

The Indian Child Welfare Act Beyond the Basics

An Overview of the ICWA

Active Efforts

Qualified Expert Witness Testimony

Placement Preferences

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I. INTRODUCTION:

A. Why Does the ICWA Exist?

Congress passed the Indian Child Welfare Act (hereinafter the ICWA) in 1978 to remedy the problem of the inappropriate removal of Indian children from their families and inappropriate placement of Indian children in non - Indian homes. After ten years of hearings on the issue, Congress believed that this problem was largely by the lack of understanding by state courts and administrative bodies about Indian cultural and social norms.

The ICWA affirms existing tribal authority to handle child protection cases (including child abuse, child neglect, and adoption) involving Indian children and to establish a preference for exclusive tribal jurisdiction over these cases.

The ICWA regulates and sets minimum standards for the handling of those cases remaining in state court and in state child social services agencies. It addresses both the removal of Indian children from their homes and cultural environments, and the placement of Indian children in homes that will protect their right to grow up with knowledge and integration of their Indian heritage. The ICWA makes it more difficult to remove an Indian child from his or her family, and imposes procedural and substantive burdens as a matter of federal law on state entities before a child may be placed in foster care or before termination of parental rights can be made.

Finally, the ICWA recognizes the importance of the Indian child's relationship with his/her tribe. It recognizes that the Indian child's tribe has an interest in the Indian child that is distinct from but on a parity with the interests of the parents.

B. Citations and Source Material on the ICWA

1. The ICWA is codified at 25 U.S.C. 1901 to 1963. Exhibit 1.
2. Oregon Law expressly incorporates ICWA into the juvenile code. During the 1992 revision of the Oregon Juvenile Code, the Legislature expressly incorporated the provisions of the ICWA throughout the juvenile code.
3. The Department of Human Services (DHS) has incorporated the ICWA into its administrative rules, OAR 413-070-100 to 413-070-0260. Exhibit 2.
4. JCIP Juvenile Court Dependency Bench Book on Oregon Judicial Department's web page under program.
5. National Indian Child Welfare Association: NICWA provides public policy, research and advocacy; information and training on Indian child welfare; and community development services. NICWA's web page is www.NICWA.org

II. APPLICATION OF THE ACT-- WHEN DOES IT APPLY

The application of the ICWA depends on two factors:

1. The proceeding must be a child custody proceeding as defined by the Act; and
2. The child must be an Indian child as defined by the Act.

A. Child Custody Proceeding

1. Specifically covers foster care placements, termination of parental rights, pre-adoptive placements, and adoption proceedings.
2. Foster care placement includes any action removing an Indian child from his/her parents or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated. 25 U.S.C. § 1903(1)(I).

3. Act excludes certain proceedings: delinquency proceedings, divorce proceedings, and educational placement of Indian children. 25 U.S.C. §1903(1)(I).

B. Indian Child

1. Act sets out three criteria for application of the ICWA to child:
 - a. The child must be unmarried;
 - b. The child must be under 18 years of age; and,
 - c. The child must be a member of an Indian tribe or eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. §1903(4).
2. Child's Relationship to his/her Tribe.

A key component of the ICWA is the recognition that an Indian child has the right to maintain and or develop his or her relationship to the child's tribe and that Indian tribes have an important interest in its children. Thus, the ICWA provides that the Indian child's tribe must be included in any child custody proceedings covered by its provisions.

- a. There are approximately 564 federally recognized Indian tribes and Alaskan Native Villages in the United States, including nine federally recognized Indian tribes in the State of Oregon. Each tribe and village establishes and maintains tribal enrollment records of tribal members and makes determinations regarding an individual's membership in that particular tribe or village. Additionally, individual tribes and villages may be able to assist with expert witnesses required under the provisions of the ICWA.
- b. Location and Telephone Numbers for Indian Tribes
 - 1) The Department of Interior annually publishes a list of federally recognized Indian tribes in the Federal Register and the list is entitled to judicial notice on the status of a particular tribe. The most recent list was published on October 1, 2010. The citation is 75 Fed. Reg. 60810-60814 (October 1, 2010).

- 2) The federal regulations implementing the ICWA provide that Indian tribes may designate an agent other than the tribal chair for service of notice of ICWA proceedings. *25 CFR 23.12*. The most recent list was published by the Bureau of Indian Affairs on May 19, 2010. The citation is 75 Fed. Reg. 28104-28154 (May 19, 2010).

