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# Indian Child Welfare Act Facts & Fiction

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NATIONAL COUNCIL OF  
JUVENILE AND FAMILY COURT JUDGES

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**The National Council of Juvenile and Family Court Judges®** (NCJFCJ), headquartered on the University of Nevada campus in Reno since 1969, provides cutting-edge training, wide-ranging technical assistance, and research to help the nation’s juvenile and family courts, judges, and staff in their important work. Since its founding in 1937 by a group of judges dedicated to improving the effectiveness of the nation’s juvenile courts, the NCJFCJ has pursued a mission to improve courts and system practice and to raise awareness of the core issues that touch the lives of many of our nation’s children and families.

This Technical Assistance Bulletin is a publication of the NCJFCJ in collaboration with Casey Family Programs, whose mission is to provide, improve –and ultimately prevent the need for – foster care.

NCJFCJ staff would like to recognize Craig Dorsay, consultant with the National Resource Center on Legal and Judicial Issues and the American Bar Association, for lending his experience in representing Indian tribes, parents, and children and his knowledge in training professionals on the Indian Child Welfare Act to this document.

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The Indian Child Welfare Act (ICWA) became Federal law in 1978. Congress was very clear in its intent when enacting this important protection for Indian children, families, and federally recognized tribes: "...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;...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."<sup>1</sup> The history of forced removal of Indian people from their land and separation of children and families as part of government policy created the need for strong and directive legislation. ICWA is such legislation; however, it has not been fully implemented by state courts. The National Council of Juvenile and Family Court Judges (NCJFCJ), together with other national partners, has developed tools and strategies for judges to achieve full compliance with ICWA. In addition to this publication, the NCJFCJ has developed *Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*, an ICWA Implementation Discussion Guide and Assessment Toolkit, and publications encouraging collaboration among state courts and tribal courts in order to improve outcomes for children, families, and tribal communities.

The following resource was developed as a tool for state court judges and court professionals involved in dependency hearings. It may also be useful when preparing for hearings. The Tribal Judicial Leadership Group, coordinated by the NCJFCJ and Casey Family Programs, and comprised of tribal and state court judges, identified the need to dispel common misconceptions and misunderstandings around ICWA. Included below are common misunderstandings, facts, recommended practices, and statutory references surrounding application, notice, membership, intervention, transfer, active efforts, best interests, qualified expert witnesses, and placement. This structure is meant to allow users to jump to issues of particular concern in their jurisdictions, but can also be reviewed as a whole. The misconceptions listed below do not reflect the opinions of the author, the NCJFCJ, or Casey Family Programs, but were developed from years of experience working with state courts to comply with ICWA and are intended to confront misconceptions in order to improve compliance with the Act. Judges and other professionals are encouraged to consult state and federal case law to further their understanding of ICWA's requirements.

## ISSUE

Many times questions arise whether ICWA applies in a particular case because the facts and law can vary so much. Questions about the Indian status of the child and/or family, the involvement of the tribe, what proceedings are covered or excluded under the Act, and what the intent of Congress was with regard to specific language can all make determination of whether the Act applies in a specific case challenging.

## COMMON MISCONCEPTIONS

ICWA does not apply...

- Unless the tribe intervenes.
- In voluntary proceedings.
- In custody proceedings between unwed parents or where a relative or non-relative is seeking custody of an Indian child.

## FACTS AND SUMMARY OF LAW

- Tribal intervention is not necessary to trigger ICWA. Only two basic facts are necessary for a case to come under the law 1) the child who is the subject of a child custody proceeding is an “Indian child” as defined by ICWA, and 2) the proceeding in question is a “child custody proceeding” as defined by ICWA. Statutory definitions are included on the following page.

- ICWA does apply in voluntary proceedings. While some case law says notice to the tribe is not necessary in a voluntary proceeding, tribes still have the right to intervene at certain points in the case. Even in voluntary proceedings the tribe’s interests remain.

Judicial exceptions to coverage of ICWA are not favored and have been discouraged in state case law.

ICWA covers a broad range of child custody proceedings,

including proceedings involving unwed parents, relatives, and non-relatives. While ICWA only expressly excludes an award of custody to one parent in a divorce proceeding, case law also excludes custody proceedings between unwed parents. ICWA does apply if a relative or non-relative seeks custody of an Indian child.

