domicile," whereby different rules could apply from time to time to the same Indian child, simply as a result of his or her being moved across state lines. Pp. 1605-1607.

(b) The generally accepted meaning of the term "domicile" applies under the ICWA to the extent it is not inconsistent with the objectives of the statute. In the absence of a statutory definition, it is generally assumed that the legislative purpose is expressed by the ordinary meaning of the words used, in light of the statute's object and policy. Well-settled common-law principles provide that the domicile of minors, who generally are legally incapable of forming the requisite intent to establish a domicile, is determined by that of their parents, which has traditionally meant the domicile of the mother in the case of illegitimate children. Thus, since the domicile of the twins' mother (as well as their father) has been, at all relevant times, on appellant's reservation, the twins were also domiciled there even though they have never been there. This result is not altered by the fact that they were "voluntarily surrendered" for adoption. Congress enacted the ICWA because of concerns going beyond the wishes of individual parents, finding that the removal of Indian children from their cultural setting seriously impacts on long-term tribal survival and has a damaging social and psychological impact on many individual Indian children. These concerns demonstrate that Congress could not have intended to enact a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional

scheme simply by giving birth and placing the child for adoption off the reservation. Pp. 1607-1611.

511 So.2d 918 (Miss.1987), reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C.J., and KENNEDY, J., joined, *post,* p. 1611.

Edwin R. Smith argued the cause and filed briefs for appellant.

***32** *Edward O. Miller* argued the cause and filed a brief for appellees.*

* Briefs of *amici curiae* urging reversal were filed for the Association of American Indian Affairs, Inc., et al. by *Bertram E. Hirsch* and *Jack F. Trope;* for the Menominee Indian Tribe of Wisconsin by *Kathryn L. Tierney;* for the Navajo Nation by *Donald R. Wharton;* and for the Swinomish Tribal Community et al. by *Jeanette Wolfley, Craig J. Dorsay,* and *Richard and Dauphinais.*

Justice BRENNAN delivered the opinion of the Court.

This appeal requires us to construe the provisions of the Indian Child Welfare Act that establish exclusive tribal jurisdiction over child custody proceedings involving Indian children domiciled on the tribe's reservation.

I

A

The Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. § § 1901-****1600** 1963, was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. Senate oversight hearings in 1974 yielded numerous examples, statistical data, and expert testimony documenting what one witness called "[t]he wholesale removal of Indian children from their homes, ... the most tragic aspect of Indian life today." Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler) (hereinafter 1974 Hearings). Studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. *Id.*, ***33** at 15; see also H.R.Rep. No. 95-1386, p. 9 (1978) (hereinafter House Report), U.S.Code Cong. & Admin.News 1978, pp. 7530, 7531. Adoptive placements counted significantly in this total: in the State of Minnesota, for example, one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption. The adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes. 1974 Hearings, at 75-83. A number of witnesses also testified to the serious adjustment problems encountered by such children during adolescence, [FN1] as well as the impact of the adoptions on Indian parents and the tribes themselves. See generally 1974 Hearings.

FN1. For example, Dr. Joseph Westermeyer, a University of Minnesota social psychiatrist, testified about his research with Indian adolescents who experienced difficulty coping in white society, despite the fact that they had been raised in a purely white environment:

"[T]hey were raised with a white cultural and social identity. They are raised in a white home. They attended, predominantly white schools, and in almost all cases, attended a church that was predominantly white, and really came to understand very little about Indian culture, Indian behavior, and had virtually no viable Indian identity. They can recall such things as seeing cowboys and Indians on TV and feeling that Indians were a historical figure but were not a viable contemporary social group.

"Then during adolescence, they found that society was not to grant them the white identity that they had. They began to find this out in a number of ways. For example, a universal experience was that when they began to date white children, the parents of the white youngsters were against this, and there were pressures among white children from the parents not to date these Indian children....

"The other experience was derogatory name calling in relation to their racial identity....

* * *

> "[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess." 1974 Hearings, at 46.

Further hearings, covering much the same ground, were held during 1977 and 1978 on the bill that became the ***34** ICWA. [FN2] While much of the testimony again focused on the harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities, there was also considerable emphasis on the impact on the tribes themselves of the massive removal of their children. For example, Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, testified as follows:

> FN2. Hearing on S. 1214 before the Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess. (1977) (hereinafter 1977 Hearings); Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978) (hereinafter 1978 Hearings).

> "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be ****1601** raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships." 1978 Hearings, at 193.

See also *id.*, at 62. [FN3] Chief Isaac also summarized succinctly what numerous witnesses saw as the principal reason for the high rates of removal of Indian children:

> FN3. These sentiments were shared by the ICWA's principal sponsor in the House, Rep. Morris Udall, see 124 Cong.Rec. 38102 (1978) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy"), and its minority sponsor, Rep. Robert Lagomarsino, see *ibid.* ("This bill is directed at conditions which ... threaten ... the future of American Indian tribes ...").

> "One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life ***35** and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." *Id.*, at 191-192. [FN4]

> FN4. One of the particular points of concern was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society. The House Report on the ICWA noted: "An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." House Report, at 10, U.S.Code Cong. & Admin.News 1978, at 7532. At the conclusion of the 1974 Senate hearings, Senator Abourezk noted the role that such extended families played in the care of children: "We've had testimony here that in Indian communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or a friend will take that child in. It's the extended family concept." 1974 Hearings, at 473. See also *Wisconsin Potowatomies of Hannahville Indian Community v. Houston*, 393 F.Supp. 719 (WD Mich.1973) (discussing custom of extended family and tribe assuming responsibility for care of orphaned children).

The congressional findings that were incorporated into the ICWA reflect these sentiments. The Congress found:

> "(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children ...;
>
> "(4) that an alarmingly high percentage of Indian families are broken up by the removal, often

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

"(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people ***36** and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901.

At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child "who resides or is domiciled within the reservation of such tribe," as well as for wards of tribal courts regardless of domicile. [FN5] Section 1911(b), on ****1602** the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court.

FN5. Section 1911(a) reads in full:

"An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child."

Various other provisions of ICWA Title I set procedural and substantive standards for those child custody proceedings that do take place in state court. The procedural safeguards include requirements concerning notice and appointment of counsel; parental and tribal rights of intervention and petition for invalidation of illegal proceedings; procedures governing voluntary consent to termination of parental rights; and a full faith and credit obligation in respect to tribal court decisions. See § § 1901-1914. The most important substantive requirement imposed on state courts is that of § 1915(a), which, absent "good cause" to the contrary, mandates ***37** that adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families.

The ICWA thus, in the words of the House Report accompanying it, "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report, at 23, U.S.Code Cong. & Admin.News 1978, at 7546. It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," *ibid.*, and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." *Id.*, at 24, U.S.Code Cong. & Admin.News 1978, at 7546. [FN6]

FN6. The quoted passages are from the House Report's discussion of § 1915, in which the ICWA attempts to accomplish these aims, in regard to nondomiciliaries of the reservation, through the establishment of standards for state-court proceedings. In regard to reservation domiciliaries, these goals are pursued through the establishment of exclusive tribal jurisdiction under § 1911(a).

Beyond its jurisdictional and other provisions concerning child custody proceedings, the ICWA also created, in its Title II, a program of grants to Indian tribes and organizations to aid in the establishment of child welfare programs. See 25 U.S.C. § § 1931-1934.

B

This case involves the status of twin babies, known for our purposes as B.B. and G.B., who were born out of wedlock on December 29, 1985. Their mother, J.B., and father, W.J., were both enrolled members of appellant Mississippi Band of Choctaw Indians (Tribe), and were residents and domiciliaries of the Choctaw Reservation in Neshoba County, Mississippi. J.B. gave birth to the twins in Gulfport, Harrison County, Mississippi, some 200 miles from the reservation. On January 10, 1986, J.B. executed a consent-to-adoption form before the Chancery Court of Harrison ***38** County. Record 8-10. [FN7] W.J. signed a similar form. [FN8] ****1603** On January 16, appellees Orrey and Vivian Holyfield

[FN9] filed a petition for adoption in the same court, *id.*, at 1-5, and the chancellor issued a Final Decree of Adoption on January 28. *Id.*, at 13-14. [FN10] Despite the court's apparent awareness of the ICWA, [FN11] the adoption decree contained no reference to it, nor to the infants' Indian background.

> FN7. Section 103(a) of the ICWA, 25 U.S.C. § 1913(a), requires that any voluntary consent to termination of parental rights be executed in writing and recorded before a judge of a "court of competent jurisdiction," who must certify that the terms and consequences of the consent were fully explained and understood. Section 1913(a) also provides that any consent given prior to birth or within 10 days thereafter is invalid. In this case the mother's consent was given 12 days after the birth. See also n. 26, *infra.*
>
> FN8. W.J.'s consent to adoption was signed before a notary public in Neshoba County on January 11, 1986. Record 11-12. Only on June 3, 1986, however--well after the decree of adoption had been entered and after the Tribe had filed suit to vacate that decree--did the chancellor of the Chancery Court certify that W.J. had appeared before him in Harrison County to execute the consent to adoption. *Id.*, at 12-A.
>
> FN9. Appellee Orrey Holyfield died during the pendency of this appeal.
>
> FN10. Mississippi adoption law provides for a 6-month waiting period between interlocutory and final decrees of adoption, but grants the chancellor discretionary authority to waive that requirement and immediately enter a final decree of adoption. See Miss.Code Ann. § 93- 17-13 (1972). The chancellor did so here, Record 14, with the result that the final decree of adoption was entered less than one month after the babies' birth.
>
> FN11. The chancellor's certificates that the parents had appeared before him to consent to the adoption recited that "the Consent and Waiver was given in full compliance with Section 103(a) of Public Law 95-608" (*i.e.*, 25 U.S.C. § 1913(a)). Record 10, 12-A.

Two months later the Tribe moved in the Chancery Court to vacate the adoption decree on the ground that under the ICWA exclusive jurisdiction was vested in the tribal court. *Id.*, at 15-18. [FN12] On July 14, 1986, the court overruled the motion, ***39** holding that the Tribe "never obtained exclusive jurisdiction over the children involved herein...." The court's one-page opinion relied on two facts in reaching that conclusion. The court noted first that the twins' mother "went to some efforts to see that they were born outside the confines of the Choctaw Indian Reservation" and that the parents had promptly arranged for the adoption by the Holyfields. Second, the court stated: "At no time from the birth of these children to the present date have either of them resided on or physically been on the Choctaw Indian Reservation." *Id.*, at 78.

> FN12. The ICWA specifically confers standing on the Indian child's tribe to participate in child custody adjudications. Title 25 U.S.C. § 1914 authorizes the tribe (as well as the child and its parents) to petition a court to invalidate any foster care placement or termination of parental rights under state law "upon a showing that such action violated any provision of sections 101, 102, and 103" of the ICWA. 92 Stat. 3072. See also § 1911(c) (Indian child's tribe may intervene at any point in state-court proceedings for foster care placement or termination of parental rights). "Termination of parental rights" is defined in § 1903(1)(ii) as "any action resulting in the termination of the parent-child relationship."

The Supreme Court of Mississippi affirmed. 511 So.2d 918 (1987). It rejected the Tribe's arguments that the state court lacked jurisdiction and that it, in any event, had not applied the standards laid out in the ICWA. The court recognized that the jurisdictional question turned on whether the twins were domiciled on the Choctaw Reservation. It answered that question as follows:

> "At no point in time can it be said the twins resided on or were domiciled within the territory set aside for the reservation. Appellant's argument that living within the womb of their mother qualifies the children's residency on the reservation may be lauded for its creativity; however, apparently it is unsupported by any law within this state, and will not be addressed at this time due to the far-reaching legal ramifications that would occur were we to follow such a complicated tangential course." *Id.*, at 921.

***40** The court distinguished Mississippi cases that appeared to establish the principle that "the domicile of minor children follows that of the parents," *ibid.;* see *Boyle v. Griffin,* 84 Miss. 41, 36 So. 141 (1904); *Stubbs v. Stubbs,* 211 So.2d 821 (Miss.1968); see also *In re Guardianship of Watson,* 317 So.2d 30 (Miss.1975). It noted that "the Indian twins ... were voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents, and it is undisputed that the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi." ****1604** 511 So.2d, at 921. Therefore, the court said, the twins' domicile was in Harrison County and the state court properly exercised jurisdiction over the adoption proceedings. Indeed, the court appears to have concluded that, for this reason, *none* of the provisions of the ICWA was applicable. *Ibid.* ("[T]hese proceedings ... actually escape applicable federal law on Indian Child Welfare"). In any case, it rejected the Tribe's contention that the requirements of the ICWA applicable in state courts had not been followed: "[T]he judge did conform and strictly adhere to the minimum federal standards governing adoption of Indian children with respect to parental consent, notice, service of process, etc." *Ibid.* [FN13]

FN13. The lower court may well have fulfilled the applicable ICWA procedural requirements. But see n. 8, *supra,* and n. 26, *infra.* It clearly did not, however, comply with or even take cognizance of the substantive mandate of § 1915(a): "In any adoptive placement of an Indian child *under State law,* a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." (Emphasis added.) Section 1915(e), moreover, requires the court to maintain records "evidencing the efforts to comply with the order of preference specified in this section." Notwithstanding the Tribe's argument below that § 1915 had been violated, see Brief for Appellant 20-22 and Appellant's Brief in Support of Petition for Rehearing 11-12 in No. 57,659 (Miss.Sup.Ct.), the Mississippi Supreme Court made no reference to it, merely stating in conclusory fashion that the "minimum federal standards" had been met. 511 So.2d, at 921.

***41** Because of the centrality of the exclusive tribal jurisdiction provision to the overall scheme of the ICWA, as well as the conflict between this decision of the Mississippi Supreme Court and those of several other state courts, [FN14] we granted plenary review. 486 U.S. 1021, 108 S.Ct.1993, 100 L.Ed.2d 225 (1988). [FN15] We now reverse.

FN14. See, *e.g., In re Adoption of Halloway,* 732 P.2d 962 (Utah 1986); *In re Adoption of Baby Child,* 102 N.M. 735, 700 P.2d 198 (App.1985); *In re Appeal in Pima County Juvenile Action No. S-903,* 130 Ariz. 202, 635 P.2d 187 (App.1981), cert. denied *sub nom. Catholic Social Services of Tucson v. P.C.,* 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982).

FN15. Because it was unclear whether this case fell within the Court's appellate jurisdiction, we postponed consideration of our jurisdiction to the hearing on the merits. Pursuant to the version of 28 U.S.C. § 1257(2) applicable to this appeal, we have appellate jurisdiction to review a state-court judgment "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." It is sufficient that the validity of the state statute be challenged and sustained as applied to a particular set of facts. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468, 473-474, n. 4, 109 S.Ct. 1248, 1252, n. 4, 103 L.Ed.2d 488 (1989); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 288-290, 42 S.Ct. 106, 107-108, 66 L.Ed. 239 (1921). In practice, whether such an as-applied challenge comes within our appellate jurisdiction often turns on how that challenge is framed. See *Hanson v. Denckla,* 357 U.S. 235, 244, 78 S.Ct. 1228, 1234, 2 L.Ed.2d 1283 (1958); *Memphis Natural Gas Co. v. Beeler,* 315 U.S. 649, 650-651, 62 S.Ct. 857, 859-860, 86 L.Ed. 1090 (1942).
In the present case appellants argued below "that the state lower court jurisdiction over these adoptions was preempted by plenary federal legislation." Brief for Appellant in No. 57,659 (Miss.Sup.Ct.), p. 5. Whether

this formulation "squarely" challenges the validity of the state adoption statute as applied, see *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-441, 99 S.Ct. 1813, 1817, 60 L.Ed.2d 336 (1979), or merely asserts a federal right or immunity, 28 U.S.C. § 1257(3), is a difficult question to which the answer must inevitably be somewhat arbitrary. Since in the near future our appellate jurisdiction will extend only to rare cases, see Pub.L. 100-352, 102 Stat. 662, it is also a question of little prospective importance. Rather than attempting to resolve this question, therefore, we think it advisable to assume that the appeal is improper and to consider by writ of certiorari the important question this case presents. See *Spencer v. Texas*, 385 U.S. 554, 557, n. 3, 87 S.Ct. 648, 650, n. 3, 17 L.Ed.2d 606 (1967). We therefore dismiss the appeal, treat the papers as a petition for writ of certiorari, 28 U.S.C. § 2103, and grant the petition. (For convenience, we will continue to refer to the parties as appellant and appellees.)

***42** II

Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ****1605** ICWA. Indeed, some of the ICWA's jurisdictional provisions have a strong basis in pre-ICWA case law in the federal and state courts. See, *e.g.*, *Fisher v. District Court, Sixteenth Judicial District of Montana*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) (*per curiam*) (tribal court had exclusive jurisdiction over adoption proceeding where all parties were tribal members and reservation residents); *Wisconsin Potowatomies of Hannahville Indian Community v. Houston*, 393 F.Supp. 719 (WD Mich.1973) (tribal court had exclusive jurisdiction over custody of Indian children found to have been domiciled on reservation); *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975) (same); *In re Adoption of Buehl*, 87 Wash.2d 649, 555 P.2d 1334 (1976) (state court lacked jurisdiction over custody of Indian children placed in off-reservation foster care by tribal court order); see also *In re Lelah-puc-ka-chee*, 98 F. 429 (ND Iowa 1899) (state court lacked jurisdiction to appoint guardian for Indian child living on reservation). In enacting the ICWA Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States.