3. Eligibility for Membership or Enrollment

Federal law provides that Indian tribes have authority to determine whether a specific child is a member of that tribe. Each tribe decides its own criteria for membership or enrollment. Tribal determination of membership is conclusive. *In re Junious M.*, 193 Cal. Rptr. 40, 144 Cal. App3d 786 (1983).

- a. Tribe must be consulted as to whether or not child is a member of Tribe or eligible for membership in the Tribe. Generally, a decision by a tribe that a child is eligible for or enrolled as a member of the tribe is not reviewable by state courts.
 - b. If Tribe is unknown, Bureau of Indian Affairs may be able to assist.
 - c. Enrollment is most common but not the only way to determine membership in a tribe. A child may be a member of tribe without being formally enrolled. *Nelson v Hunter*, 132 Or App 361, 364, 888 P2d 124 (1995).
 - d. You cannot tell if someone is a member of an Indian tribe based upon physical appearances. You must ask the questions about whether family is a member of a tribe or have relatives that are tribal members.
 - e. There are limits on an Indian tribe's ability define its membership to include children who otherwise are not eligible for membership in the tribe in order to have the Act apply.
- 1) An example is the ICWA Agreement between the Klamath Tribes and SOSCF. The Klamath Tribes and DHS entered into an ICWA Agreement that

defined Klamath children as follows: any unmarried person who is under age eighteen and is either (a) a member or eligible to be a member of the Klamath Tribe or (b) is the biological child of a person who is a member of or eligible to be a member of the Klamath Tribe.” The Oregon Court of Appeals held that statute authorizing agreements between SCF and tribes did not permit expansion of definition of “Indian children” beyond that set forth in ICWA. *In State ex rel SOSCF v Klamath Tribe*, 170 Or App 106, 11 P3d 701 (2000).

2) In a recent case in the 10th Circuit Court of Appeals, the Court held that purposes of the Indian Child Welfare Act, children with temporary citizenship in the Cherokee were not considered an “Indian child” as that term is defined by the Act. *Nielsen v Ketchum*, No. 09-4129, 09-4129 (10 Cir. April 5, 2011). The Cherokee Nation adopted a Citizenship Act which provided in part that “every newborn child who is a Direct Descendant of an Original Enrollees (Dawes Commission Roles) shall be automatically admitted as a citizen of the Cherokee Nation for a period of 240 days following the birth of the child.”

4. Act does not cover children of Canadian Indians, members of Indian tribes not recognized by federal government, or a child who does not meet criteria for membership in any one tribe.

5. DHS caseworker can facilitate obtaining enrollment paperwork, assist family enrollment paperwork, and submit applications for child within DHS custody.

6. State law and BIA interpretation of the ICWA require the court to inquire if the child in a child custody proceeding is covered by the ICWA. Oregon law requires a court to inquire at hearings whether the child is an Indian child subject to the Act:

Applicability of Indian Child Welfare Act. When a court conducts a hearing, the court shall inquire whether a child is an Indian child subject to the Indian Child Welfare Act. If the court knows or has reason to know that an Indian child is involved, the court shall enter an order requiring the Department of Human Services to

notify the Indian child's tribe of the pending proceedings and of the tribe's right to intervene and shall enter an order that the case be treated as an Indian Child Welfare Act case until such time as the court determines that the case is not an Indian Child Welfare Act case. ORS 419B.878.

See also, State v N.L. 237 Or App 133, 239 P.3d 255 (2010) ("On record at the time of the jurisdictional hearing, the juvenile court should have applied the ICWA to the case. Oregon Court of Appeals concluded that the juvenile court's jurisdictional/dispositional judgment did not meet the requirements of ORS 419B.340(7) and thus, the juvenile court judgment finding children within jurisdiction was reversed and case remanded.)

7. You must have competent evidence of child's enrollment or eligibility for enrollment. *Quinn v Walters*, 320 Or 233 (1994).
 - a. Oregon Evidence Code provides for self-authentication of documents with official seals of federally recognized Indian tribal governments or political subdivision, department, officer or agency thereof, and a signature of attestation or execution. *OEC 902(11)(a)*.
 - b. Oral testimony of person with knowledge of the membership requirements of an Indian tribe is sufficient evidence to prove that a child is eligible for membership in an Indian tribe. *State ex rel v Tucker*, 76 Or App 546, 655 P2d 208 (1985), *rev. denied*, 300 Or 605 (1986).