## RECOMMENDED PRACTICES

It is best to treat a case as an ICWA proceeding whenever it is suspected that an Indian child as defined by ICWA is involved. This practice avoids revisiting decisions and determinations months down the road if it is determined to be an ICWA

proceeding because revisiting placement or jurisdiction decisions may impact the best interests of the Indian child and delay permanency. Judges should conduct a thorough initial hearing; explaining ICWA and reasons for asking about Native heritage, and engaging with parents directly regarding their heritage.

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**Alert:** In *Adoptive Couple v. Baby Girl*, 570 U.S. \_\_\_\_, 133 S.Ct. 2552, 2013 WL 3184627 (June 25, 2013) (“Baby Girl Veronica”), the U.S. Supreme Court held that §§ 1912(d), 1912(e), and 1912(f), do not apply to an unwed Indian father who has not previously had physical or legal custody of his Indian child, or who has not had visitation or provided child support.

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## STATUTORY REFERENCES

### § 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.

### § 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 for 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) “Pre-adoptive 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 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.

### **Citations related to findings in Adoptive Couple v. Baby Girl**

#### **25 USC § 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.

## ISSUE

It is not always easy for the court to determine when and to whom notice should be given in a potential ICWA proceeding, and whether notice may need to be repeated during different phases of an ICWA state court proceeding.

## COMMON MISCONCEPTIONS

- Giving notice is not required in voluntary proceedings.
- Parents have a right to determine whether or not to notify their own tribe.
- A child must be an enrolled member for notice requirements to be triggered.
- Notification is required only at the beginning of the case.
- Tribes are difficult to notify because it is confusing to locate the right person(s) to give notice to and even when notice is given, tribes tend not to respond or intervene.
- Rather than give notice to the actual tribe, you can notify the Bureau of Indian Affairs (BIA).

## FACTS AND SUMMARY OF LAW

- ICWA expressly requires notice only in involuntary proceedings but many provisions of ICWA that apply to tribes cannot be invoked if the tribe does not get notice of an ICWA proceeding. A number of states have implemented ICWA laws that expressly require notice in ICWA voluntary proceedings.
- Parental preference regarding notice does not determine whether the tribe receives notice for an ICWA proceeding, whether involuntary or voluntary.
- A child must only be eligible for enrollment and be the biological child of a member of an Indian tribe. Eligibility for enrollment differs by tribe and can only be determined by the tribe. A lack of response from a Tribe is not proof of non-eligibility.
- If notice is not provided to the tribe at the beginning of a case and the tribe is later identified, the tribe must be notified as soon as possible thereafter.
- There are many tools available to identify tribes and to locate the correct address or contact information to contact a tribe. The BIA publishes a list of ICWA Federally Designated Agents. This list can be found online on the BIA website. Tribes' ability to respond and participate actively in a case varies with each tribe's resources and budget, but each tribe has the right to notice and the right to participate.

- Where the identity or location of the parent, Indian custodian, or the Tribe cannot be determined, giving notice to the BIA is required.

## RECOMMENDED PRACTICES

Tribes should be given notice as soon as there is information that a child may be Indian. Judges should make appropriate findings and child welfare agencies should proceed accordingly if there is reason to believe a child may fall under the provisions of the law or if ICWA cannot be definitively ruled out.

Notice should be sent by registered mail to the Tribal Chairperson or ICWA representative and contact should be initiated through other avenues of communication such as email and telephone, in conjunction with registered mail, to facilitate response.

Use the internet, contact the BIA or State Indian Affairs Office to find tribal addresses and contact information.

Notice is required to be provided to the tribe, parents, and Indian custodian in all ICWA proceedings.

## STATUTORY REFERENCES

### § 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 rights 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.

## ISSUE

Membership and eligibility for membership in an Indian tribe can be a complicated issue because every tribe has different membership requirements, especially for a child who may be eligible for membership in more than one tribe. While tribes have exclusive authority to determine membership, in cases where children may be members of more than one tribe the court may have to make a determination as to which tribe is the Indian child's tribe. This decision affects all parts of an ICWA proceeding, including which tribe will participate in a case and where the child may be placed.