The state-court proceeding at issue here was a "child custody proceeding." That term is defined to include any " 'adoptive placement' which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." 25 U.S.C. § 1903(1)(iv). Moreover, the twins were "Indian children." See 25 U.S.C. § 1903(4). The sole issue in this case is, as the Supreme Court of Mississippi recognized, whether the twins were "domiciled" on the reservation. [FN16]

FN16. "Reservation" is defined quite broadly for purposes of the ICWA. See 25 U.S.C. § 1903(10). There is no dispute that the Choctaw Reservation falls within that definition.
Section 1911(a) does not apply "where such jurisdiction is otherwise vested in the State by existing Federal law." This proviso would appear to refer to Pub.L. 280, 67 Stat. 588, as amended, which allows States under certain conditions to assume civil and criminal jurisdiction on the reservations. Title 25 U.S.C. § 1918 permits a tribe in that situation to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior. The State of Mississippi has never asserted jurisdiction over the Choctaw Reservation under Public Law 280. See F. Cohen, Handbook of Federal Indian Law 362-363, and nn. 122-125 (1982); cf. *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

***43** A

[1] The meaning of "domicile" in the ICWA is, of course, a matter of Congress' intent. The ICWA itself does not define it. The initial question we must confront is whether there is any reason to believe that Congress intended the ICWA definition of "domicile" to be a matter of state law. While the meaning of a federal statute is necessarily a federal question in the sense that its construction remains subject to this Court's supervision, see P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 566 (3d ed. 1988); cf. *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 210, 66 S.Ct. 992, 995, 90 L.Ed. 1172 (1946), Congress sometimes intends that a statutory term be given content by the application of state law. *De Sylva v. Ballentine*, 351 U.S. 570, 580, 76 S.Ct. 974, 980, 100 L.Ed. 1415 (1956); see also *Beaver County, supra; Helvering v.*

Stuart, 317 U.S. 154, 161-162, 63 S.Ct. 140, 144-145, 87 L.Ed. 154 (1942). We start, however, with the general assumption that "in the absence of a plain indication to the contrary, ... Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U.S. 101, 104, 63 S.Ct. 483, 485, 87 L.Ed. 640 (1943); *NLRB v. Natural Gas Utility Dist. of Hawkins County,* 402 U.S. 600, 603, 91 S.Ct. 1746, 1749, 29 L.Ed.2d 206 (1971); *Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103, 119, 103 S.Ct. 986, 995, 74 L.Ed.2d 845 (1983). One reason for this rule of construction is that federal statutes are generally intended to have uniform ****1606** nationwide application. *Jerome, supra,* 318 U.S., at 104, 63 S.Ct., at 485; *Dickerson, supra,* 460 U.S., at 119-120, 103 S.Ct., at 995-996; *United States v. Pelzer,* 312 U.S. 399, 402- 403, 61 S.Ct. 659, 660-661, 85 L.Ed. 913 (1941). Accordingly, the cases in which we have ***44** found that Congress intended a state-law definition of a statutory term have often been those where uniformity clearly was not intended. *E.g., Beaver County, supra,* 328 U.S., at 209, 66 S.Ct., at 995 (statute permitting States to apply their diverse local tax laws to real property of certain Government corporations). A second reason for the presumption against the application of state law is the danger that "the federal program would be impaired if state law were to control." *Jerome, supra,* 318 U.S., at 104, 63 S.Ct., at 486; *Dickerson, supra,* 460 U.S., at 119-120, 103 S.Ct., at 995; *Pelzer,* 312 U.S., at 402-403, 61 S.Ct., at 661. For this reason, "we look to the purpose of the statute to ascertain what is intended." *Id.,* at 403, 61 S.Ct., at 661.

In *NLRB v. Hearst Publications, Inc.,* 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), we rejected an argument that the term "employee" as used in the Wagner Act should be defined by state law. We explained our conclusion as follows:

> "Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no ... patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is ... intended to solve a national problem on a national scale.... Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by ... varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems." *Id.,* at 123, 64 S.Ct., at 857.

See also *Natural Gas Utility Dist., supra,* 402 U.S., at 603-604, 91 S.Ct., at 1749. For the two principal reasons that follow, we believe that what we said of the Wagner Act applies equally well to the ICWA.

First, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its ***45** enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. [FN17] More specifically, its purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings. Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct. See 25 U.S.C. § 1901(5) (state "judicial bodies ... have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families"). [FN18] Under ****1607** these circumstances it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law.

> FN17. This conclusion is inescapable from a reading of the entire statute, the main effect of which is to curtail state authority. See especially § § 1901, 1911-1916, 1918.

> FN18. See also 124 Cong.Rec. 38103 (1978) (letter from Rep. Morris K. Udall to Assistant Attorney General Patricia M. Wald) ("[S]tate courts and agencies and their procedures share a large part of the responsibility" for the crisis threatening "the future and integrity of Indian tribes and Indian families"); House Report, at 19, U.S.Code Cong. & Admin.News 1978, at 7541 ("Contributing to this problem has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future"). See also *In re Adoption of Halloway,* 732 P.2d, at 969 (Utah state court "quite frankly might be expected to be more receptive than a tribal court to [Indian

child's] placement with non-Indian adoptive parents. Yet this receptivity of the non-Indian forum to non-Indian placement of an Indian child is precisely one of the evils at which the ICWA was aimed").

Second, Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile. An example will illustrate. In a case quite similar to this one, the New Mexico state courts found exclusive jurisdiction in the tribal court pursuant to § 1911(a), ***46** because the illegitimate child took the reservation domicile of its mother at birth--notwithstanding that the child was placed in the custody of adoptive parents 2 days after its off-reservation birth and the mother executed a consent to adoption 10 days later. *In re Adoption of Baby Child*, 102 N.M. 735, 737-738, 700 P.2d 198, 200-201 (App.1985). [FN19] Had that mother traveled to Mississippi to give birth, rather than to Albuquerque, a different result would have obtained if state-law definitions of domicile applied. The same, presumably, would be true if the child had been transported to Mississippi for adoption after her off-reservation birth in New Mexico. While the child's custody proceeding would have been subject to exclusive tribal jurisdiction in her home State, her mother, prospective adoptive parents, or an adoption intermediary could have obtained an adoption decree in state court merely by transporting her across state lines. [FN20] Even if we could conceive of a federal statute under which the rules of domicile (and thus of jurisdiction) applied differently to different Indian children, a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind. [FN21]

FN19. Some details of the *Baby Child* case are taken from the briefs in *Pino v. District Court, Bernalillo County*, 469 U.S. 1031, 105 S.Ct. 501, 83 L.Ed.2d 393 (1984). That appeal was dismissed under this Court's Rule 53, 472 U.S. 1001, 105 S.Ct. 2693, 86 L.Ed.2d 709 (1985), following the appellant's successful collateral attack, in the case cited in the text, on the judgment from which appeal had been taken.

FN20. Nor is it inconceivable that a State might apply its law of domicile in such a manner as to render inapplicable § 1911(a) even to a child who had lived several years on the reservation but was removed from it for the purpose of adoption. Even in the less extreme case, a state-law definition of domicile would likely spur the development of an adoption brokerage business. Indian children, whose parents consented (with or without financial inducement) to give them up, could be transported for adoption to States like Mississippi where the law of domicile permitted the proceedings to take place in state court.

FN21. For this reason, the general rule that domicile is determined according to the law of the forum, see Restatement (Second) of Conflict of Laws § 13 (1971) (hereinafter Restatement), can have no application here.

***47** We therefore think it beyond dispute that Congress intended a uniform federal law of domicile for the ICWA. [FN22]

FN22. We note also the likelihood that, had Congress intended a state-law definition of domicile, it would have said so. Where Congress did intend that ICWA terms be defined by reference to other than federal law, it stated this explicitly. See § 1903(2) ("extended family member" defined by reference to tribal law or custom); § 1903(6) ("Indian custodian" defined by reference to tribal law or custom and to state law).

B

It remains to give content to the term "domicile" in the circumstances of the present case. The holding of the Supreme Court of Mississippi that the twin babies were not domiciled on the Choctaw Reservation appears to have rested on two findings of fact by the trial court: (1) that they had never been physically present there, and (2) that they were "voluntarily surrendered" by their parents. 511 So.2d, at 921; see Record 78. The question before us, therefore, is whether under the ICWA definition of "domicile" such facts suffice to render the twins nondomiciliaries of the Reservation.

We have often stated that in the absence of a statutory definition we "start with the assumption that the legislative purpose is ****1608** expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962); *Russello v. United States*, 464 U.S. 16, 21, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983). We do so, of course, in the light of the " 'object and policy' " of the statute. *Mastro Plastics*

Corp. v. NLRB, 350 U.S. 270, 285, 76 S.Ct. 349, 359, 100 L.Ed. 309 (1956), quoting *United States v. Heirs of Boisdoré*, 8 How. 113, 122, 12 L.Ed. 1009 (1849). We therefore look both to the generally accepted meaning of the term "domicile" and to the purpose of the statute.

That we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine "the ordinary meaning of the words used." Well-settled state law can inform our understanding of what Congress had in mind when it employed a term it did not define. Accordingly, we find it helpful to borrow established common-law principles of domicile ***48** to the extent that they are not inconsistent with the objectives of the congressional scheme.

[2][3][4][5] "Domicile" is, of course, a concept widely used in both federal and state courts for jurisdiction and conflict-of-laws purposes, and its meaning is generally uncontroverted. See generally Restatement § § 11- 23; R. Leflar, L. McDougal, & R. Felix, American Conflicts Law 17-38 (4th ed. 1986); R. Weintraub, Commentary on the Conflict of Laws 12-24 (2d ed. 1980). "Domicile" is not necessarily synonymous with "residence," *Perri v. Kisselbach*, 34 N.J. 84, 87, 167 A.2d 377, 379 (1961), and one can reside in one place but be domiciled in another, *District of Columbia v. Murphy*, 314 U.S. 441, 62 S.Ct. 303, 86 L.Ed. 329 (1941); *In re Estate of Jones*, 192 Iowa 78, 80, 182 N.W. 227, 228 (1921). For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there. *Texas v. Florida*, 306 U.S. 398, 424, 59 S.Ct. 563, 576, 83 L.Ed. 817 (1939). One acquires a "domicile of origin" at birth, and that domicile continues until a new one (a "domicile of choice") is acquired. *Jones, supra*, 192 Iowa, at 81, 182 N.W., at 228; *In re Estate of Moore*, 68 Wash.2d 792, 796, 415 P.2d 653, 656 (1966). Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents. *Yarborough v. Yarborough*, 290 U.S. 202, 211, 54 S.Ct. 181, 185, 78 L.Ed. 269 (1933). In the case of an illegitimate child, that has traditionally meant the domicile of its mother. *Kowalski v. Wojtkowski*, 19 N.J. 247, 258, 116 A.2d 6, 12 (1955); *Moore, supra*, 68 Wash.2d, at 796, 415 P.2d, at 656; Restatement § 14(2), § 22, Comment *c;* 25 Am.Jur.2d, Domicile § 69 (1966). Under these principles, it is entirely logical that "[o]n occasion, a child's domicile of origin will be in a place where the child has never been." Restatement § 14, Comment *b*.

[6] It is undisputed in this case that the domicile of the mother (as well as the father) has been, at all relevant times, on the Choctaw Reservation. Tr. of Oral Arg. 28-29. Thus, it is clear that at their birth the twin babies were also domiciled ***49** on the reservation, even though they themselves had never been there. The statement of the Supreme Court of Mississippi that "[a]t no point in time can it be said the twins ... were domiciled within the territory set aside for the reservation," 511 So.2d, at 921, may be a correct statement of that State's law of domicile, but it is inconsistent with generally accepted doctrine in this country and cannot be what Congress had in mind when it used the term in the ICWA.

Nor can the result be any different simply because the twins were "voluntarily surrendered" by their mother. Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the ****1609** large numbers of Indian children adopted by non-Indians. See 25 U.S.C. § § 1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"), 1902 ("promote the stability and security of Indian tribes"). [FN23] The numerous prerogatives accorded the tribes through the ICWA's substantive provisions, *e.g.*, § § 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over nondomiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court actions), 1915(e) (right to obtain records), 1919 (authority to conclude agreements with States), must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.

FN23. See also *supra*, at 1601, and n. 3.

In addition, it is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children ***50** themselves of such placements outside their culture. [FN24] Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because

of concerns going beyond the wishes of individual parents. As the 1977 Final Report of the congressionally established American Indian Policy Review Commission stated, in summarizing these two concerns, "[r]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children." Senate Report, at 52. [FN25]

FN24. In large part the concerns that emerged during the congressional hearings on the ICWA were based on studies showing recurring developmental problems encountered during adolescence by Indian children raised in a white environment. See n. 1, *supra.* See also 1977 Hearings, at 114 (statement of American Academy of Child Psychiatry); S.Rep. No. 95-597, p. 43 (1977) (hereinafter Senate Report). More generally, placements in non-Indian homes were seen as "depriving the child of his or her tribal and cultural heritage." *Id.,* at 45; see also 124 Cong.Rec. 38102-38103 (1978) (remarks of Rep. Lagomarsino). The Senate Report on the ICWA incorporates the testimony in this sense of Louis La Rose, chairman of the Winnebago Tribe, before the American Indian Policy Review Commission:
"I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that has a value system that is A-1 in the State of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think ... they destroy him." Senate Report, at 43.
Thus, the conclusion seems justified that, as one state court has put it, "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *In re Appeal in Pima County Juvenile Action No. S-903,* 130 Ariz., at 204, 635 P.2d, at 189.

FN25. While the statute itself makes clear that Congress intended the ICWA to reach voluntary as well as involuntary removal of Indian children, the same conclusion can also be drawn from the ICWA's legislative history. For example, the House Report contains the following expression of Congress' concern with both aspects of the problem:
"One of the effects of our national paternalism has been to so alienate some Indian [parents] from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family. Another expression of it is the involuntary, arbitrary, and unwarranted separation of families." House Report, at 12, U.S.Code Cong. & Admin.News 1978, at 7534.

***51** These congressional objectives make clear that a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme is inconsistent with what Congress intended. [FN26] ****1610** See *in RE adoption oF child oF indiaN heritage,* 111 N.J. 155, 168-171, 543 A.2d 925, 931-933 (1988). The appellees in this case argue strenuously that the twins' mother went to great lengths to give birth off the reservation so that her children could be adopted by the Holyfields. But that was precisely part of Congress' concern. ***52** Permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the ICWA was intended to accomplish. [FN27] The Supreme Court of Utah expressed this well in its scholarly and sensitive opinion in what has become a leading case on the ICWA:

FN26. The Bureau of Indian Affairs pointed out, in issuing nonbinding ICWA guidelines for the state courts, that the terms "residence" and "domicile" "are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act." 44 Fed.Reg. 67584, 67585 (1979). The clear implication is that state law that *did* tend to undermine the ICWA's purposes could not be taken to express Congress' intent. There is some authority for the proposition that abandonment can effectuate a change in the child's domicile, *In re Adoption of Halloway,* 732 P.2d, at 967, although this may not be the majority rule. See Restatement § 22, Comment *e* (abandoned child generally retains the domicile of the last-abandoning parent). In

any case, as will be seen below, the Supreme Court of Utah declined in the *Halloway* case to apply Utah abandonment law to defeat the purpose of the ICWA. Similarly, the conclusory statement of the Supreme Court of Mississippi that the twin babies had been "legally abandoned," 511 So.2d, at 921, cannot be determinative of ICWA jurisdiction.

There is also another reason for reaching this conclusion. The predicate for the state court's abandonment finding was the parents' consent to termination of their parental rights, recorded before a judge of the state Chancery Court. ICWA § 103(a), 25 U.S.C. § 1913(a), requires, however, that such a consent be recorded before "a judge of a court of competent jurisdiction." See n. 7, *supra.* In the case of reservation-domiciled children, that could be only the tribal court. The children therefore could not be made non-domiciliaries of the reservation through any such state-court consent.

FN27. It appears, in fact, that all Choctaw women give birth off the reservation because of the lack of appropriate obstetric facilities there. See Juris.Statement 4, n. 2. In most cases, of course, the mother and child return to the reservation after the birth, and this would presumably be sufficient to make the child a reservation domiciliary even under the Mississippi court's theory. Application of the Mississippi domicile rule would, however, permit state authorities to avoid the tribal court's exclusive § 1911(a) jurisdiction by removing a newborn from an allegedly unfit mother while in the hospital, and seeking to terminate her parental rights in state court.