C. ICWA expands persons who have standing in child custody proceedings involving Indian children.

1. Extended Family within Indian cultures share equal responsibility for raising an Indian child. ICWA recognizes this fact by providing standing to Indian extended family party status in dependency proceedings, 25 U.S.C. 1911(c) and creating placement preferences to family members when an Indian child is removed from the physical custody of his/her parent.
2. Indian custodians. ICWA provides that Indian custodian have equal standing of a parent in situations where Indian people who are caretakers of Indian child according to tribal custom or law. "Indian custodian" is defined as "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).

3. Indian Parents: Definition includes both Indian and non Indian biological parent. It also:
 - a. Defines the parent of an Indian child to include any unwed father who has acknowledged or established paternity to the child.
 - b. Acknowledgment or establishment of paternity can be under tribal or state law. If under tribal law, the determination doesn't necessarily need to conform with state procedural requirements.
 - c. Definition of parent includes an Indian adoptive parent of a child but not a non-Indian adoptive parent.

IV. JURISDICTION: WHICH COURT HAS IT?

A. Exclusive Jurisdiction:

ICWA provides that Indian tribes have exclusive jurisdiction over child custody proceedings involving Indian children who reside or are domiciled on an Indian reservation. 25 U.S.C. 1911(a); *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30, 104 L. Ed. 2d 29, 109 S. Ct. 1597 (1989).

1. The Ninth Circuit Court of Appeals clarified the application of this provision of the ICWA in states subject to Public Law 280. In *Doe v Mann*, 415 F3d 1038 (2005), the court held that in states subject to Public Law 280, states and tribes have concurrent jurisdiction over dependency cases arising on Indian reservations.

2. Public Law 280 is a federal statute which granted specific states jurisdiction over criminal and some civil matters arising in Indian country. Oregon is one of the states which was granted such jurisdiction. There are three Indian tribes which are not subject to PL 280 in Oregon: the Confederated Tribes of Warm Springs, Confederated Tribes of Umatilla Indians and the Burns Paiute Tribe. Thus, cases involving Indian children residing on one of these 3 tribes'

reservations would be subject to the exclusive jurisdiction of Tribal Court.

B. Concurrent Jurisdiction

1. Tribes and States have concurrent jurisdiction over an Indian child domiciled off reservation. ICWA codifies preference that when possible, child custody proceedings involving Indian children should be heard in tribal courts. 25 U.S.C. 1911(b). *Holyfield*, 104 L.Ed2d at p. 39.

2. Section 1911(b) provides that upon petition of the Tribe, parents, or child, a child custody proceeding involving an Indian child in state court shall be transferred to the appropriate tribal court unless:

- a. Either parent objects to transfer;
 - 1) Courts have used forum non conveniens doctrine of state law and held that case would be transferred over parents objections when the transfer is in the best interest of the child.
- b. Good Cause to the contrary exists. The BIA guidelines set out basis for good cause not to transfer:
 - 1) That evidence cannot be presented in tribal court because of the burden on the parties to the case;
 - 2) The proceeding is at an advanced stage when the petition to transfer is made;
 - 3) The child is over 5 years of age and has never had any contact with an Indian community; or,
 - 4) That the tribe to which transfer is contemplated does not have an operating tribal court. The socio-economic adequacy of the tribal social services or judicial systems are not valid reasons not to transfer.
- c. Burden of proof is on the party objecting to the transfer.

- d. The Oregon Court of Appeals upheld a trial court's decision that there was good cause to deny the Tribe's motion to transfer the case to tribal court because of the Tribe's motion was filed during the termination of parental rights trial in April 2000 and the Tribe had been participating the case since October 1998. *State ex rel DHS v. Lucas*, 177 Or App 318, 33 P3d 1001 (2001). The Court of Appeals noted the BIA guidelines and commentary supported denying motions to transfers when the motion was filed at an advanced stage of the proceeding. In its opinion, the Court specifically cited the commentary accompanying the guidelines on the disruptive effect on the adjudicative process. 177 Or App at 324.

C. Emergency Removal: 25 U.S.C. §1922

1. Emergency removal of an Indian child by a State court is allowed under the ICWA only when necessary to prevent" imminent physical damage or harm to the child." 25 U.S.C. §1922. See, OAR 413-070-0150. If removal or placement is based upon emotional or psychological harm to the Indian child, custody of Indian child must be returned to Indian parent or custodian until jurisdiction can be established in compliance with requirements of the ICWA.