## COMMON MISCONCEPTIONS

- ICWA does not apply to a child who is not an enrolled member of a tribe.
- Tribes try to get as many members as possible, even children who do not really qualify for membership.
- Indian children can be members of more than one tribe at a time.

## FACTS AND SUMMARY OF LAW

- A child who is eligible for membership in a tribe is covered by ICWA so long as one biological parent is a member of a tribe.
- Tribes have exclusive authority to determine their own membership. Membership is a political classification under the United States Constitution, not a racial one, and special treatment of tribes and Indians under federal law is justified. Tribes tend to be quite strict about who they allow to become tribal members and applying for tribal membership can be a difficult process.
- Membership criteria and qualifications vary between tribes. Most tribal constitutions as well as some federal requirements prohibit a person from being a member of more than one tribe at the same time even though they may be eligible for membership in more than one tribe, and it is eligibility that triggers ICWA.

## RECOMMENDED PRACTICES

A Tribe should be immediately contacted anytime there is a question about whether an Indian child is involved in a child custody proceeding to seek the tribe's determination of membership eligibility and to provide as much relevant information as possible so the tribe can make an accurate and timely determination of the membership eligibility of the child.

The child welfare agency should assist the child in becoming a member of his or her tribe. Some state ICWA laws require the state agency to assist an Indian family in becoming members of

a tribe.

If a child is a member of or eligible for membership in more than one tribe, the court may be required to determine which tribe "has the more significant contact" for purposes of notice and intervention. Recommended practice would be to give notice to all tribes that may have an interest in the child.

## STATUTORY REFERENCES

### § 1912 Pending court proceedings

(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;...

## ISSUE

ICWA gives Indian tribes a right to participate in state court child custody proceedings involving tribal children that does not exist normally under state law. The details of tribal intervention in an ICWA proceeding can be complicated.

## COMMON MISCONCEPTIONS

- If a tribe does not intervene in an ICWA proceeding, ICWA does not apply.
- If a tribe does not immediately intervene after receiving notice, the tribe loses its right to intervene later.
- If a parent objects, the tribe cannot intervene in an ICWA proceeding.

## FACTS AND SUMMARY OF LAW

- ICWA applies even if a tribe chooses not to intervene.
- Tribes have the right to intervene at any time in the proceeding including intervening for the first time on appeal.
- Parents cannot object to tribal participation in a case; the tribe's right to intervene exists independently of parental rights.

## RECOMMENDED PRACTICES

Developing and maintaining relationships with local tribes and with tribal enrollment offices for those tribes whose members appear in court can help improve the timeliness of responses to notice and intervention.

Judges should ask at every hearing what the child welfare agency has done to involve the tribe and should expect that the agency is applying the active efforts standard to ICWA cases, even when the tribe has not intervened.

The court should allow for tribal participation by telephone or video conferencing, and to the extent possible, schedule court hearings to facilitate the attendance of tribal participants. State courts should also allow a tribal representative to present the tribe's case to the court even if they are not an attorney and should allow tribal attorneys to participate even if they are not licensed in that particular state.

Judges should fully explain to parents, in easily understandable language, the requirements of ICWA and the tribe's rights to intervene.

## STATUTORY REFERENCES

### § 1911(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.

## ISSUE

Transfer of jurisdiction of a state child custody proceeding to tribal court under ICWA is subject to more litigation than any other provision of ICWA. Terms in ICWA for determination by a state court as to whether transfer should be allowed or can be denied are not well defined, and consideration of whether to grant a motion to transfer jurisdiction to tribal court is dependent upon the weighing of a complicated list of different factors.

## COMMON MISCONCEPTIONS

- The state court can deny transfer of jurisdiction to a tribal court under the “good cause” language of ICWA for any reason, including inconvenience to state workers.
- Parents and tribes wait until the last minute to petition to transfer, until they know they will lose if they stay in state court.
- Transfer of jurisdiction of an ICWA proceeding to tribal court must always be denied if a motion to transfer is not made immediately after the tribe received notice and intervened.