"To the extent that [state] abandonment law operates to permit [the child's] mother to change [the child's] domicile as part of a scheme to facilitate his adoption by non-Indians while she remains a domiciliary of the reservation, it conflicts with and undermines the operative scheme established by subsections [1911(a)] and [1913(a)] to deal with children of domiciliaries of the reservation and weakens considerably the tribe's ability to assert its interest in its children. The protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and ***53** adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children. [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents." *In re Adoption of Halloway,* 732 P.2d 962, 969-970 (1986).

We agree with the Supreme Court of Utah that the law of domicile Congress used in the ICWA cannot be one that permits individual reservation-domiciled tribal members to defeat the tribe's exclusive jurisdiction by the simple expedient of giving birth and placing the child for adoption off ****1611** the reservation. Since, for purposes of the ICWA, the twin babies in this case were domiciled on the reservation when adoption proceedings were begun, the Choctaw tribal court possessed exclusive jurisdiction pursuant to 25 U.S.C. § 1911(a). The Chancery Court of Harrison County was, accordingly, without jurisdiction to enter a decree of adoption; under ICWA § 104, 25 U.S.C. § 1914, its decree of January 28, 1986, must be vacated.

III

We are not unaware that over three years have passed since the twin babies were born and placed in the Holyfield home, and that a court deciding their fate today is not writing on a blank slate in the same way it would have in January 1986. Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain.

Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of *who* should make the custody determination concerning these children--not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court. Had the mandate of the ICWA been

followed in ***54** 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." *Halloway,* 732 P.2d, at 972. It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe--and perhaps the children themselves--in having them raised as part of the Choctaw community. [FN28] Rather, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy." *Ibid.*

> FN28. We were assured at oral argument that the Choctaw court has the authority under the tribal code to permit adoption by the present adoptive family, should it see fit to do so. Tr. of Oral Arg. 17.

The judgment of the Supreme Court of Mississippi is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice STEVENS, with whom THE CHIEF JUSTICE and Justice KENNEDY join, dissenting.

The parents of these twin babies unquestionably expressed their intention to have the state court exercise jurisdiction over them. J.B. gave birth to the twins at a hospital 200 miles from the reservation, even though a closer hospital was available. Both parents gave their written advance consent to the adoption and, when the adoption was later challenged by the Tribe, they reaffirmed their desire that the Holyfields adopt the two children. As the Mississippi Supreme Court found, "the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi." 511 So.2d 918, 921 (1987). Indeed, Appellee Vivian Holyfield appears before us today, urging that she be allowed to retain custody of B.B. and G.B.

***55** Because J.B.'s domicile is on the reservation and the children are eligible for membership in the Tribe, the Court today closes the state courthouse door to her. I agree with the Court that Congress intended a uniform federal law of domicile for the Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. § § 1901-1963, and that domicile should be defined with reference to the objectives of the congressional scheme. "To ascertain [the term's] meaning we ... consider the Congressional history of the Act, the situation with reference ****1612** to which it was enacted, and the existing judicial precedents, with which Congress may be taken to have been familiar in at least a general way." *District of Columbia v. Murphy,* 314 U.S. 441, 449, 62 S.Ct. 303, 307, 86 L.Ed. 329 (1941). I cannot agree, however, with the cramped definition the Court gives that term. To preclude parents domiciled on a reservation from deliberately invoking the adoption procedures of state court, the Court gives "domicile" a meaning that Congress could not have intended and distorts the delicate balance between individual rights and group rights recognized by the ICWA.

The ICWA was passed in 1978 in response to congressional findings that "an alarmingly high percentage of Indian families are broken up by the *removal,* often unwarranted, of their children from them by nontribal public and private agencies," and that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § § 1901(4), (5) (emphasis added). The Act is thus primarily addressed to the unjustified removal of Indian children from their families through the application of standards that inadequately recognized the distinct Indian culture. [FN1]

> FN1. The House Report found that "Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole." H.R.Rep. No. 95-1386, p. 9 (1978) (hereinafter House Report), U.S.Code Cong. & Admin.News 1978, p. 7531. The Senate Report similarly states that the Act was motivated by "reports that an alarmingly high percentage of Indian children were being separated from their natural parents through the actions of nontribal government agencies." S.Rep. No. 95-597, p. 11 (1977). See also 124 Cong.Rec. 12532 (1978) (remarks of Rep. Udall) ("The record developed by the Policy Review Commission, by the Senate Interior Committee in the 94th Congress; and by the Senate Select Committee on Indian Affairs and our own Interior Committee in the 95th Congress has disclosed what almost

amounts to a callous raid on Indian children. Indian children are removed from their parents and families by State agencies for the most specious of reasons in proceedings foreign to the Indian parents"); *id.*, at 38102 (remarks of Rep. Udall) ("Studies have revealed that about 25 percent of all Indian children are removed from their homes and placed in some foster care or adoptive home or institution"); *id.*, at 38103 (remarks of Rep. Lagomarsino) ("For Indians generally and tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as ongoing, self-governing communities"); Hearing on S. 1214 before the Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess., 1 (1977) ("It appears that for decades Indian parents and their children have been at the mercy of arbitrary or abusive action of local, State, Federal and private agency officials. Unwarranted removal of children from their homes is common in Indian communities").

***56** The most important provisions of the ICWA are those setting forth minimum standards for the placement of Indian children by state courts and providing procedural safeguards to insure that parental rights are protected. [FN2] The Act provides ***57** that any party seeking to effect a foster care placement of, or involuntary termination of parental rights to, an Indian child must establish by stringent standards of proof that efforts have been made to prevent the breakup of the Indian family, and that the continued custody of the child by ****1613** the parent is likely to result in serious emotional or physical damage to the child. § § 1912(d), (e), (f). Each party to the proceeding has a right to examine all reports and documents filed with the court, and an indigent parent or custodian has the right to appointment of counsel. § § 1912(b), (c). In the case of a voluntary termination, the ICWA provides that consent is valid only if given after the terms and consequences of the consent have been fully explained, may be withdrawn at any time up to the final entry of a decree of termination or adoption, and even then may be collaterally attacked on the grounds that it was obtained through fraud or duress. § 1913. Finally, because the Act protects not only the rights of the parents, but also the interests of the tribe and the Indian children, the Act sets forth criteria for adoptive, foster care, and preadoptive placements that favor the Indian child's extended family or tribe, and that can be altered by resolution of the tribe. § 1915.

FN2. "The purpose of the bill (H.R. 12533), introduced by Mr. Udall et al., is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs." House Report, at 8 (footnote omitted), U.S.Code Cong. & Admin.News 1978, at 7530. See also 124 Cong.Rec. 38102 (1978) (remarks of Rep. Udall) ("[The Act] clarifies the allocation of jurisdiction over Indian child custody proceedings between Indian tribes and the States. More importantly, it establishes minimum Federal standards and procedural safeguards to protect Indian families when faced with child custody proceedings against them in State agencies or courts").

The Act gives Indian tribes certain rights, not to restrict the rights of parents of Indian children, but to complement and help effect them. The Indian tribe may petition to transfer an action in state court to the tribal court, but the Indian parent may veto the transfer. § 1911(b). [FN3] The Act ***58** provides for a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. § § 1911(c), 1912(a). [FN4] Finally, the tribe may petition the court to set aside a parental termination action upon a showing that the provisions of the ICWA that are designed to protect parents and Indian children have been violated. § 1914. [FN5]

FN3. The statute provides in part:
"(b) Transfer of proceedings; declination by tribal court
"In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian

custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe." 25 U.S.C. § 1911.

FN4. See 44 Fed.Reg. 67584, 67586 (1979) ("The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones").

FN5. Significantly, the tribe cannot set aside a termination of parental rights on the ground that the adoptive placement provisions of § 1915, favoring placement with the tribe, have not been followed.

While the Act's substantive and procedural provisions effect a major change in state child custody proceedings, its jurisdictional provision is designed primarily to preserve tribal sovereignty over the domestic relations of tribe members and to confirm a developing line of cases which held that the tribe's exclusive jurisdiction could not be defeated by the temporary presence of an Indian child off the reservation. The legislative history indicates that Congress did not intend "to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits." House Report, at 19, U.S.Code Cong. & Admin.News 1978, at 7541; Wamser, Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus, 10 N.M.L.Rev. 413, 416 (1980). The apparent intent of Congress was to overrule such decisions as that in *In re Cantrell*, 159 Mont. 66, 495 P.2d 179 (1972), in which the State placed an Indian child, who had lived on a reservation with his mother, in a foster home only three days after he left the reservation to accompany his father on a trip. Jones, Indian Child Welfare: A Jurisdictional Approach, 21 Ariz.L.Rev. 1123, 1129 (1979). Congress specifically approved a series of cases in which the state courts declined jurisdiction over Indian children who were wards of the tribal court, *In re Adoption of Buehl*, 87 Wash.2d 649, 555 P.2d 1334 (1976); *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975), or whose ***59** parents were temporarily residing off the reservation, *Wisconsin Potowatomies* *****1614*** *of Hannahville Indian Community v. Houston*, 393 F.Supp. 719 (WD Mich.1973), but exercised jurisdiction over Indian children who had never lived on a reservation and whose Indian parents were not then residing on a reservation, *In re Greybull*, 23 Or.App. 674, 543 P.2d 1079 (1975); see House Report, at 21, U.S.Code Cong. & Admin.News 1978, at 7543. [FN6] It did not express any disapproval of decisions such as that of the United States Court of Appeals for the Ninth Circuit in *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir.1974), cert. denied, 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975), which indicated that a Montana state court could exercise jurisdiction over an Indian child custody dispute because the parents, "by voluntarily invoking the state court's jurisdiction for divorce purposes, ... clearly submitted the question of their children's custody to the judgment of the Montana state courts." 503 F.2d, at 795 (emphasis deleted).

FN6. None of the cases cited approvingly by Congress involved a deliberate abandonment. In *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975), the court upheld exclusive tribal jurisdiction where it was clear that there was no abandonment. In *Wisconsin Potowatomies of Hannahville Indian Community v. Houston*, 393 F.Supp. 719 (WD Mich.1973), there was no abandonment, the children had lived on the reservation and were members of the Indian Tribe, and the children's clothing and toys were at a home on the reservation that continued to be available to them. Finally, in *In re Adoption of Buehl*, 87 Wash.2d 649, 555 P.2d 1334 (1976), the child was a ward of the tribal court and an enrolled member of the Tribe.

The Report of the American Indian Policy Review Commission, an early proponent of the ICWA, makes clear the limited purposes that the term "domicile" was intended to serve:

"Domicile is a legal concept that does not depend exclusively on one's physical location at any one given moment in time, rather it is based on the apparent intention of permanent residency. Many Indian families move back and forth from a reservation dwelling to border communities or even to distant communities, depending on employment ***60** and educational opportunities.... In these situations, where family ties to the reservation are strong, but the child is temporarily off the reservation, a fairly strong legal argument can be made for tribal court jurisdiction." Report on Federal, State, and Tribal Jurisdiction 86 (Comm.Print 1976). [FN7]

FN7. In a letter to the House of Representatives, the Department of Justice explained its understanding that the provision was addressed to the involuntary termination of parental rights in tribal

> members by state agencies unaware of exclusive tribal jurisdiction: "As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280. It is our understanding that this legal principle is often ignored by local welfare organizations and foster homes in cases where they believe Indian children have been neglected, and that S.1214 is designed to remedy this, and to define Indian rights in such cases." House Report, at 35, U.S.Code Cong. & Admin.News 1978, at 7558.

Although parents of Indian children are shielded from the exercise of state jurisdiction when they are temporarily off the reservation, the Act also reflects a recognition that allowing the tribe to defeat the parents' deliberate choice of jurisdiction would be conducive neither to the best interests of the child nor to the stability and security of Indian tribes and families. Section 1911(b), providing for the exercise of concurrent jurisdiction by state and tribal courts when the Indian child is not domiciled on the reservation, gives the Indian parents a veto to prevent the transfer of a state-court action to tribal court. [FN8] "By allowing ****1615** the Indian parents to ***61** 'choose' the forum that will decide whether to sever the parent-child relationship, Congress promotes the security of Indian families by allowing the Indian parents to defend in the court system that most reflects the parents' familial standards." Jones, 21 Ariz.L.Rev., at 1141. As Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, stated in testimony to the House Subcommittee on Indian Affairs and Public Lands with respect to a different provision:

> FN8. The explanation of this subsection in the House Report reads as follows:
> "Subsection (b) directs a State court, having jurisdiction over an Indian child custody proceeding to transfer such proceeding, absent good cause to the contrary, to the appropriate tribal court upon the petition of the parents or the Indian tribe. Either parent is given the right to veto such transfer. The subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." *Id.*, at 21, U.S.Code Cong. & Admin.News 1978, at 7544.
> In commenting on the provision, the Department of Justice suggested that the section should be clarified to make it perfectly clear that a state court need not surrender jurisdiction of a child custody proceeding if the Indian parent objected. The Department of Justice letter stated:
> "Section 101(b) should be amended to prohibit clearly the transfer of a child placement proceeding to a tribal court when any parent or child over the age of 12 objects to the transfer." *Id.*, at 32, U.S.Code Cong. & Admin.News 1978, at 7554.
> Although the specific suggestion made by the Department of Justice was not in fact implemented, it is noteworthy that there is nothing in the legislative history to suggest that the recommended change was in any way inconsistent with any of the purposes of the statute.

> "The ultimate responsibility for child welfare rests with the parents and we would not support legislation which interfered with that basic relationship." Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 62 (1978). [FN9]

> FN9. Chief Isaac elsewhere expressed a similar concern for the rights of parents with reference to another provision. See Hearing, *supra* n. 1, at 158 (statement on behalf of National Tribal Chairmen's Association) ("We believe the tribe should receive notice in all such cases but where the child is neither a resident nor domiciliary of the reservation intervention should require the consent of the natural parents or the blood relative in whose custody the child has been left by the natural parents. It seems there is a great potential in the provisions of section 101(c) for infringing parental wishes and rights").

***62** If J.B. and W.J. had established a domicile off the reservation, the state courts would have been required to give effect to their choice of jurisdiction; there should not be a different result when the parents have not changed their own domicile, but have expressed an unequivocal intent to establish a domicile for their children off the reservation. The

law of abandonment, as enunciated by the Mississippi Supreme Court in this case, does not defeat, but serves the purposes, of the Act. An abandonment occurs when a parent deserts a child and places the child with another with an intent to relinquish all parental rights and obligations. Restatement (Second) of Conflict of Laws § 22, Comment *e* (1971) (hereinafter Restatement); *In re Adoption of Halloway,* 732 P.2d 962, 966 (Utah 1986). If a child is abandoned by his mother, he takes on the domicile of his father; if the child is abandoned by his father, he takes on the domicile of his mother. Restatement § 22, Comment *e;* 25 Am.Jur.2d, Domicil § 69 (1966). If the child is abandoned by both parents, he takes on the domicile of a person other than the parents who stands *in loco parentis* to him. *In re Adoption of Halloway, supra,* at 966; *In re Estate of Moore,* 68 Wash.2d 792, 796, 415 P.2d 653, 656 (1966); *Harlan v. Industrial Accident Comm'n,* 194 Cal. 352, 228 P. 654 (1924); Restatement § 22, Comment *i* ; cf. *In re Guardianship of D.L.L. and C.L.L.,* 291 N.W.2d 278, 282 (S.D.1980). [FN10] To be effective, the intent to abandon or the actual physical abandonment must be shown by clear and convincing evidence. *In re Adoption of Halloway, supra,* at ****1616** 966; *C.S. v. Smith,* 483 S.W.2d 790, 793 (Mo.App.1972). [FN11]

FN10. The authority of a State to exercise jurisdiction over a child in a child custody dispute when the child is physically present in a State and has been abandoned is also recognized by federal statute. See Parental Kidnaping Prevention Act of 1980, 94 Stat. 3569, 28 U.S.C. § 1738A(c)(2); see also Uniform Child Custody Jurisdiction Act, 9 U.L.A. § 3 (1988).

FN11. The Court suggests that there could be no legally effective abandonment because the parents consented to termination of their parental rights before a judge of the state court and not a tribal court judge. *Ante,* at 1610, n. 26. That suggestion ignores the findings of the State Supreme Court that the natural parents did virtually everything they could do to abandon the children to persons outside the reservation: "[T]he Indian twins have never resided outside of Harrison County, Mississippi, and were voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents, and it is undisputed that the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi." 511 So.2d 918, 921 (1987). In any event, even a consent to adoption that does not meet statutory requirements may be effective to constitute an abandonment and change the minor's domicile. See *Wilson v. Pierce,* 14 Utah 2d 317, 321, 383 P.2d 925, 927 (1963); H. Clark, Law of Domestic Relations in the United States 633 (1968).

