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## 11. FOSTER CARE PLACEMENT AND REMOVAL

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

### 25 U.S.C. § 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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### **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 or 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.

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### 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](http://www.narf.org/icwa) \*\*

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

#### 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)

#### STATE CASES

##### 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)

##### Idaho

*In re Baby Boy Doe (Baby Boy Doe II)*, 902 P.2d 477 (Idaho 1995)

##### Iowa

*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)

##### Kansas

*In re B.G.J. (B.G.J. II)*, 133 P.3d 1 (Kan. 2006)

*In re S.M.H.*, 103 P.3d 976 (Kan. Ct. App. 2005)

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### **Michigan**

*In re Jacobs*, 444 N.W.2d 789 (Mich. 1989)

### **Minnesota**

*In re A.K.H.*, 502 N.W.2d 790 (Minn. Ct. App. 1993)

*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)

*In re S.E.G. (S.E.G. II)*, 521 N.W.2d 357 (Minn. 1994)

### **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)

*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)

### **New York**

*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)

### **North Dakota**

*B.R.T. v. Executive Dir. of Soc. Servs. Bd.*, 391 N.W.2d 594 (N.D. 1986)

### **Oklahoma**

*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**

*In re Charles*, 688 P.2d 1354 (Or. Ct. App. 1984)

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

### **Pennsylvania**

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

### **South Dakota**

*In re J.C.D.*, 2004 SD 96, 686 N.W.2d 647

### **Texas**

*In re W.D.H., III*, 43 S.W.3d 30 (Tex. App. 2001)

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

### **Washington**

*In re S.B.R.*, 719 P.2d 154 (Wash. Ct. App. 1986)

*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)