## FACTS AND SUMMARY OF LAW

- ICWA presumes that transfer of jurisdiction is in the best interests of the child and tribe, and requires good grounds before such a motion can be denied, unless a parent or child objects. Case law has also allowed for children to object. Reasons that might constitute good cause are set out in the 1979 BIA Guidelines. The Guidelines give broad examples that may or may not be appropriate in a particular case. The good cause language of § 1911(b) is designed to give the state court flexibility to meet the best interests of the Indian child, for reasons consistent with the intent of ICWA.
- Tribes may decide to leave an ICWA case in state court when the case management goal is to reunite the family. Placement of the Indian child is always of paramount concern to the tribe and parents. Once the decision to terminate parental rights has been made the tribe or parents may choose to request transfer at that point to ensure appropriate placement of the child.
- Tribes are not required to file a motion to transfer within a given time frame.

## RECOMMENDED PRACTICES

Parties should be asked about transfer of jurisdiction as soon as practicable after initiation of an ICWA proceeding.

The court should revisit the issue of transfer of jurisdiction when permanent placement of an Indian child is being considered.

Judges should first consider the unique facts of each case before them before relying on the BIA Guidelines for making good cause findings related to transfer.

The state court should not cite best interests of the child to substitute its judgment as to what is the preferred outcome for the child or that of the tribe in a transfer of jurisdiction motion or in any other hearing.

The court and state social services agency should not impose the dominant culture’s notions of what constitutes a normal family and home situation for the adequate family conditions on the reservation. The Statute requires consideration of the prevailing standard of the Indian Community.

## STATUTORY REFERENCES

### (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.

## ISSUE

ICWA imposes a standard of active efforts to prevent removal and placement of an Indian child that is not specifically defined and that imposes a higher burden of proof and success on state agencies in cases where ICWA standard applies. Congress did not consider the interaction of ICWA and the Adoption and Safe Families Act when it enacted the latter law in 1997.

## COMMON MISCONCEPTIONS

- If aggravated circumstances exist under state law, the State does not have to provide remedial and rehabilitative services to the Indian family.
- Whatever is required under state and federal law meets the active efforts requirement under ICWA. The family is responsible on their own for complying with the service requirements of the case plan.
- Tribes are too under-resourced and do not have anything to offer with regard to providing services to the family.
- No services have to be provided if a parent is in prison.

## FACTS AND SUMMARY OF LAW

- ICWA active efforts standard exists independently of standards enacted pursuant to ASFA that allow remedial efforts to be terminated when aggravated circumstances exist, and case law consistently confirms the requirement to provide remedial efforts under ICWA even when the ASFA standard has been met.
- The remedial and rehabilitative services requirement of § 1912(d) requires something more than is required under general state law. The social services agency must actively assist the Indian family in achieving the case service plan objectives. If remedial and rehabilitative services are offered and the parent refuses to engage in services, the active efforts requirement has been met.
- Tribes can be valuable partners in providing services in general as well as culturally appropriate services that will meet the active efforts standard even if they have few resources.
- Active efforts for a parent in prison are judged by the services available in that environment.

## RECOMMENDED PRACTICES

The State and Tribal social services workers should jointly develop a case plan designed to meet the needs of the Indian family to achieve reunification.

Tribal services should be an integral component of any such case plan.

Social services workers should actively assist family members in accessing and completing recommended services. Service provision designed to address the specific needs of the particular family and active participation in assisting the family in accessing and participating in those services will allow permanency to be achieved more quickly for Indian children, whether that permanency is reunification or an alternative permanent placement.

Judges, as leaders, can advocate for services necessary to meet the needs of parents and children involved in the child welfare system. Judges should partner with community members, tribal leaders and other judges to advocate on behalf of children and families.

## STATUTORY REFERENCES

### § 1912(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.

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**Alert:** The Supreme Court in *Baby Girl Veronica* held that § 1912(d) ICWA does not apply to a parent who has not had prior legal or physical custody of an Indian child, because § 1912(d) applies only in cases where the “breakup” of the Indian family would be precipitated by termination of the parent’s rights, and in the case of a parent without prior legal or physical custody, there is no Indian family relationship that would be discontinued. *Baby Girl Veronica* involved a voluntary adoption, and **this holding likely does not apply in an involuntary ICWA child custody proceeding.**

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## ISSUE

ICWA imposes a statutory standard for the best interests of an Indian child that may be somewhat different from the standard that a state court normally applies in juvenile proceedings. In particular, ICWA is intended to prohibit application of a best interests standard that is detrimental to tribal family rearing practices, extended family relationships, and tribal traditional and cultural practices.

