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