***63** When an Indian child is temporarily off the reservation, but has not been abandoned to a person off the reservation, the tribe has an interest in exclusive jurisdiction. The ICWA expresses the intent that exclusive tribal jurisdiction is not so frail that it should be defeated as soon as the Indian child steps off the reservation. Similarly, when the child is abandoned by one parent to a person off the reservation, the tribe and the other parent domiciled on the reservation may still have an interest in the exercise of exclusive jurisdiction. That interest is protected by the rule that a child abandoned by one parent takes on the domicile of the other. But when an Indian child is deliberately abandoned by both parents to a person off the reservation, no purpose of the ICWA is served by closing the state courthouse door to them. The interests of the parents, the Indian child, and the tribe in preventing the unwarranted removal of Indian children from their families and from the reservation are protected by the Act's substantive and procedural provisions. In addition, if both parents have intentionally invoked the jurisdiction of the state court in an action involving a non-Indian, no interest in tribal self-governance is implicated. See *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 173, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973); *Williams v. ***64** Lee,* 358 U.S. 217, 219-220, 79 S.Ct. 269, 270-271, 3 L.Ed.2d 251 (1959); *Felix v. Patrick,* 145 U.S. 317, 332, 12 S.Ct. 862, 867, 36 L.Ed. 719 (1892).

The interpretation of domicile adopted by the Court requires the custodian of an Indian child who is off the reservation to haul the child to a potentially distant tribal court unfamiliar with the child's present living conditions and best interests. Moreover, it renders any custody decision made by a state court forever suspect, susceptible to challenge at any time as void for having been entered in the absence of jurisdiction. [FN12] Finally, it forces parents of Indian ****1617** children who desire to invoke state-court jurisdiction to establish a domicile off the reservation. Only if the custodial parent has the

wealth and ability to establish a domicile off the reservation will the parent be able to use the processes of state court. I fail to see how such a requirement serves the paramount congressional purpose of "promot[ing] the stability and security of Indian tribes and families." 25 U.S.C. § 1902.

> FN12. The facts of *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986), which the Court cites approvingly, *ante*, at 1610-1611, vividly illustrate the problem. In that case, the mother, a member of an Indian Tribe in New Mexico, voluntarily abandoned an Indian child to the custody of the child's maternal aunt off the reservation with the knowledge that the child would be placed for adoption in Utah. The mother learned of the adoption two weeks after the child left the reservation and did not object and, two months later, she executed a consent to adoption. Nevertheless, some two years after the petition for adoption was filed, the Indian Tribe intervened in the proceeding and set aside the adoption. The Tribe argued successfully that regardless of whether the Indian parent consented to it, the adoption was void because she resided on the reservation and thus the tribal court had exclusive jurisdiction. Although the decision in *Halloway*, and the Court's approving reference to it, may be colored somewhat by the fact that the mother in that case withdrew her consent (a fact which would entitle her to relief even if there were only concurrent jurisdiction, see 25 U.S.C. § 1913(c)), the rule set forth by the majority contains no such limitation. As the Tribe acknowledged at oral argument, any adoption of an Indian child effected through a state court will be susceptible of challenge by the Indian tribe no matter how old the child and how long it has lived with its adoptive parents. Tr. of Oral Arg. 15.

***65** The Court concludes its opinion with the observation that whatever anguish is suffered by the Indian children, their natural parents, and their adoptive parents because of its decision today is a result of their failure to initially follow the provisions of the ICWA. *Ante*, at 1609. By holding that parents who are domiciled on the reservation cannot voluntarily avail themselves of the adoption procedures of state court and that all such proceedings will be void for lack of jurisdiction, however, the Court establishes a rule of law that is virtually certain to ensure that similar anguish will be suffered by other families in the future. Because that result is not mandated by the language of the ICWA and is contrary to its purposes, I respectfully dissent.

490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29, 57 USLW 4409

Briefs and Other Related Documents (Back to top)

• 1988 WL 1026024 (Appellate Brief) Reply Brief of the Appellant (Dec. 23, 1988)

• 1988 WL 1026021 (Appellate Brief) Appellees' Brief (Dec. 01, 1988)

• 1988 WL 1026011 (Appellate Brief) Motion for Leave to File Amicus Curiae Brief and Brief of Amicus Curiae Menominee Indian Tribe of Wisconsin (Jul. 29, 1988)

• 1988 WL 1026016 (Appellate Brief) Motion of Association on American Indian Affairs, Inc., Kalispel Tribe of Indians of the Kalispel Reservation, Washington, the Mescalero Apache Tribe of the Mescalero Apache Reservation, New Mexico, Pueblo of San Ildefonso of New Mexico, Pueblo of Sa nta Ana of New Mexico, Pueblo of Santo Domingo of New Mexico, Pueblo of Tesuque of New Mexico, Sac and Fox Tribe of the Mississippi in Iowa of the Mesquakie Settlement, Iowa, and Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Indian Reservation, (Jul. 29, 1988)

• 1988 WL 1026004 (Appellate Brief) Navajo Nation's Motion for Leave to File Brief as Amicus Curiae and Brief of Navajo Nation, Amicus Curiae, in Support of Appellant (Jul. 28, 1988)

• 1988 WL 1026010 (Appellate Brief) Motion For Leave to File Brief of Amici And Brief of Amici Curiae Swinomish Tribal Community, Shoshone-Bannock Tribes, and Turtle Mountain Band of Chippewa Indians in Support of Appellant (Jul. 28, 1988)

• 1987 WL 880195 (Appellate Brief) Brief for the Appellant (Oct. Term 1987)

END OF DOCUMENT

APPENDIX 6

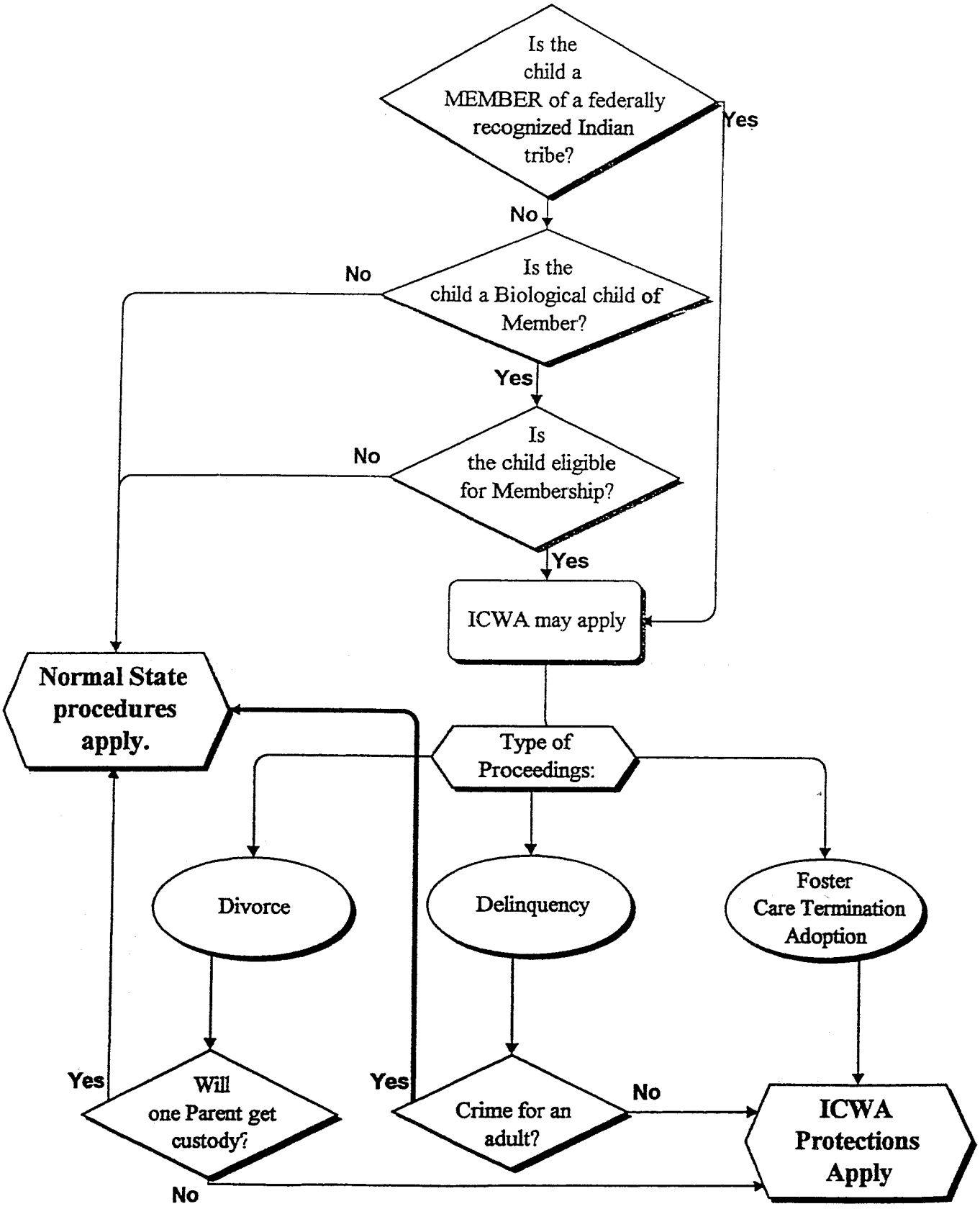
FLOW CHARTS

DISCLAIMER:

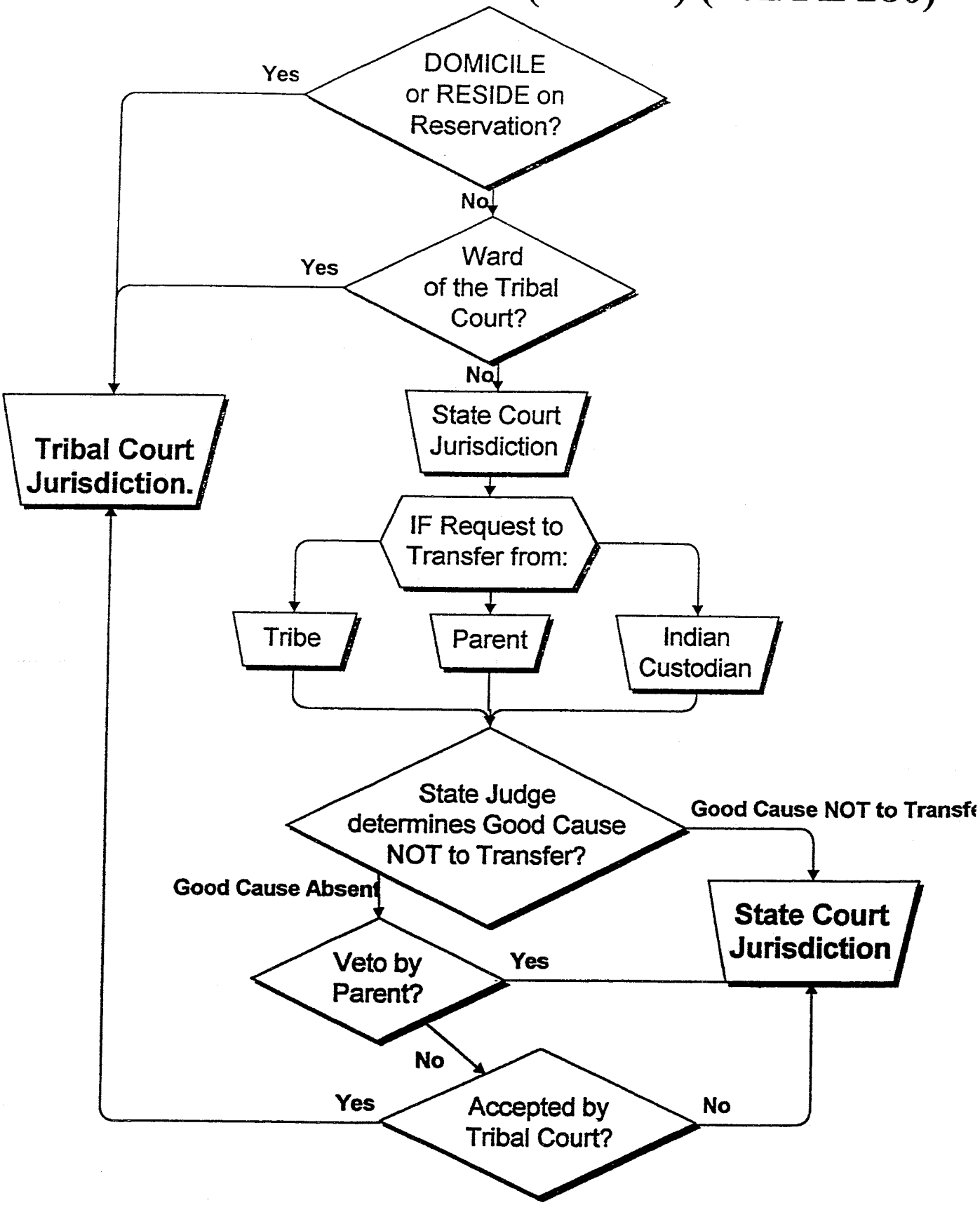
The following flow charts are from *Native American Resource Directory for Juvenile and Family Court Judges*, published by the National Council of Juvenile and Family Court Judges (NCJFCJ), Permanency Planning for Children Dept., ©2003.

- Will the ICWA apply to this case?
- Jurisdiction and the ICWA (sec 101) (non-P.L. 280)
- Notice requirements of ICWA (sec 102)
- Checklist for removal or termination (sec 102)
- Placement preferences (sec 105)
- Voluntary Consent to TPR
- Withdrawal of consent (sec 103)
- Emergency removal (sec 112)

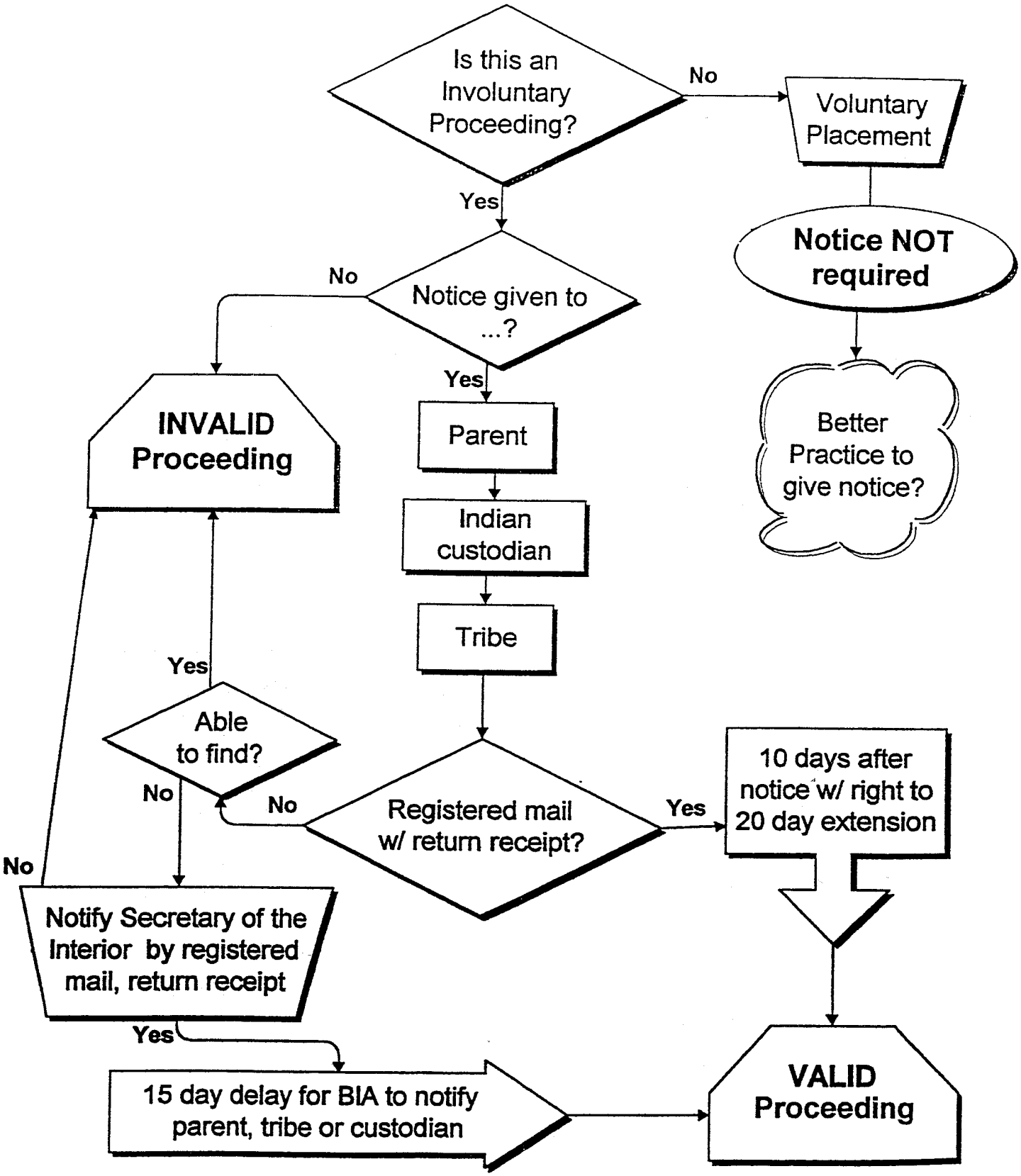
Will the ICWA apply to this case?