- a. Oregon law allows a child to be removed on broader grounds, including danger of emotional harm and danger posed to others by the child's behavior. An Indian child who is only in danger of emotional harm may not be removed until the provisions of the Indian Child Welfare Act are met. An Indian child who poses a danger to others may not, on that ground alone, be placed in foster care.
- b. Danger of emotional harm can also be danger of physical harm i.e. a suicidal child.

2. Emergency removal or placement of an Indian child must be terminated when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. §1922.

- a. Court or state authorities determine that return of the child is appropriate; or

b. Child custody proceeding is initiated and the court complies with the provisions of the Indian Child Welfare Act under ORS 419B.185 (1)(a)-(c):

or,

c. Transfer of the child to the jurisdiction of the appropriate Indian tribe. *Id.*

3. Emergency Custody must not continue for more than 90 days. BIA Guidelines, B.7.(d)., 44 Fed. Reg. 67,589-67,590.

4. Applies to Indian child domiciled on reservation but who are temporarily located off reservation as well as Indian child domiciled off reservation. *State ex rel Juv. Dept. v. Charles*, 70 Or App. 10, 688 P.2d 1354, *rev. denied*, 312 Or 150 (1984).

5. Notice requirements of the ICWA are not applicable to emergency removal. *Id.*

V. ADJUDICATION OF INVOLUNTARY DEPENDENCY PROCEEDINGS UNDER THE ICWA

Substantive and Procedural Requirements

A. Notice:

Notice of child custody proceeding involving an Indian child must be given to the Indian child's parents or Indian custodian, and to the Indian child's tribe.

1. ICWA provides that proceeding cannot occur until at least ten days after receipt of notice has occurred. 25 U.S.C. §1912

2. Party may request additional twenty days. *Id.*

3. Notice must include the following information:

a. Party's right to intervene;

b. The party's right to appointment of counsel; and,

c. The party's right to request mandatory extension of time.

4. Failure to provide notice can lead to invalidation of proceeding.
25 U.S.C. §1914.

B. ICWA expands who is party to proceeding involving Indian children.

1. The Indian child's tribe and the Indian custodian, if any, have an absolute right to intervene at "any point" in a state court proceeding under the Act. 25 USC 1911(c). This right to intervene includes the right to intervene at the appellate level even though the tribe or Indian custodian had not intervened at the trial court.
2. An Indian tribe is not required to be represented by an attorney in order to intervene and participate in the proceedings. *State ex rel. Lane County Juvenile Department v. Shuey*, 199 Or App 185, 850 P2d 378(1993). The Court of Appeals held that Indian Child Welfare Act (ICWA) preempted state statutes requiring groups and associations to be represented by attorney when applied to Indian tribe's attempt to intervene in child custody proceeding under ICWA.

C. Burden of Proof

ICWA requires State or party who filed petition to demonstrate:

1. Active efforts have been made to provide remedial and rehabilitative efforts to the family and that these efforts will not lead to reunification of the family; and,
2. Continued care and custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child.
 - a. In termination of parental rights cases, the standard of proof for the attempts to provide remedial and rehabilitative services is beyond a reasonable doubt. *In the Matter of Appeal of Pima Juvenile County Juvenile Action*, 635 P.2d 187 (Ariz. Ct App 1981) cert denied, 455 U.S. 1007 (1982); *State Department of Social Services v. Morgan*, 364 N.W. 2d 754, 758 (Mich. Ct. App. 1985).
 - b. In foster care placements, the standard of proof for the attempts to provide remedial and rehabilitative services is clear and convincing evidence.

D. ICWA Requires Showing of Active Efforts to Prevent Removal of Indian child.

1. Indian Child Welfare Act requires active efforts not reasonable efforts prior to removing a child from his/her home.
 - a. Section 1912 (d) of the Act requires that prior to removing an Indian child from their home, the party seeking such removal must show 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 been unsuccessful. See also, OAR 413-070-0160 (3).
 - b. Applies to both foster care placements and termination of parental rights.
2. State law requires that to meet the burden of proof under this section, the state must explicitly show that efforts have not only been made but that these efforts have been unsuccessful. ORS 419B.340(1) and ORS 419B.500.

The showing that these services have been made but proven unsuccessful prior to the removal of the child can be shown at the hearing on the merits of the foster care placement or parental rights. *State ex rel Juvenile Dept. v Charles*, 688 P 2d 1354, n. 107 (Ore. Ct. App 1984).

3. Meaning of Active Efforts

The term active implies something more than merely identifying the needs of the family. It contemplates that the needs are identified and then real attempts are made to provide needed services to assist the family in maintaining the child in the home.