## COMMON MISCONCEPTIONS

- ICWA requires state courts to apply its requirements even when they are not in the best interests of the Indian child.
- ICWA applies a kind of generalized notion of protecting Indian culture and identity.
- Only biological family relationships need to be considered when applying ICWA.

## FACTS AND SUMMARY OF LAW

- Case law holds that ICWA as a whole is in the best interests of the Indian child.
- What is thought of generally as the “best interests” of a child is very subjective and is culturally linked to the dominant culture. In actuality, family units are extremely diverse in character, and there are many satisfactory ways to address the best interests of a child. In enacting ICWA, Congress determined that retaining an Indian child in his or her culture or placing an Indian child in a culturally appropriate placement best serves the needs of that Indian child.
- ICWA expressly states that the “unique values of Indian culture” should be considered in hearings regarding the placement of Indian children. In most tribal communities, the extended family and the community share child-rearing responsibilities. These interests are also protected under ICWA.

## RECOMMENDED PRACTICES

It is in the best interests of the Indian child to be able to maintain or develop a connection to family members and the tribe. Judges and other system professionals can keep, foster, and encourage a child’s connection to and involvement with their Indian and tribal culture. Knowledge of tribal culture and family connection serves the best interests of the Indian child and is most likely to lead to a healthy, well-rounded Indian adult.

Courts should identify and include Qualified Expert Witnesses or tribal experts in hearings to ensure they are incorporating the unique values of Indian culture in their decisions.

## STATUTORY REFERENCES

### § 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.

## ISSUE

ICWA imposes a requirement of expert witness testimony in ICWA cases to avoid removal or placement of an Indian child based on a misunderstanding of tribal culture or family relationships and child rearing practices. It may be difficult to identify qualified expert witnesses. This requirement applies even when the case seems, upon initial review, to be based upon non-cultural factors.

## COMMON MISCONCEPTIONS

- Expert witnesses as set out in ICWA are required only in a case where cultural factors affect the family's fitness to parent.
- The expert witness provision of ICWA can be used to avoid responsibility for the actions of the parents.

## FACTS AND SUMMARY OF LAW

- ICWA requires an expert witness to testify to whether the parent's conduct has caused emotional or physical harm to the Indian child, and whether it is likely that the parent can be persuaded to change or remedy the conduct that led to removal of the Indian child from the parent's custody. An expert witness is always required for cases involving foster care placement or termination of parental rights.
- In ICWA cases, an expert with knowledge of tribal cultural and family rearing practices will be helpful in explaining the family's conduct and in identifying appropriate culturally relevant services that will assist in returning the child to the family.

## RECOMMENDED PRACTICES

Requiring the involvement of a qualified expert at an early stage of any ICWA proceeding will help identify from the Tribe's perspective the services, including culturally relevant services, that will be most likely to address the conditions that lead to removal of the child, and lead to successful reunification of the family.

The qualifications for a culturally knowledgeable expert witness will often be broader and less technical than that required for expert witnesses in other cases.

The use of state social services workers or state employees as expert witnesses to meet ICWA requirements generally should be avoided.

Tribal community members may be able to serve as qualified expert witnesses. This could include a tribal elder or community leader.

Regardless of specific tribal affiliation, tribal expert witnesses may have a better understanding of tribal cultural and family rearing practices.

State courts should develop lists of Qualified Expert Witnesses with knowledge of tribes in their area and for tribes whose children may appear frequently that can be called upon to appear at proceedings and contribute to the courts' understanding of a family's circumstances or tribal cultural tradition.

## STATUTORY REFERENCES

### § 1912(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.

### § 1912(f) Parental rights termination orders; 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.

## ISSUE

Placement of an Indian child may be the tribe's highest interest in an ICWA case. In many cases the tribe may defer to the state primary responsibility to try to reunite a family while still remaining involved. But when reunification does not work, the Tribe has primary interest in continuing or developing its relationship to a child or children, and ensuring placement of tribal children within the extended family and/or tribal community. Normal practice and procedure in state courts, including the general placement of Indian children in non-Indian foster or adoptive homes, is in conflict with the placement requirements of ICWA.