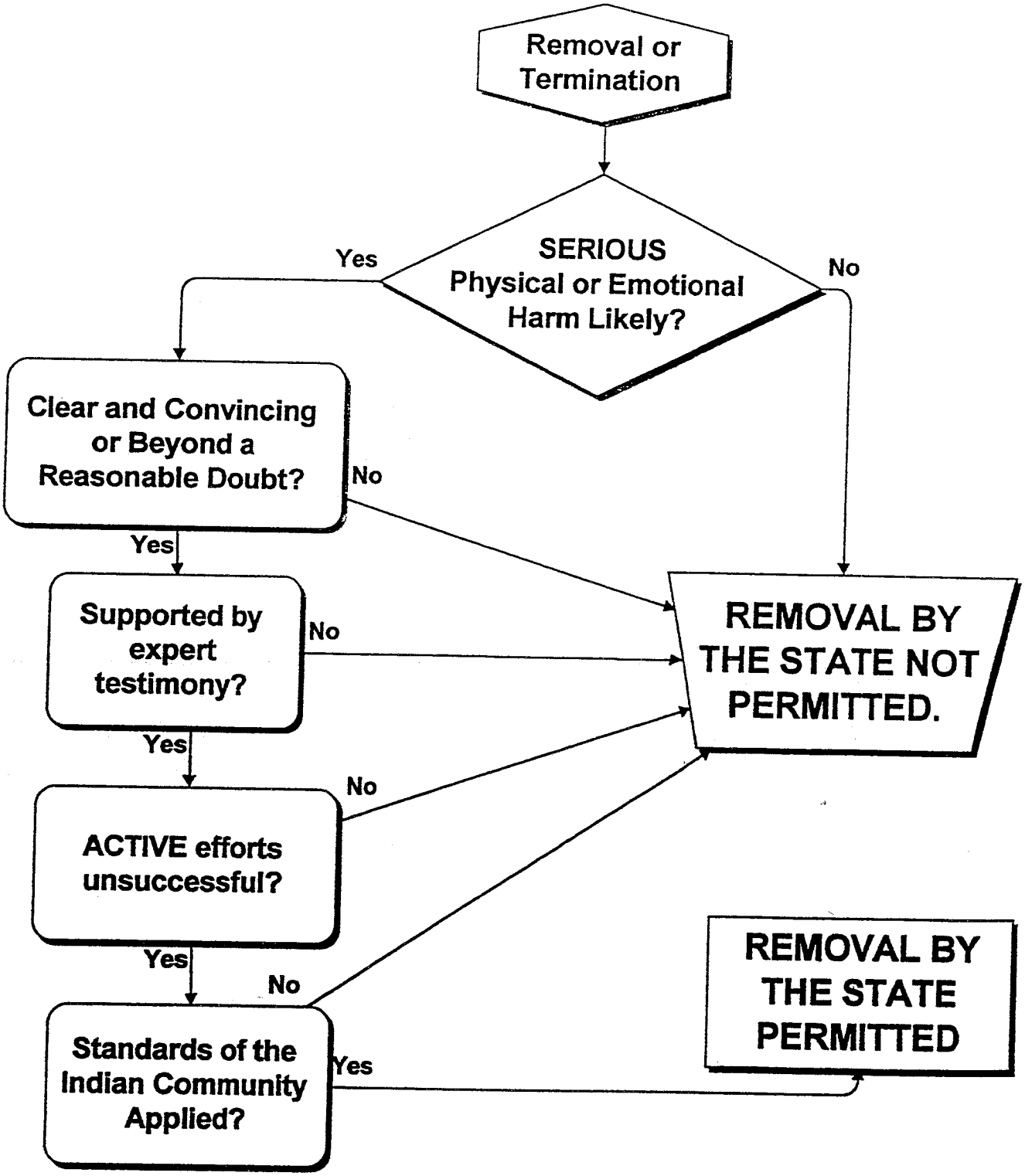
Jurisdiction & the ICWA (Sec 101) (non PL 280)



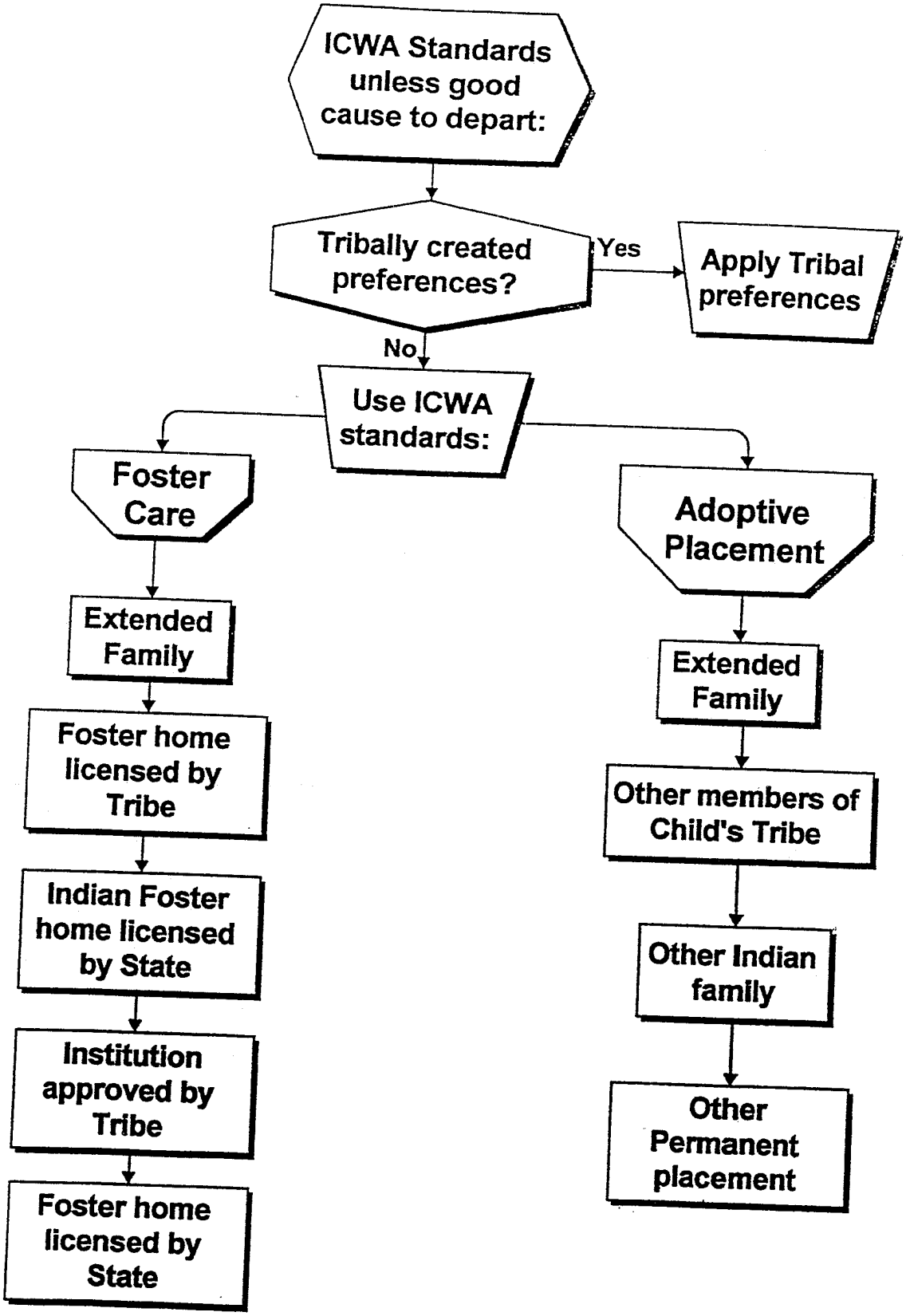
Notice Requirements of ICWA (Sec 102)



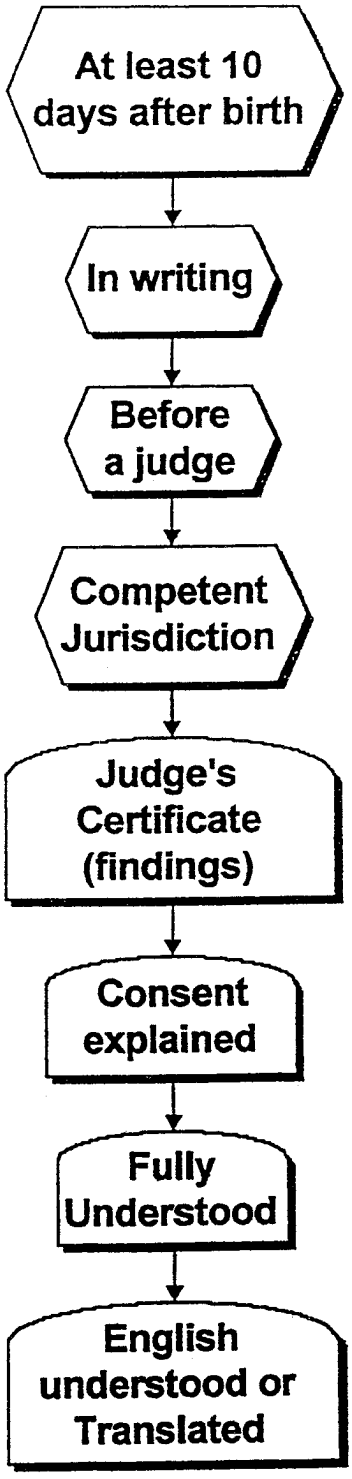
Checklist for Removal or Termination (Sec 102)



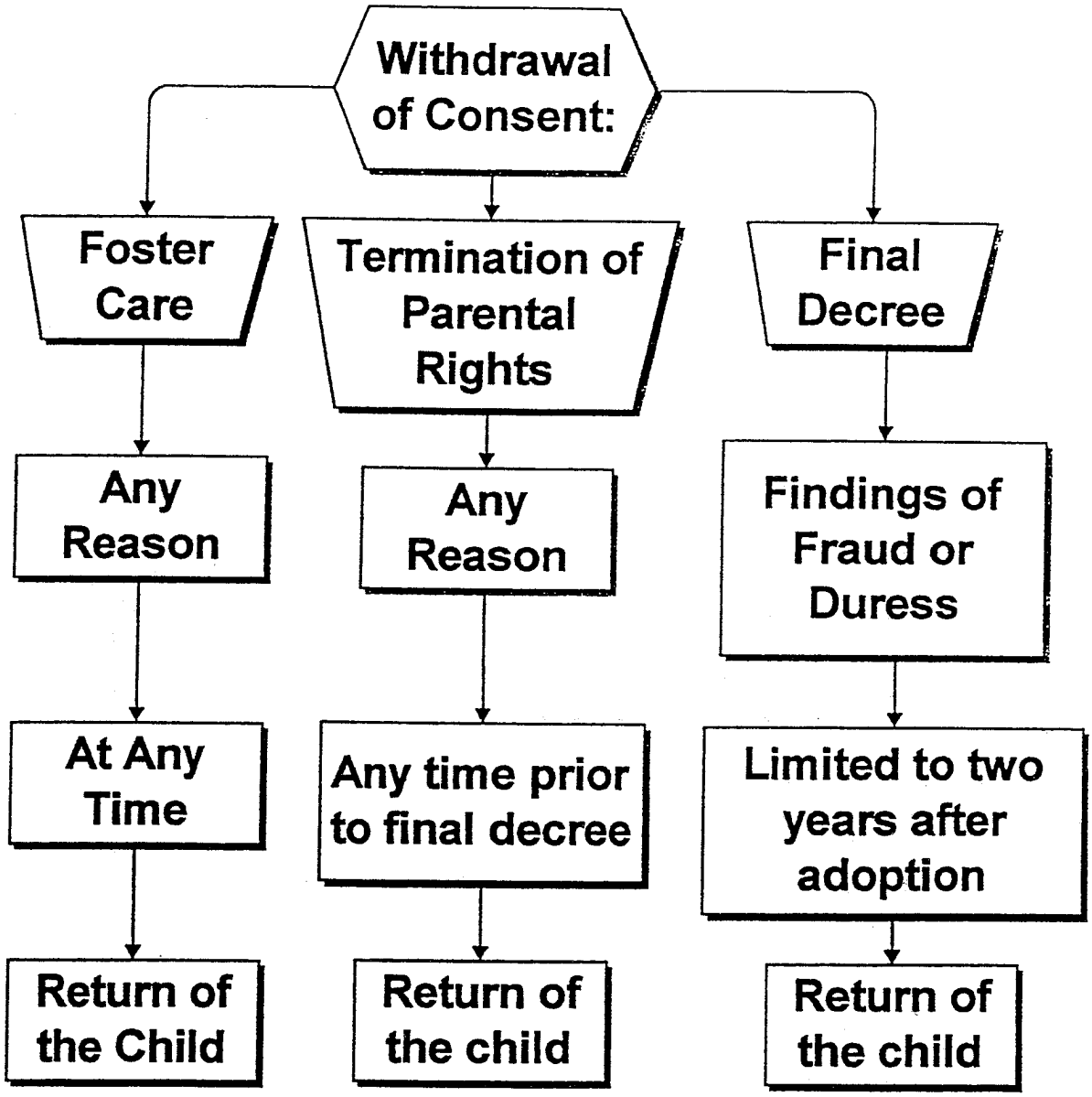
Placement Preferences (Sec 105)



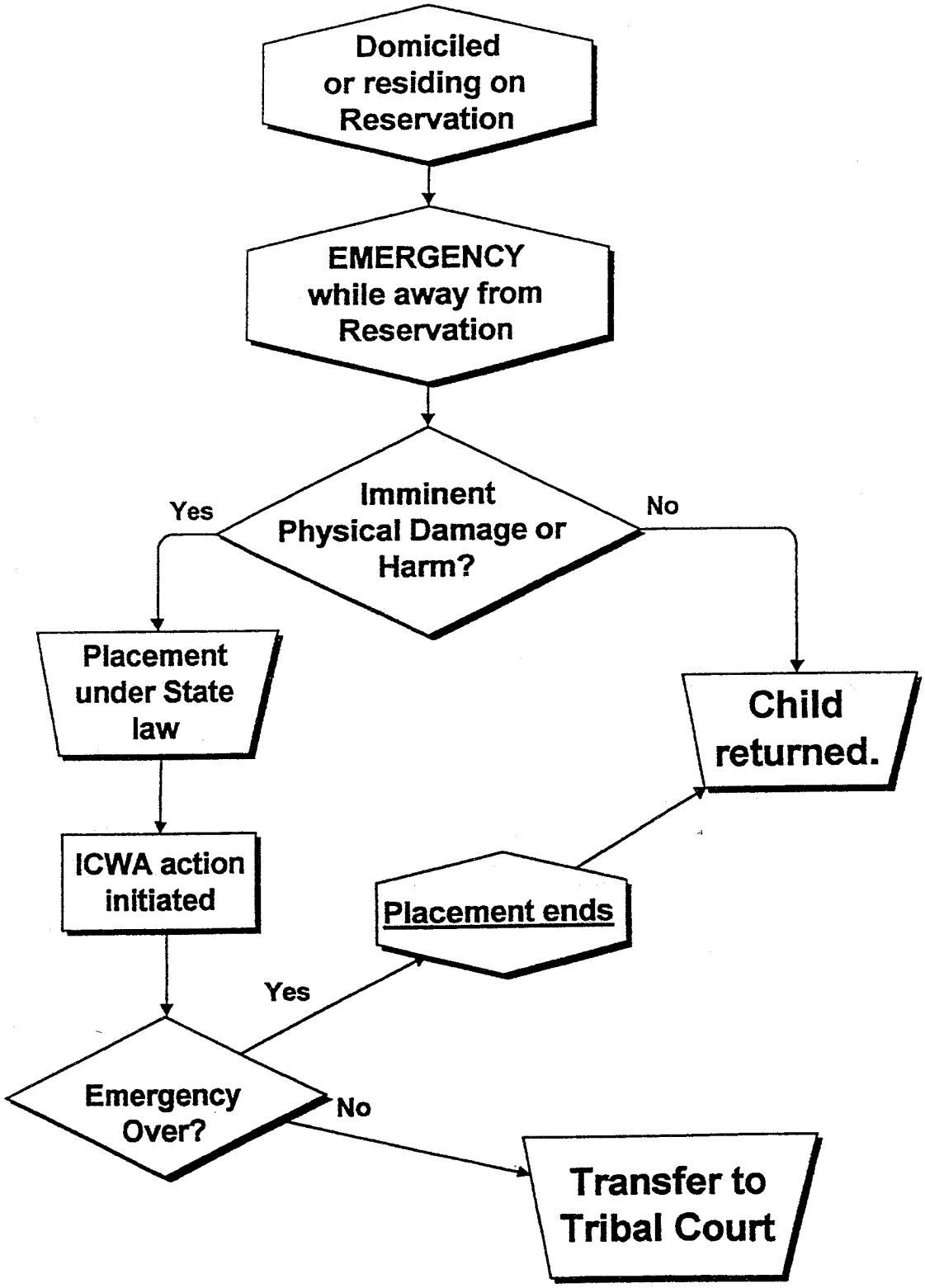
Voluntary consent to TPR



Withdrawal of Consent (sec 103)



Emergency Removal (Sec 112)



DISCLAIMER

The Indian Child Welfare Glossary and Flowchart by the National Indian Child Welfare Association (NICWA) was placed on its web site during 2005.