- a. Distinguish term is "active" from state laws which typically require public or private agencies to resort to remedial measures prior to initiating placement or termination proceedings.
- b. ICWA imposes additional requirement to cases involving Indian children.

ICWA language is clear that this requirement must be met before the court can order placement of child outside of his/her parent's or Indian custodian's home.

c. Bureau of Indian Affairs Guidelines

Guidelines state that any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his/her parents or Indian custodians. *44 Fed Reg 67592, Efforts to Alleviate Need to Remove Child From Parents or Indian Custodians. D.2.*

- 1) The Guidelines also provides that the Active efforts shall take into account the prevailing social and cultural conditions and the way of life of the Indian child's tribe to help the family successfully function as a home for the child. *Id.*
- 2) Involve and use the available resources of the extended family, the tribe, Indian social services agencies and individual Indian care givers. *Id.*

Individual care givers means medicine men other members of the child's tribe who may have developed special skills that can be used to help the child's family succeed. *Id.*

d. Case law interpreting the active efforts requirement of Section 1912 (d).

- 1) The Oregon Court of Appeals in its decision in *State ex rel Juvenile Department v Charles*, 688 P2d 1354 (Ore. Ct. App 1984) provides a good analysis of Section 1912(d). In this case, the state pointed to testimony peppered throughout the hearing that indicated that some remedial efforts

were made which were arguably unsuccessful and argued that this complied with Section 1912(d). The Oregon Court of Appeals rejected this argument and held that "the diffuse evidence to which the state points does not amount to the affirmative showing contemplated by Congress when it enacted Section 1912(d). An explicit showing of remedial and rehabilitative efforts and the success of such efforts must be made to meet the burden of section 1912(d)." 688 P.2d at 1359.

Court addressed the timing of the showing of success or failure of remedial and rehabilitative efforts and found that the words used by the Act "to effect" refer to a legal proceeding and that therefore the showing required by Section 1912 (d) need only be made in a hearing on the merits of foster care placement or parental rights termination. *Id.* at 1358.

Court found that the intent of Section 1912 (d) was to fulfill the goal of preventing the break-up of Indian families by mandating application remedial and rehabilitative measures designed to prevent the breakup of Indian families. *Id.* at 1358- 1359. And that the language of this section is unequivocal. The state **shall** satisfy the court that..."(Emphasis added).

2) Other Jurisdictions decisions interpreting active efforts:

The Alaska Supreme Court in its decision *A.M. v. Alaska*, 945 P.2d 296, 306 (Alaska 1997) on the definition of active efforts under the ICWA wrote:

" [W]e cited the distinction between "active efforts" and "passive efforts" drawn by Craig J. Dorsay, *The Indian Child Welfare Act and Laws Affecting Indian Juveniles Manual* 157-58 (1984). According to Dorsay, passive efforts entail merely drawing up a reunification plan and requiring the "client" to use "his or her own resources to[] bring [] it to fruition." Dorsay at 157-58. Active efforts, on the other hand, include "tak[ing] the client

through the steps of the plan rather than requiring the plan be performed on its own.” *Id.*

Along this same line, the Maryland Court of Special Appeals in *In re Nicole B and Max B*, 972 A.2d 1194(Md.App. July 2007), in its decision remanding the case to the trial court to consider whether active efforts had been made noted:

“We do not know exactly what additional services the Department could have provided. It may have been able to identify funds to help pay for the “Another Way” methadone treatment, or offer other assistance to Ms. B. to deal with her substance abuse problem. Quite possibly, the “active efforts” standard, under these circumstances, would require the Department to do more than just recommend a program. The “active efforts” standard may also have required that the Department facilitate Ms. B.’s visitations with her children, which she said she could not make because she “was hiding” in her house, possibly due to her panic disorder, by having a social worker accompany her when she leaves her home for the visits. “

Id. at 1207. *See also, In re Welfare of Children of S. W.* 727 N.W.2d 144, 150 (Minn. Ct. App. 2007); *In re A.N.*, 106 P.3d 556, 560 (Mont. 2005)(Ct held the term “active efforts, by definition, implies heightened responsibility compared to passive efforts. Giving the parent a treatment plan and waiting for him to complete it would constitute passive efforts.)

