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### 3. WHO HAS RIGHTS UNDER THE ACT

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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;

(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;

### 3. WHO HAS RIGHTS UNDER THE ACT

(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 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.

**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.

### 3. WHO HAS RIGHTS UNDER THE ACT

#### **(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.**



**Frequently Asked Questions**

- 3.1 What rights do Indian children have under the ICWA?**
- 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)?**
- 3.3 What are the rights of Indian custodians under the ICWA?**
- 3.4 What are the rights of extended family of Indian children under the ICWA?**
- 3.5 What are the rights of tribal members who are not extended family under the ICWA?**
- 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?**
- 3.7 What are the rights of tribes under the ICWA?**
- 3.8 What are the rights of adoptive parents of Indian children under the ICWA?**
- 3.9 What are the rights of foster parents of Indian children under the ICWA?**
- 3.10 What are the rights of Indian children who have been adopted under the ICWA?**

**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 rights, 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

### 3. WHO HAS RIGHTS UNDER THE ACT

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 rights, 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 rights, 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. WHO HAS RIGHTS UNDER THE ACT

#### **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



### 3. WHO HAS RIGHTS UNDER THE ACT

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/state 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. WHO HAS RIGHTS UNDER THE ACT

#### **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](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

#### **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)

*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)

*In re Bernard A.*, 77 P.3d 4 (Alaska 2003)

*E.A. v. State*, 46 P.3d 986 (Alaska 2002)

*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)

*V.D. v. State*, 991 P.2d 214 (Alaska 1999)

*In re W.E.G.*, 710 P.2d 410 (Alaska 1985)

#### **Arizona**

*In re Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz. Ct. App. 1983)

*In re Maricopa County Juvenile Action No. JD-6982*, 922 P.2d 319 (Ariz. Ct. App. 1996)

*In re Pima County Juvenile Action No. S-903*, 635 P.2d 187 (Ariz. Ct. App. 1981)

*State v. Zaman*, 946 P.2d 459 (Ariz. 1997)

#### **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 Daniel M.*, 1 Cal. Rptr. 3d 897 (Ct. App. 2003)

*In re Jonathon S.*, 28 Cal. Rptr. 3d 495 (Ct. App. 2005) (certified for partial publication)

#### **Iowa**

*In re H.N.B.*, 619 N.W.2d 340 (Iowa 2000)

#### **Michigan**

*In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986)

#### **Montana**

*In re Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993)

#### **New Mexico**

*In re Begay*, 765 P.2d 1178 (N.M. Ct. App. 1988)

### 3. WHO HAS RIGHTS UNDER THE ACT

#### **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)