 Authors: Chey Clifford-Stoltenberg, Rachel Kupcho, Phoebe A. Mills, and David Simmons. Acknowledgments: Craig Dorsay, Attorney at law.

Related resources for families are located at NICWA's web site (www.nicwa.org).

Indian Child Welfare Glossary and Flowchart

NICWA

National Indian Child Welfare Association

Protecting our children • Preserving our culture

The Indian Child Welfare glossary is compiled to accompany the ICWA/Child Protective Services (CPS) Flow Chart. The glossary represents words that are commonly used in Indian child welfare and in situations where the Indian Child Welfare Act is applied.

This material was developed by the National Indian Child Welfare Association.

Authors
Chey Clifford-Stoltenberg, Rachel Kupcho, Phoebe A. Mills, and David Simmons

Acknowledgements
We would like to thank Craig Dorsay, attorney at law, for his valuable assistance in completing this glossary.

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ICWA/Child Protective Services (CPS) Flow Chart

Flow Chart Key

Hearings

* may involve *termination of parental rights* prior to placement

Italicized words=terms defined in the companion

STEP 1: Intake
Child abuse or neglect report comes in to CPS or law enforcement

Enough information to warrant investigation →

CPS worker or law enforcement contacts family and conducts **investigation** at the family's home

Allegations of abuse and/or neglect are founded →

CPS case opened

Not enough information to substantiate report →

Screened Out: case is closed

Allegations of abuse and/or neglect are unfounded →

Case closed

Child is removed from the home

If *child* is determined to be *Indian*:
- *Active efforts* begin
- *Placement* preferences apply

ICWA: *Notice to tribe* required; *tribal intervention*/transfer of jurisdiction possible

OR

Child stays in home and services are offered to the family

If *child* is determined to be *Indian*:
- *Notice to tribe* required
- *Active efforts* provision applies

Case reviewed every six months or sooner

Concurrent Planning

Child placed in *temporary care*

Develop *service plan* for *reunification*

Begin *permanency plan* for *child*

Child may return home

Alternate Care *Placement* (may include returning home, foster care, *kinship care*, *guardianship**, residential care, or *adoption**)

1) ***Emergency Hearing/Shelter Hearing/Detention Hearing:*** Occurs within 24-72 hours

2) ***Disposition Hearing/Placement Hearing***

3) ***Pre-Trial Conference/Pre-Trial Hearing***

4) ***Jurisdictional Hearing/Adjudication***

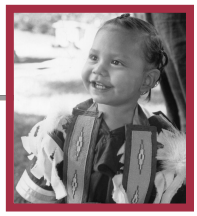
5) ***Review Hearing/Status Hearing***

6) ***Permanency Hearing/Implementation Hearing***

7) ***Termination Hearing***

For more information on each specific hearing, please see NICWA's *Indian Child Welfare Glossary*

NICWA
National Indian Child Welfare Association



A

- **Active efforts**: "Active efforts" is an action that is required of the state in caring for an *Indian child*, mandated under the *Indian Child Welfare Act (ICWA)*. While active efforts is undefined in ICWA, it refers to an effort more intense than the legal term "reasonable efforts." Active efforts applies to providing *remedial and rehabilitative services* to the family prior to the removal of an Indian child from his or her parent or *Indian custodian*, and/or an intensive effort to reunify an Indian child with his or her parent or *Indian custodian*.

- **Adoption**: Adoption is the legal transfer of parental *custody* for a *child* to adoptive parent(s). There are different forms of adoption, and it does not always include *termination of parental rights*. The new kinship network that is formed upon adoption may include birth parents and relatives, past foster families, and other persons significant to the child.

- **Adoption & Safe Families Act (ASFA)**: The Adoption & Safe Families Act (ASFA) is a federal law enacted in1997 that sets timelines and requirements for finding a permanent home for a *child* in temporary *custody*. It is important to note, however, that ASFA does not supercede the *Indian Child Welfare Act (ICWA)* and that ICWA requirements must still be met.

- **ASFA**: Please see "Adoption & Safe Families Act."

C

- **CASA**: Please see "Court Appointed Special Advocate."

- **Case plan**: Please see "service plan."

- **Child**: A child is any person under 18 years of age or any person under 21 years of age who is under state *custody* in the child welfare system. Please see also "Indian child."

- **Child abuse and neglect**: Child abuse and neglect is defined differently by individual tribes and states. However, the U.S. federal government provides a foundation definition under the federal Child Abuse Prevention and Treatment Act (CAPTA) (42 U.S.C.A. §5106g), as amended by the Keeping Children and Families Safe Act of 2003: child abuse and neglect is "at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm." Types of child abuse can include physical abuse, sexual abuse and exploitation, and emotional abuse or maltreatment. Types of child neglect can include physical, medical, educational, emotional, and moral neglect.

- **Child Protective Services (CPS) / Protective Services**: Child protective services (CPS) are services that the state provides to look after the safety of children. They are often associated with the involuntary removal of a *child* from an unsafe home; however, CPS also provides services to strengthen and support families.

Words that are *italicized* in a definition are defined in a separate entry in this glossary.

- **Concurrent planning**: Concurrent planning is a practice technique used by social workers that takes place when the worker and the family simultaneously plan for *reunification* and an alternate permanent *placement* if reunification is not possible.

- **Court Appointed Special Advocate / CASA**: A CASA volunteer is a trained community volunteer appointed by a judge to speak for the best interests of an abused and neglected child.

- **CPS**: Please see "Child protective services."

- **Custodian**: A custodian is a person who has legal *custody* of a *child* under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such *child.* See also the definition of "Indian custodian."

- **Custody**: There are 2 kinds of custody: legal and physical.

    1. Legal custody: Legal custody gives a parent the authority to make the decisions about the children's health, education and welfare. Joint legal custody allows both parents equal responsibility for such decisions in the children's lives.

    2. Physical custody: Physical custody refers to the time the *child* spends with each parent on a regular basis. Joint physical custody can occur when parents can agree on a plan on their own or with a mediator's help.

  Sometimes, a judge gives both parents joint legal custody, but not joint physical custody. This means both parents have equal responsibility for important decisions in the children's lives, but, the *child* lives with one parent most of the time and usually has scheduled time with the other parent.

- **Customary adoption:** A customary adoption is a practice, ceremony, or process conducted in a manner that is long-established, continued, reasonable, and certain; considered by the people of a tribe to be binding or found by the tribal court to be authentic, which gives a child a legally recognized permanent parent-child relationship with a person other than the child's biological parent without a requirement for termination of parental rights (TPR).

D

- **Deposition:** A deposition is a *proceeding* that typically occurs outside of the courtroom. It is a collection of statements of parties involved, and these statements are given under oath. A court reporter may use audio or video-recording equipment to collect the information. The deposition is a way for the opposing attorney to learn about the facts and opinions before a *trial* begins, and it may be used at the time of trial.

E

- **Enrollment in a tribe**: Enrollment in a tribe is registration with a tribe that verifies membership with that tribe. See also "member of a tribe."

- **Expert witness**: Under *ICWA*, an "expert witness" is someone who can

provide the court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias. The testimony of a qualified expert witness is required in the case of an *Indian child* in order to make a *foster care placement* or *termination of parental rights*. A qualified expert witness can be identified with help from the tribe of the *child*, the BIA, or *Indian* organizations and is meant to be a person with more knowledge than the average social worker or anthropologist.

F

- **Family Group Conferencing:** Family group conferencing is a family-centered, strengths-based, and culturally relevant technique used by social workers to gather a family and other significant people for the purpose of establishing a care plan for a *child*. The meeting is often structured into three phases: information sharing, family alone time, and presentation of the plan. Follow-up conferences may occur if needed.

- **Family preservation**: "Family preservation" often refers to a program that provides services specifically identified for families in crisis whose children are at risk of out-of-home placement. Family preservation actively seeks to obtain or directly provide the critical services needed to enable the family to remain together in a safe and stable environment.

- **Foster care**: Foster care is the provision of temporary parental care and supervision to a *child* typically not related through legal or blood ties. For more information on foster care placements, see also "placement."

G

- **Guardian ad litum**: A guardian ad litem is an advocate for a child whose welfare is a matter of concern for the court. In legal terms, it means "guardian for the lawsuit."

- **Guardianship**: Guardianship is an out-of-home *placement* designated by a court between a *child* and caretaker which, in most cases, is intended to be permanent. (The child is no longer a ward of the court.)

H

- **Hearing**: A hearing is a *proceeding* to review procedural issues or other matters before a magistrate, such as a judge, without a jury. While some hearings may follow the same process of a *trial*, other hearings may not have as much formal testimony as a trial and may be more brief. There are seven (7) types of hearings that are often associated with child welfare cases. It is important for parent(s)/*custodian*(s) to be present at each of these hearings, as absence could be taken as a lack of interest in the *child*.

    1. Emergency hearing / Shelter hearing / Detention hearing: An emergency hearing occurs within 24-72 hours that the state has taken emergency physical *custody* of a *child* suspected to be a victim of abuse or neglect. The purpose of this hearing is for the court to give official *notice* to the parents about what is happening and to determine what steps the state will follow next with regard to the custody of the child: return to parent(s) or live somewhere else for now. If the court decides the child needs to live

somewhere else, it can make visitation orders so the parent can see the child. The court will also tell the parents where they can get help so the child can come back to them. The court also decides if the state's social services made an "*active effort*" or "reasonable effort" to keep the child with the parents.

2. Disposition hearing / Placement hearing: In a disposition hearing the court names the specific place where the *child* will go. This hearing can sometimes be combined with another hearing, to confirm *placement* with a specific family or agency. The initial disposition hearing typically occurs within 14 days after removal of the child.

3. Pre-trial conference / Pre-trial hearing: At the pretrial conference, the court may consider efforts to locate and serve all parties, try to simplify the issues, resolve legal questions, resolve questions about and mark evidence, discuss settlement and mediation, decide whether the *child* will testify at adjudication and under what conditions, establish a reasonable time limit for presenting evidence, consider any other matters that may help resolve the case, and have the parties submit list of witnesses.

4. Jurisdictional hearing / Adjudication: A jurisdictional hearing is one in which the state or the tribe has to establish sufficient grounds under state or tribal law for the state or tribe to take legal *custody* of the *child*. There are a 3 grounds under which the state can take custody of the child: dependency, neglect, abuse (sexual or physical), and hearings that are on the grounds of dependency are often called "dependency hearings."

   a. Dependency hearing: In a dependency hearing, the state is required to establish that the *child* is dependent instead of abused or neglected. Every state has its own grounds for establishing dependency, however the general meaning of dependency is that through no fault of the parents, the parents are unable to take care of the child, and the child is on his/her own and needs assistance.

5. Review hearing / Status hearing: In a review hearing the state reviews its need to continue jurisdiction over the *child*. It also allows the court to decide whether to continue with family *reunification* services, order additional services, set a date for a permanency hearing, and/or dismiss the case.

6. Permanency hearing / Implementation hearing: A permanency hearing is required under the *Adoption & Safe Families Act of 1997 (ASFA)* and decides a permanent *placement* for the *child* and the future direction of the case. At this hearing, the court makes a permanent plan for the child. The plans can be to place the child with a relative, foster parent, or in a group home; name a legal guardian for the child; or *termination of parental rights* so the child can be adopted. *Reunification* with the original caretakers is not an option by the time this hearing occurs.

7. Termination hearing: In a termination hearing the state court proceeds with the *termination of parental rights (TPR)*. This is like a regular *trial* and may sometimes occur before a jurisdictional hearing or any full-blown trial to develop procedural matters.

I

- **ICWA**: Please see "Indian Child Welfare Act."

- **Indian**: "Indian" is a term used in U.S. federal language, including the *Indian Child Welfare Act (ICWA)*, to refer to any person who is a member of a federally recognized American Indian tribe or Alaska Native village, or who is an Alaska Native and a member of a Regional Corporation. See http://www.indians.org/ for a list of federally recognized tribes.

- **Indian child**: As defined in the *Indian Child Welfare Act (ICWA)*, an Indian child is "any unmarried person who is under age 18 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" (U.S.C. Title 25).

- **Indian Child Welfare Act / ICWA**: The Indian Child Welfare Act (*ICWA*) is a federal law passed in 1978 that guides states in their process for *placement* of an *Indian child* that is in their *custody*. This act was passed in response to the alarmingly high rate of Indian children being removed from their homes unnecessarily. It requires that states seek placement for the *child* with that child's family, tribe, and other American *Indian* homes before looking elsewhere. It generally does not apply to divorce *proceedings*, intrafamily disputes, *juvenile delinquency* cases, or cases under tribal court jurisdiction.

- **Indian custodian**: As defined in the *Indian Child Welfare Act (ICWA)*, an Indian custodian is "any *Indian* person who has legal *custody* of an *Indian child* under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such *child* [italics added]" (U.S.C. Title 25).

- **Involuntary:** In Indian child welfare, this refers to the process by which a parent loses *custody* of a *child* to a state agency and the child is placed in foster care due to *child abuse and/or neglect*. In order to regain custody, the parent and social worker together develop a *service plan* outlining *remedial or rehabilitative services* for *reunification* with the child.

J

- **Juvenile delinquency**: Juvenile delinquency occurs when a person under the age of 18 years commits a violation of the federal or state laws which would have been a crime if committed by an adult; or when noncriminal acts are committed by a juvenile for which supervision or treatment by juvenile authorities is authorized. There are narrow exceptions where the *Indian Child Welfare Act (ICWA)* may apply in juvenile delinquency cases.

K

- **Kinship care**: Kinship care is when a non-parent relative provides parental care and supervision to a *child*.

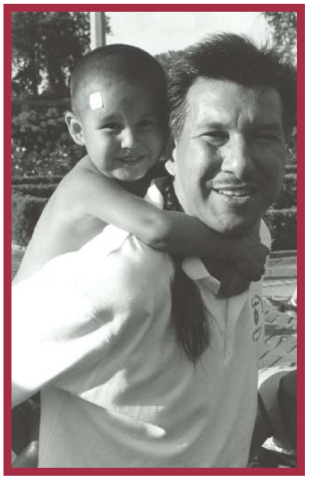
M

- **Member of a tribe**: The definition of what constitutes membership in a tribe varies from tribe to tribe, and final determination of membership lies with the tribe. Membership can be more inclusive than *enrollment in a tribe*.

N

- **Notice to parent/custodian**: Under the *Indian Child Welfare Act (ICWA)*, states are required to ensure that a parent/*custodian* is notified when their *Indian child* is involved in any involuntary *proceeding* that could lead to a *foster care placement* or *termination of parental rights (TPR)*. The party seeking the foster care placement or TPR is required to notify the parent/*custodian* and the Indian child's tribe by registered mail with return receipt requested of the pending proceedings and of their right to intervene. Additionally, "if the identity or location of the parent or *Indian custodian* and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe [italics added]" (U.S.C. Title 25).

- **Notice to tribe**: Under the *Indian Child Welfare Act (ICWA)*, once the state receives *custody* of an *Indian child*, it is required to notify that *child*'s tribe(s) by registered mail with return receipt requested that the child is in their custody so that the tribe may decide if it wishes to intervene. Please see also "tribal intervention."



O

- **Out-of-home Placement**: Please see "placement."

P

- **Permanency planning**: In Indian child welfare practice, permanency planning is planning for maintenance of an *Indian child*'s sense of belonging to their extended family, their tribe, and their caretakers in a permanent and stable home. This planning includes carrying out a set of goal-directed activities designed to help the *child* live in such a home, offering the child the opportunity to establish life-long relationships with the placement family, extended family, and their tribe. Examples of permanent *placements* include *kinship care*, *guardianship*, *adoption*, *reunification*, conventional or *customary adoption*, and long-term *foster care*.

- **Permanent placement:** Please see "placement."

- **Placement:** A placement occurs when a *child* is brought to live in a home other than his or her original home. The placement of the child may be temporary or long-term in out-of-home care or *foster care*, or it may be permanent. Under the *Indian Child Welfare Act*, placement preferences exist for an *Indian child*. They are in order of preference as follows:
    1. A member of the Indian child's extended family (*Indian* or non-Indian);
    2. A foster home licensed, approved, or specified by the Indian child's tribe;
    3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
    4. An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

Out-of-home/ Foster Care Placements: Placement preferences apply to both voluntary and involuntary *foster care* placements. See definitions for *involuntary* and *voluntary*.

Permanent placement: In Indian child welfare practice, a permanent placement is a permanent and stable home that maintains an *Indian child*'s sense of belonging to their extended family, their tribe, and their caretakers.

- **Proceeding**: A proceeding is a process by which legal judgments are administered. Types of proceedings include a *deposition*, a *hearing*, and a *trial*. Child protection proceedings usually take place in a hearing.