## COMMON MISCONCEPTIONS

- A parental preference as to placement of an Indian child is controlling and overrides the preference of the Tribe and relatives as to placement of that Indian child.
- ICWA does not apply and the tribe does not need to be notified if the parent wants to remain anonymous in a voluntary placement.
- The placement preferences in ICWA trump a tribe's placement preferences.
- Bonding of an Indian child with non-Indian caretakers is good cause not to follow ICWA placement preferences.
- A general placement search conducted by the agency will suffice in ICWA cases.

## FACTS AND SUMMARY OF LAW

- Parental preference in placement of an Indian child is a factor to be considered "where appropriate" but should not automatically override the right of the Indian child to be placed pursuant to ICWA.
- The tribe's right to participate in an ICWA proceeding cannot be affected by the wishes of the parent for anonymity.
- If the tribe's preferences are different from the ICWA preferences, the court must follow the tribe's preferences.
- In most cases, bonding cannot be used as grounds to avoid the placement preferences. There may be a few cases with extraordinary circumstances that could be considered, along with other factors, in determining whether good cause to avoid the placement preferences exists.
- The placement provision is the most important section of the Act. ICWA sets out specific preferences for placement

of an Indian child which must be followed in the absence of good cause to the contrary. The burden of proof is on the party opposing application of the placement preferences. A comprehensive and diligent search of placements within the placement preference order must be conducted. A home within the placement preferences must be found unsuitable before an alternative placement can be considered.

## RECOMMENDED PRACTICES

State agencies should be encouraged from the earliest moment to look diligently for placements that comply with the placement preferences of ICWA and to involve the relevant tribe and family in placement search efforts as much as possible. Agencies should also find out if the tribe's preferences are different from the ICWA preferences.

Good cause should be narrowly applied to limit avoidance of ICWA's placement preferences.

Placement in a non-preferential home should not occur just because the non-preferred home that is available might offer more opportunities for an Indian child.

Parental preference for a particular placement should not be used without good reason to avoid the placement preferences of ICWA.

## STATUTORY REFERENCES

### § 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.

- (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.

## ISSUE

Terminating parental rights is a last resort and the ultimate consequence in child welfare cases. Due to the parents' and tribe's rights in ICWA cases, termination of parental rights may not always be an option. The concept of family is broader in tribal communities, which can provide for a greater array of options when identifying a permanent home for an Indian child.

## COMMON MISCONCEPTIONS

- Tribes never support termination of parental rights.
- State law standards to terminate parental rights are sufficient in ICWA cases.
- There are exceptions to providing active efforts and remedial services prior to terminating parental rights.

## FACTS AND SUMMARY OF LAW

- Some tribes disapprove of terminating parental rights. They may choose to place the child outside the parent's home with relatives or others under a guardianship or customary adoption without terminating parental rights. Family ties have significant cultural and spiritual meaning in many tribal communities. Severing those ties can harm not only children and parents, but the extended family and the community.
- The standard for termination in ICWA cases is "beyond a reasonable doubt"; a higher standard than that required in non-ICWA cases. State law may require courts to apply both state and ICWA standards in termination proceedings.
- Unlike ASFA, which allows for certain exceptions to the reasonable efforts requirement placed on the child welfare agency, ICWA requires active efforts be provided to parents in all cases in which ICWA applies.

## RECOMMENDED PRACTICES

Some state courts, those in California for example, have begun conducting customary adoptions. At the option of their tribe, children who cannot be returned home are eligible for adoption by and through the laws, traditions, and customs of the child's tribe without requiring termination of parental rights. More information is available at the California Court's website at <http://www.courts.ca.gov/programs-tribal.htm>. State court judges can advocate for this ability in order to provide permanency for Indian children whose parents are no longer able to care for them. In addition, services to support relative guardianship placements or other permanent guardianship arrangements can be useful in ICWA as well as non-ICWA cases, as an alternative to termination of parental rights.

Regardless of specific tribal affiliation, tribal expert witnesses may have a better understanding of tribal cultural and family rearing practices.

State courts should develop lists of Qualified Expert Witnesses with knowledge of tribes in their area and for tribes whose children may appear frequently that can be called upon to appear at proceedings and contribute to the courts' understanding of a family's circumstances or tribal cultural tradition.

## STATUTORY REFERENCES

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

- (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.