- **Protective services**: Please see "child protective services (CPS)."

R

- **Relinquishment of child custody**: Please see "termination of parental rights."

- **Remedial and rehabilitative services**: Remedial and rehabilitative services are services provided by the state to give support to families to help them become safe *placements* for a *child*. These services are required in the *Indian Child Welfare Act (ICWA)*. The intention of these services is to provide supports to a family to prevent the removal of a child by "rehabilitating" or strengthening the family in their parenting and other related skills, and/or to provide support that assists in "remediating" or correcting the situation in a home that led to the removal of a *child*. These services can include *family group conferencing*, parent counseling, substance abuse counseling, job-skill training, and many other types of services.

- **Residential care**: Residential care is the provision of parental care and supervision to a *child* by a public or private agency in a facility where the *child* lives.

- **Reunification**: Reunification is the *active efforts* of state services to help bring the *child* and family back together after a child has been removed from a home.

S

- **Service plan**: A service plan is an arrangement of services identified by a social worker and family to meet the needs of the *child* and/or parents. Services for the child can include counseling, cultural practices for healing, medical treatment, protective day care, and out-of-home *placement*. Services for both the parents and the child can include *concurrent planning*, *family group conferencing*, counseling, cultural practices for healing, and other *rehabilitative and remedial services*. The service plan may include informal sources of support, like extended family, church, and the tribe. Social workers will have a certain number of face-to-face contacts and home visits with the family, but the level of service varies by family needs, the proximity of services, and the services provided by other agencies. The service plan is time-limited, meaning that goals and objectives must be met within a limited time or the social worker will look at other permanent *placements*.

T

- **Temporary care**: Temporary care is a temporary, safe place that a *child* may be staying at while a permanent *placement* is being sought after. This can include *kinship care*, relative placement, *foster care*, and placement in a care facility.

- **Termination of parental rights (TPR)**: Termination of parental rights is a decision by which a parent loses all rights to their *child*. There are two ways a parent's rights to a child may be terminated:

  - Voluntary TPR: In a voluntary TPR, the decision to end parental rights is agreed upon by both parents. A child is removed, placed in alternative care, and can be returned upon the parents' request.

  - Involuntary TPR: In an involuntary TPR, the decision to end parental rights is made by a court of law and may occur without either parent's consent. A petition must first be filed in a court before it can be ordered. A child is removed, placed in alternative care, and cannot be returned upon the parents' request. Under a *customary adoption*, a modification of parental rights may occur instead of TPR.

- **TPR**: Please see "Termination of parental rights."

- **Transfer of jurisdiction**: Please see "tribal intervention."

- **Trial**: A trial is a *proceeding* to examine disputed questions about facts and law that is presided over by a magistrate, such as a judge, with or without a jury. A trial is usually more formal than a *hearing*. Formal procedures in a trial include opening statements limited to a specific outline, presentation of evidence in a certain order, final arguments, and a final verdict or judgment that usually concludes the trial. A trial can be open to the public. There are several types of trials but they can generally be grouped as "civil trials" or "criminal trials":
  1. Civil trials: In civil trials addressing child *custody* cases, allegations of *child abuse and neglect* are not as severe as they are in a criminal trial. The majority of court processes in child abuse and neglect cases are handled in civil trials or hearings. There can be multiple parties in the case.
  2. Criminal trials: In criminal trials addressing child *custody* cases, allegations of *child abuse and neglect* are more serious than in civil trials. The seriousness of allegations determines if the state will file it as a criminal case, and the state must be able to prove such allegations. Civil child abuse and neglect cases may proceed simultaneously with a criminal case. Criminal trials have only two parties: the state and the defendant, though there will be similar players as in a civil trial. In most criminal cases the exact punishment will be determined by the judge at a hearing held after the trial.

- **Tribal intervention**: Tribal intervention in a child *custody* case occurs when a tribe acts on its right to participate in a child custody *proceeding*. The *Indian Child Welfare Act (ICWA)* states that "in any State court proceeding for the *foster care placement* of, or *termination of parental rights* to, an *Indian child*, the *Indian custodian* of the *child* and the *Indian child's* tribe shall have a right to intervene at any point in the proceeding [italics added]" (USC Title 25, 1911.C.). This intervention can be wide in its interpretation: the tribe may request to transfer the case to tribal court (a "transfer of jurisdiction") or the tribe may choose to only monitor the case through court records. Transfer of jurisdiction can be requested by either the parent or the tribe. A tribe may intervene at any point in an Indian child custody proceeding.

V

- **Voluntary:** In Indian child welfare, this term refers to the process by which a parent consents to *relinquish custody* of a *child* over to a state or private agency. A child may be returned to the parent at her/his request, as long as there is no risk of imminent harm or danger presented. Valid consent of a voluntary placement must be given in writing, recorded before a judge, and executed after the child is ten days old.

G13248-1

APPENDIX 7

FORMS

1. **Notice Form**
2. **Consent to Temporary Custody & Certification**
3. **Consent to Termination of Parental Rights**
4. **Motion to Intervene**
5. **Order Granting Motion to Intervene**
6. **Motion for Extension of Time**
7. **Order Granting Extension of Time**
8. **Request to Produce and Examine**
9. **Order Granting Request to Produce and Examine**
10. **Petition for Acceptance of Jurisdiction**
11. **Order Accepting Jurisdiction**
12. **Motion to Transfer Jurisdiction and Dismiss Case**
13. **Order Transferring Jurisdiction to Tribal Court**
14. **Petition to Obtain Adoption Records**

Visit www.narf.org/icwa for copies of forms in PDF and Word format.

Disclaimer: These forms are intended to facilitate compliance with the letter and spirit of ICWA and are intended for educational and informational purposes only. They are not legal advice. You should consult competent legal counsel for legal advice, rather than rely on these forms.

NOTICE FORM

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

State of _____,	)	Case No.
	)	
Department of _____	)	INDIAN CHILD WELFARE
	)	ACT NOTICE,
In the Matter of	)	
	)	
BABY BOY DOE, DOB: _____	)	25 U.S.C. § 1912(a)
	)	
A person under eighteen years of age	)	
_____	)	

TO: 1. _____
_____
_____
_____
_____
_____

2. _____
_____
_____
_____
_____
_____

Notice is hereby given pursuant to the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, that a petition involving the above named minor child has been filed in the _____ County District Juvenile Court alleging that the child is within the jurisdiction of the court. A copy of the petition is attached. It is alleged that the above named minor child is a member of or eligible for membership in the _____ Indian tribe, and that the Indian Child Welfare Act applies to this proceeding:

1. Information on the child is as follows:
   a. Name: _____
   b. Present residence: _____
   c. Place of birth: _____
   d. Date of birth: _____

e. Where child was taken into custody: _____

f. Tribal affiliation: _____

g. Tribal census of enrollment number: _____

2. Information on the parents is as follows:

A. i. Mother's Name: _____

ii. Maiden Name: _____

iii. Permanent Address: _____

iv. Current Address: _____

v. Place of Birth: _____

vi. Date of Birth: _____

vi. Tribal Affiliation: _____

vii. Tribal enrollment or census number: _____

B. i. Father's Name: _____

ii. Permanent Address: _____

iii. Current Address: _____

iv. Place of Birth: _____

v. Date of Birth: _____

vi. Tribal Affiliation: _____

vii. Tribal enrollment or census number: _____

C. If these are not the natural parents, please supply the same information on the natural parents: _____

D. Please supply the names of relatives, other family names, and other information about the extended family that will aid in identification: _____

_____

_____

3. The petitioner in this proceeding is:

a. Name: _____

b. Address: _____ Phone: _____

c. Title: _____

4. The social worker for the state in this proceeding, if not the petitioner is:

a. Name: _____

b. Address: _____ Phone: _____

5. The attorney for the petitioner is:

a. Name: _____

b. Address: _____Phone: _____

6. The petition has been filed in the District Juvenile Court for _____ County, State of _____

A hearing is scheduled in this matter on _____, 20___, at ___(am)(pm), before the Honorable _____.

The address of the court is _____.

The phone number of the court is _____.

7. No proceeding involving the above named minor child shall take place until at least ten (10) days after receipt of this notice.

8. The _____, the biological parents, and any Indian custodian of the above named child have the right to intervene and be made a party in this proceeding under the Indian Child Welfare Act.

9. If the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them. The parents or Indian custodians have the right to be represented by an attorney at every stage of this proceeding. The court may, in its discretion, appoint an attorney to represent the above named minor child.

10. The _____, the parents or the Indian custodians of the above named minor child have the right, upon request, to be granted an additional twenty (20) days to prepare for this proceeding. Such request may be made by motion, in writing, or by calling the court clerk at the number listed under #6, above.

11. The _____, the parents, or the Indian custodians of the above named minor child have the right, upon request, to examine all documents or other material which may be used to make a decision in this matter. Such request shall be made in writing to the court clerk, or the Court at the hearing.

12. The _____, the parents, or the Indian custodians have the right to petition the court to transfer this proceeding to the courts of the_____. Such petition shall be in writing and presented to the court clerk or orally to the court at the scheduled hearing. The petition shall be granted in the absence of good cause to the contrary or the objection of either parent.

13. A decision in this matter may effect the future custodial rights of the_____, the parents, and the Indian custodians of the above named minor child, and may result in the temporary or permanent removal of the child from his/her home, the termination of

parental rights to the child, and the permanent placement or adoption of the child.

14 The information contained in this notice and the attached Petition is confidential and should not be disclosed or revealed to any person or agency which is not necessary for proper notification of the parents, Indian custodians or the tribe of the above named minor child, and which is not necessary for the exercise of their rights under the Indian Child Welfare Act.

15. This notice has been sent by registered mail, return receipt requested, this _____ day of _____, 20____.

_____

Petitioner

CONSENT TO TEMPORARY CUSTODY & CERTIFICATION

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

In the Matter of: _____,)) DOB: _____)) Person Under Eighteen Years of Age.) _____)	Case No: CONSENT TO TEMPORARY CUSTODY AND CERTIFICATION

Pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1913, I, _____, do consent to the placement of my child _____, date of birth _____,with _____.

Before this Court, I do state:

1. That I am an enrolled member of the_____, Enrollment No. _____, date of birth. _____.

2. That my child, _____, date of birth _____, is an enrolled member of, Enrollment No. _____, or is eligible to be a member of, the _____.

3. That I am presently unable to care for my child and prefer that he/she be placed with _____, pursuant to the placement preferences of the Indian Child Welfare Act of 1978, 25 U.S.C. § 1915(b).

4. That I fully understand the consequences of my actions.

5. That I have the right to withdraw my consent to temporary custody at any time under the Indian Child Welfare Act of 1978, 25 U.S.C. § 1913(b), at which time my child shall be returned to my custody.

CONSENT TO TEMPORARY CUSTODY & CERTIFICATION

6. That I do not intend to waive any of my rights under the Indian Child Welfare Act by signing this consent.

7. That this consent was not signed prior to, or within ten days after, the birth of my child.

Executed this _____ day of _____, 20__ in open Court before a Judge of the _____Court, for _____County, State of _____.

CERTIFICATION

Pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1913(a), I, the Honorable _____, Judge of the _____ Court, for _____ County, State of _____, do certify that this consent was executed in writing and recorded before me in open court, that the terms and consequences of the consent were fully explained in detail and were fully understood by _____, and that he/she understood English or that it was interpreted into a language that he/she understood.

Certified this_____ day of _____, 20___.

_____
Judge

CONSENT TO TERMINATION OF PARENTAL RIGHTS

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

IN THE MATTER OF: _____,	)	Case No:
	)	
DOB: _____,	)	CONSENT TO TERMINATION
	)	OF PARENTAL RIGHTS (OR
	)	ADOPTION) AND CERTIFICATION
A Person Under Eighteen Years of Age.	)	
_____	)	

Pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1913, I, _____, do consent to the termination of parental rights (adoption) to my child, _____, date of birth _____, and his/her placement with _____.

Before this Court, I do state:

1. That I am an enrolled member of the _____, Enrollment No. _____, date of birth _____.

2. That my child, _____, date of birth _____, is an enrolled member of, Enrollment No. _____, or is eligible for enrollment with, the _____.

3. That I desire to terminate my parental rights to my child (that my child be adopted) and prefer that he/she be placed with _____, who is related to the child as a(n) _____, pursuant to the placement preferences of the Indian Child Welfare Act of 1978, 25 U.S.C. § 1915(a) or (d).

4. That I fully understand the consequences of my actions .

5. That I have the right to withdraw my consent to termination of my parental rights (adoption) pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1913(c), for any reason at any time prior to the entry of a final decree of termination or adoption, at which time my child

shall be returned to my custody.

6. That I wish to be notified if the final decree of adoption to my child is vacated or set aside, or if the adoptive parents voluntarily consent to the termination of their parental rights to my child, so I may petition the court for the return of his/her custody at that time pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1916.

7. That I do not intend to waive any of my rights under the Indian Child Welfare Act by signing this consent.

8. That this consent was not signed prior to, or within ten days after, the birth of my child.

(9. That I prefer that this consent be signed in closed court because I wish to remain anonymous.)

Executed this _____ day of _____, 20__, in open (closed) court before a Judge of the _____Court, for _____County, State of _____.

CERTIFICATION

Pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1913(a), I, the Honorable _____, Judge of the _____ Court, for _____ County, State of _____, do certify that this consent was executed in writing and recorded before me in open court, that the terms and consequences of the consent were fully explained in detail and were fully understood by _____ and that he/she understood English or that it was interpreted into a language that he/she understood.

Certified this ____ day of _____, 20___.

_____

Judge

MOTION TO INTERVENE

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

In the Matter of: _____,	)	Case No.
	)	
DOB: _____,	)	MOTION TO INTERVENE
	)	
A Person Under Eighteen Years of Age.	)	
_____	)	

COMES NOW the Petitioner, _____, the undersigned, and moves the Court to permit the _____ to intervene in this matter, a child custody proceeding involving an Indian child as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(1). As grounds for this motion, the Tribe states:

1. The child is an "Indian child" as defined by the Indian Child Welfare Act, 25 U.S.C. § 1903(4), in that the child is under age eighteen, date of birth _____, and is a member of, Enrollment No. _____, or is eligible for membership in, the _____.

2. The _____ is an Indian tribe as defined by the Indian Child Welfare Act, 25 U.S.C. § 1903(8), and this fact is entitled to judicial notice by virtue of publication in the Federal Register [list most recent publication of tribes entitled to federal services and benefits].

3. The Tribe is "the Indian child's tribe" as defined by the Indian Child Welfare Act, 25 U.S.C. § 1903(5), in that the child is a member of, or eligible for membership in, the Tribe.

4. The Indian Child Welfare Act, 25 U.S.C. § 1911(c), gives the Indian child's tribe the right to intervene at any point in a state court proceeding "for the foster care placement of, or termination of parental rights to, an Indian child."

MOTION TO INTERVENE

WHEREFORE, Petitioner requests the Court to grant the Motion to Intervene in the above-captioned proceeding.

_____, Signed

_____

_____

_____

I hereby certify that a true and correct copy of this Motion was mailed to the opposing party, this _____ day of _____, 20___.

By:

ORDER GRANTING MOTION TO INTERVENE

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

In the Matter of: _____,	)	Case No.
	)	
DOB: _____,	)	
	)	ORDER
A Person Under Eighteen Years of Age.	)	
_____	)	

The Court having reviewed the Motion to Intervene, and it appearing that good cause exists for the granting of such Motion,

It is therefore ORDERED that the _____ Motion to Intervene is hereby granted.

ORDERED, this _____ day of _____, 20__.

_____

Judge

MOTION FOR EXTENSION OF TIME

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

In the Matter of: _____,	)	Case No.
	)	
DOB: _____,	)	MOTION FOR EXTENSION
	)	OF TIME
A Person Under Eighteen Years of Age.	)	
_____	)	

COMES NOW the petitioner, _____, the undersigned, and moves the Court for an extension of time of at least twenty (20) days from the hearing date in this matter currently scheduled for _____, 20___. As grounds for this motion, the Tribe states:

1. Insufficient information has been provided to the Tribe to determine whether the named child(ren) is a member of the _____or eligible for membership in the_____. Additional time is necessary to verify membership.

2. Additional time is necessary for the Tribe to prepare for this proceeding and for the Tribal Division of Social Welfare to complete an initial assessment of this matter and to investigate potential placements for the child(ren).

3. The Indian Child Welfare Act, 25 U.S.C. § 1912(a), provides that "the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding." (emphasis added.).

MOTION FOR EXTENSION OF TIME

WHEREFORE, Petitioner requests that the Court postpone the above-named proceeding for at least twenty (20) days to permit the Tribe to prepare for the proceeding.

_____, Signed

_____

_____

_____

I hereby certify that copies of this Motion have been mailed to the opposing party, this ____ day of _____, 20___.

By:

ORDER GRANTING EXTENSION OF TIME

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

In the Matter of: _____,	)	Case No.
	)	
DOB: _____,	)	ORDER
	)	
A Person Under Eighteen Years of Age.	)	
_____	)	

The Court having reviewed the Motion for an Extension of Time and it appearing that good cause exists for the granting of such Motion.

IT IS THEREFORE ORDERED that the _____ Motion for an Extension of Time is hereby granted.

_____
Judge

REQUEST TO PRODUCE AND EXAMINE

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

In the Matter of: _____	)	Case No.
	)	
DOB: _____	)	REQUEST TO PRODUCE AND
	)	EXAMINE
	)	
A Person Under Eighteen Years of Age	)	
_____	)	

COMES NOW the Petitioner, _____ , and requests copies of all reports and other documents which may be a basis for any decision with respect to the above-entitled action involving _____. As grounds for this motion, the Tribe states:

1. The notice of the pending Indian child custody proceeding from the _____ Court contains insufficient information for the Tribe to determine whether the named party is a member of, or eligible for membership in, the _____ Tribe.

2. The Tribe needs access to all documents and information relevant to this proceeding so the Tribal Division of Social Welfare can begin assessing this case and planning for the child, and so the Tribe can prepare adequately for the proceeding.

3. The Indian Child Welfare Act, 25 U.S.C. § 1912(c), gives the tribe "the right to examine all reports or other documents filed with the court upon which any decision with respect to [a foster care placement or termination of parental rights] action may be based.

REQUEST TO PRODUCE AND EXAMINE

WHEREFORE, Petitioner requests the Court to order the production of all information relevant to this proceeding for representatives of the Tribe to inspect and copy at the address of _____.

_____, Signed
_____
_____
_____
_____

I hereby certify that a true and correct copy of this Motion have been mailed to the opposing party this _____ day of _____, 20___.

By:

ORDER GRANTING REQUEST TO PRODUCE AND EXAMINE

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

In the Matter of: _____,	)	Case No.
	)	
DOB: _____,	)	
	)	ORDER
	)	
A Person Under Eighteen Years of Age.	)	
_____	)	

The Court having reviewed the Request to Produce and Examine, and it appearing that good cause exists for the granting of such Request,

It is therefore ORDERED that the _____ Tribe's Request to Produce and Examine is hereby granted.

ORDERED, this _____ day of _____, 20___.

_____
Judge

PETITION FOR ACCEPTANCE OF JURISDICTION

IN THE _____ TRIBAL COURT
_____ RESERVATION

_____,	)	
Tribal Division of Social Welfare	)	Case No.
	)	
In the Matter of: _____,	)	PETITION FOR ACCEPTANCE OF
	)	JURISDICTION AND AWARD
Date of Birth: _____,	)	OF TEMPORARY CUSTODY
	)	
A Person Under Eighteen Years of Age.	)	
_____	)	

COMES NOW the Petitioner, Tribal Division of Social Welfare, the undersigned, and requests the Tribal Court to accept jurisdiction of the child custody proceeding involving the above-named child, which is pending in _____ Court, for _____ County, State of _____, Docket No. _____. This proceeding is being transferred to the Tribe pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1911(b). The Tribal Division also requests the court to award temporary custody of the above-named minor child to the Tribal Division until such time as a hearing can be scheduled to determine whether custody should continue. As grounds therefore, the Tribal Division states:

1. That the minor child is a member of, Enrollment No. _____, or eligible for membership in, the _____ Tribe.

2. That the natural mother/father of the minor children is a member of the Tribe, Enrollment No. _____.

3. That the dependency and neglect proceeding involving the above named minor child, pending in the _____Court, for _____County, State of _____, Docket No. _____, was based upon acts of dependency or neglect by the natural mother/father.

4. That the Tribe filed a motion to Transfer Jurisdiction and Dismiss the State Court

PETITION FOR ACCEPTANCE OF JURISDICTION

Proceeding, Docket No. _____, requesting transfer of the case to the Tribal Court pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1911(b).

5. That it is in the best interests of the minor child that this Court accept jurisdiction of the State Court Proceeding, Docket No. _____, that is pending in the _____Court, for _____County, State of _____.

6. That the natural father/mother, due to his/her acts of dependency or neglect, is presently unable to properly provide for the care and maintenance of the above-named minor child, making the child a dependent or neglected child as defined by Tribal law, [Insert Tribal Law & Code Citation if available].

7. That it is in the best interests of the minor child that temporary custody of the minor child be awarded to the Tribal Division of Social Welfare until such time as a hearing is conducted to determine whether custody should continue with the Tribal Division.

WHEREFORE, Petitioner requests that the Tribal Court accept jurisdiction of the child custody proceeding that was pending in the _____Court, for _____County, State of _____, Docket No. _____, and award temporary custody of the minor child to the Tribal Division of Social Welfare until such time as a hearing is conducted to determine whether custody should continue.

DATED this _____ day of _____, 20___.

_____, Signed

_____

_____

_____

PETITION FOR ACCEPTANCE OF JURISDICTION

I hereby certify that a true and correct copy of this Motion was mailed to opposing counsel, this _____ day of _____, 20___.

By:

ORDER ACCEPTING JURISDICTION

IN THE _____ TRIBAL COURT
_____ RESERVATION

_____,	)	Case No.
Tribal Division of Social Welfare	)	
	)	ORDER ACCEPTING JURIS-
IN THE MATTER OF:	)	DICTION AND AWARDING
	)	TEMPORARY CUSTODY
_____, DOB: _____	)	
_____	)	

THIS MATTER having come before the Court upon the _____ Tribal Division of Social Welfare's Petition for Acceptance of Jurisdiction and Award of Temporary Custody, and the Court having been fully advised in the premises, finds:

1. That the minor child is a member of, Enrollment No. _____, or is eligible for membership in, the _____.

2. That the minor child is the biological child of _____, Enrollment No._____, and _____, Enrollment No._____.

3. That the minor child has been or will be returned to the jurisdiction of this Tribal Court.

4. That this Court has jurisdiction over the subject matter and parties pursuant to Title____ of the Tribe's Tribal Law & Order Code, and the Indian Child Welfare Act, 25 U.S.C. § 1911(b).

5. That reasonable grounds exist to believe that the child is dependent or neglected as defined by tribal law.

6. That it is in the best interest of the minor child that the Tribal Court accept jurisdiction of the child custody proceeding that is pending in the _____ Court, for

ORDER ACCEPTING JURISDICTION

_____ County, State of _____, Docket No._____, and that the Tribal Division of Social Welfare be awarded temporary custody of the minor child until such time as a hearing is conducted in Tribal Court to determine whether custody should continue.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. That this Tribal Court hereby accepts jurisdiction of the child custody proceeding in the _____Court, for _____County, State of _____, Docket No._____, involving the minor child.

2. That the Tribal Division of Social Welfare is hereby awarded temporary custody of the minor child.

3. That this matter be set for a hearing forthwith to determine whether custody should continue in the Tribal Division of Social Welfare.

ORDERED this _____ day of _____, 20___.

_____

Tribal Judge

MOTION TO TRANSFER JURISDICTION AND DISMISS CASE

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

In the Matter of: _____,	)	Case No.
	)	
DOB: _____,	)	MOTION TO TRANSFER
	)	JURISDICTION AND DISMISS
A Person Under Eighteen Years of Age.	)	THE CASE
_____	)	

COMES NOW the Petitioner, _____, the undersigned, and petitions the Court to transfer this action to the _____ Tribal Court, _____ Reservation, ____(city)_____, ___(state)_____, and to dismiss the state court proceeding pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1911(b). As grounds therefore, the Tribe states:

1. The minor child involved in this proceeding is an "Indian child" as defined by the Indian Child Welfare Act, 25 U.S.C. § 1903(4), in that the child is under eighteen years of age, date of birth _____, and the child is a member of, Enrollment No. _____, or is eligible for membership in, the Tribe.

2. The _____ is an "Indian tribe" as defined by the Indian Child Welfare Act, 25 U.S.C. § 1903(8), and this fact is entitled to judicial notice by virtue of publication in the Federal Register, [list most recent publication of tribes entitled to federal services and benefits].

3. The Tribe is "the Indian child's tribe" as defined by the Indian Child Welfare Act, 25 U.S.C. § 1903(5), in that the child is a member of, or eligible for membership in, the Tribe.

4. This is a child custody proceeding as defined by the Indian Child Welfare Act, 25 U.S.C. § 1903(1), in that it involves a foster care placement, termination of parental rights, pre-adoptive placement or adoptive placement.

MOTION TO TRANSFER JURISDICTION AND DISMISS CASE

5. The Indian Child Welfare Act, 25 U.S.C. § 1911(b), requires that the state court transfer a child custody proceeding involving an Indian child to the jurisdiction of the Tribe when the Indian child's tribe petitions the state court.

6. Good cause does not exist to deny transfer of this proceeding.

7. The Tribal Court seeks to take jurisdiction of this proceeding and to provide planning and placement for the named child.

WHEREFORE Petitioner requests the Court to transfer the above captioned proceeding to the Tribal Court, _____ Reservation, _____(city)_____, _____(state)_____, and to dismiss this case as stated above.

_____, Signed

_____

_____

_____

I hereby certify that a true and correct copy of this Motion was mailed to the opposing party this _____ day of _____, 20___.

By:

ORDER TRANSFERRING JURISDICTION TO TRIBAL COURT

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

In the Matter of: _____,	)	Case No.
	)	
DOB: _____,	)	ORDER
	)	
A Person Under Eighteen Years of Age.	)	
	)	
_____	)	

On petition of the _____ Tribe, and it appearing to the Court that the Motion to Transfer Jurisdiction and Dismiss the case is well taken and grounds exist,

IT IS THEREFORE ORDERED that the above-entitled proceeding be transferred to the jurisdiction of the _____ Tribe, and that the above-entitled proceeding be, and the same hereby is, dismissed from the _____Court, for _____County, State of _____, and

THE CLERK OF THE COURT IS DIRECTED AND ORDERED to forward to the Honorable _____, Tribal Judge, [INSERT ADDRESS], a copy of the complete file in this matter.

_____

Judge

PETITION TO OBTAIN ADOPTION RECORDS

IN THE _____ COURT
FOR _____ COUNTY, STATE OF _____

In the Matter of: _____,	)	Case No.
	)	
DOB: _____,	)	
	)	
A Person Under Eighteen Years of Age.	)	
	)	
_____	)	

PETITION PURSUANT TO 25 U.S.C. § 1917
TO OBTAIN CERTAIN BIRTH RECORD INFORMATION
FROM COURT AND AGENCY ADOPTION RECORDS

COMES NOW the Petitioner, _____, and respectfully petitions the Court for an order, pursuant to 25 U.S.C. § 1917, permitting him/her to have access to certain identifying information pertaining to him/herself, his/her natural mother/father, and natural maternal/paternal grandparents, and contained in the records of his/her adoption maintained in the above-captioned matter by this Court and by _____ an agency that maintains the adoption records of the now defunct _____. In support of his/her petition, Petitioner states:

1. I presently reside at _____.

2. I was born on _____ in _____. On information and belief, my natural mother/father named me _____ at birth.

3. On _____ the _____ Court, a predecessor to this Court, entered a decree of adoption approving my adoption by _____ and changing my name to _____.

4. The _____ an agency that is now defunct was involved in my adoption and kept records pertaining to the adoption. _____ currently maintains the adoption records of this defunct agency.

5. According to this Court's records of my adoption, my natural mother/father was American Indian/Alaskan Native. I do not know his/her tribal affiliation. On information and belief, his/her name is _____.

6. Members of American Indian tribes/Alaskan Native villages are provided with legal rights under federal law that are not available to others. These rights include, for example, scholarships and other education programs, health care, employment rights, business grants and loans, a variety of social services, property rights including the right to share tribal lands and the income therefrom, the right to be exempt from certain taxes, and other similar rights.

7. Members of American Indian tribes/Alaskan Native villages associate with one another in a socio-political community, commonly known as the tribal relationship, sharing a common heritage and culture and promoting the economic well-being of the entire tribal community.

8. I am not a member of any Indian tribe/Alaskan Native village and, at present, I am unable to establish eligibility for such membership.

9. I have been deprived of my Indian culture, heritage and tribal relationship and all the rights under federal law that would flow from membership in a tribe/Alaskan Native village. I have also been deprived of the political, social, economic, and

psychological advantages and benefits which would flow from membership in a tribe/Alaskan Native vilalge.

10. The Indian Child Welfare Act, 25 U.S.C. 1901 *et seq.*, provides in pertinent part:

> 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. § 1917.

11. United States Senate Report No. 95-597, 95th Cong. 1st Sess. (November 3, 1977), explains § 1917.

> An Indian child who has been placed in adoptive, foster care, or other setting is authorized upon obtaining the age of eighteen to obtain information regarding his or her placement as may be needed to qualify for enrollment in his or her tribe of origin and for other benefits and property rights to which he or she may be entitled because of Indian status.

Senate Report No. 95-597 at page 11.

> It is the intent of this section [sec. 1917] as amended to authorize the release of only such information as is necessary to establish the child's rights as an Indian person. Upon a proper showing to a court that knowledge of the names and addresses of his or her natural parent or parents is needed, only then shall the child be entitled to the information under the provision of this section.

Senate Report No. 95-597 at page 18.

12. The Indian Child Welfare Act was enacted after extensive Congressional testimony and study revealed that an inordinate number of Indian children had been separated from their tribal communities through adoption and other placements frequently detrimental to the children, their families and their tribes.

> . . . the Congress finds –
> . . . (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the social and cultural standards prevailing in Indian communities and families.

25 U.S.C. §§ 1901(4) and 1901(5).

13. The Congress in the Indian Child Welfare Act stressed the national policy of protecting and preserving the relationship between Indian tribes and their children. 25 U.S.C. §§ 1901(2), 1901(3) and 1902. The policy derived in part from findings by the American Indian Policy Review Commission that "'[r]emoval of Indian children from their cultural setting [by placement in non-Indian adoptive homes] seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.'" *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989). *See also, Matter of Adoption of a Child of Indian Heritage*, 111 N.J. 155, 543 A.2d 925, 930-931 (1988) (The Indian Child Welfare Act is based on findings " . . . that an Indian child . . . separated from all aspects of Indian culture . . . . not only posed a threat to the stability and security of Indian tribes, but also carried with it the potential for psychological harm to the Indian child . . . [including] ethnic confusion and a sense of abandonment").

14. Petitioner was adopted by non-Indians.

15. The rights available to Indians because of their status as Indians can only be obtained by members of Indian tribes.

16. Virtually every Indian tribe/Alaskan Native village requires an applicant for membership to identify by name the biological parent(s) of the applicant to determine if such parent(s) is a member of the tribe/village and to present documentation, usually an original certificate of birth, the final decree of adoption, and other related documents, evidencing the fact that the person adopted is actually the biological child of the tribal member(s) identified as the parent(s) of the applicant for membership. Only in this way can tribes/villages determine if the applicant for membership possesses the requirements necessary for membership.

17. In order for me to identify the Indian tribe/Alaskan Native village with which I am related and secure membership as a member of such tribe/village, it is necessary for me to identify my natural mother/father and, perhaps his/her parents by name.

18. In addition to the personal importance to me of establishing my Indian identity and securing membership in the tribe/village with which I have a relationship, it is also of great importance that my children and my grandchildren also be able to establish an Indian identity and to secure all of the legal and other rights associated with tribal membership. If I am able to become a member of a tribe/village, my children and grandchildren may also be able to become tribal members.

19. On _____, I informed my attorney, _____, that (adoptive parents' names) _____ has no objection to the granting of this petition and that such position could be represented to the Court as part of this petition.

20. My adoptive parents, _____, fully support my efforts to secure the information requested through this petition. See Exhibit A and B annexed hereto, affidavits of adoptive mother and father.

WHEREFORE, movant respectfully requests that this Court enter an order:

1. Granting movant the right to inspect and copy the records of his/her adoption maintained by this Court, and the records of _____ now maintained by _____ for the purpose of identifying his/her tribal affiliation or the tribal affiliation of her natural father/mother and, if necessary, his/her natural maternal/paternal grandparents.

2. Granting movant the right to inspect and copy all information contained in the records of his/her adoption maintained by this Court, and the records of _____ now maintained by _____ as may be necessary to enable him/her to become a member of an Indian tribe/Alaskan Native village and to protect his/her rights flowing from the tribal relationship and his/her status as an Indian/Alaskan Native, such information to include the original certificate of his/her birth, the final decree of adoption, the names and last known addresses of his/her biological father/mother, and if necessary, his/her biological maternal/paternal grandparents.

_____
Signed

APPENDIX 8

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APPENDIX 9

NICWA TRAINING MATERIALS

ICWA Training & Technical Resources From the National Indian Child Welfare Association (NICWA).

A list of NICWA's curriculum materials and purchasing information can be found by going to NICWA's curriculum page.

At its website, NICWA also provides policy-related information (current legislation, laws, regulations and research articles) related to ICWA implementation. These materials are under the policy and research page.

NICWA is dedicated to the well-being of all American Indian children and families. Each of these resources has been developed in close consultation with Native American consultants, staff and advisory committees of representatives from a variety of tribes and organizations. Each is culturally appropriate and directly applicable to the oftentimes unique circumstances of Indian communities.

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