E. Requirement of Testimony from Qualified Expert Witness Prior to Ordering Foster Care or Termination of Parental Rights

1. Foster care placement provision requires that "No foster care placement may be ordered in absence of a determination, supported by clear and convincing evidence, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" 25 U.S.C. §1912 (e). *See also*, ORS 419B.340(7); OAR 413-070-0200(1).
2. Termination of parental rights provision requires: "No termination of parental rights may be ordered in absence of a determination, supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses,

that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. 1912 (f), *See also*, ORS 419B.500. *See also*, OAR 413-070-200(2), and Bureau of Indian Affairs Guidelines 44 Fed. Reg. at 67592.

3. Burden of proof in involuntary proceedings is to show the existence of particular conditions in the home that are likely to result in serious emotional or physical harm to the child.
4. Two questions that are involved in meeting this burden:
 - a. whether it is likely that the conduct of the parent will result in serious emotional or physical harm to the child; and
 - b. if such conduct will cause such harm, whether the parents can be persuaded to modify their conduct. *Id.*
5. Who Has The Burden: Caselaw

In order to meet the standard of proof for foster care placement or termination of parental rights, the moving party needs to present testimony of expert witnesses who possess special knowledge of the social and cultural aspects of Indian life. 25 U.S.C. 1912 (e) and (e); *In re J.R.H.*, 258 N.W.2d 311, 321 (Iowa 1982); *D.A.W. v State*, 699 P.2d 340 (Alaska 1985); *But see, State ex rel Juv. Dept. v Charles*, 688 P.2d 1354, 1359 (Or. Ct. App. 1984)(Ct. noted in dicta that there may be instances in which the state could make such a showing by merely presenting physical evidence or lay testimony)

- a. State will fail to meet its burden of proof where the state presents no expert testimony and any qualified testimony is offered to the contrary. *State ex rel. Juv. Dept. v. Charles*, 688 P.2d at 1360, n. 107.(Reliance on social workers who are unfamiliar with Indian cultures represent the very problem Congress attempted to solve with passage of the ICWA);
- b. Limited exception is in instances in which cultural factors are not implicated. *See, State ex rel. Juvenile Dept. v. Tucker*, 710 P.2d 793 (Or. Ct. App. 1985) (In *Tucker*, the Court of Appeals found that the mother was so severely retarded that her parental rights would have been

terminated under any standards, and therefore there was no need for an expert to testify about cultural implications of termination.)

6. Who is an Expert Witness for Purposes of ICWA?

a. Expert Witness is not defined by the ICWA Legislative history indicates that Congress intended "qualified expert witness" to refer to an expert with particular and significant knowledge of and sensitivity to Indian culture."

1) The intent of the ICWA is to have an expert with particular and significant knowledge of and sensitivity to Indian culture. See, H.R. 1386.

2) "qualified expert witness" means that the witness needs to have expertise beyond the normal social worker qualifications. *H.R. 1386, supra* at 22. *See also, State ex rel Juvenile Dept. v Charles*, 70 Or App 10 (1984)(State failed to met the burden for foster care by presenting testimony of two experienced social workers who testified in support of foster care and who did not possess specialized knowledge of social or cultural aspects of Indian life.) *See also, State ex rel Juvenile Dept. v Woodruff*, 108 Or App 353 (1991).

b. Oregon Administrative Rules provides that to qualify as an expert witness, a witness most likely will be:

1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organizations and child rearing practices;

2) A lay person having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within Indian child's tribe;

3) A professional person having substantial education and experience in the area of his or her specialty along with substantial knowledge of prevailing social and

cultural standards and child rearing practices within Indian child's tribe; OAR 413-070-0200(3) *See also*, 44 Fed. Reg. at 67593.

VI. ICWA ISSUES IN PERMANENCY HEARINGS: FINDINGS REQUIRED

- A. If case plan at the permanency hearing is reunification, the court is required to determine whether DHS has made active effort to make it possible for the ward to safely return home. ORS 419B.476(2)(a).
- B. If the case plan has changed from reunification to some other permanent plan since the last review hearing, the court may determine whether DHS has made active efforts to make it possible for the ward to safely return home. ORS 419B.476(4)(a)
- C. The court is required to follow the placement preferences of the ICWA. 419B.476 (6).
- D. Burden of proof is on the Agency to show that these efforts have been made.

VII. AFSA and ICWA

A. ASFA is Silent on Applicability to Indian Tribes

ASFA applies to each State through federal social services funding allocated to each State. Congress did not take the ICWA into account when it passed ASFA. There is no mention of the ICWA or of Indian tribes in ASFA or in its legislative history. Federal administrative rules implementing AFSA require each State is to develop its own list of what constitutes aggravated circumstances. *See* 65 Federal Register 4053 (Jan. 25, 2000). Under the rules, the State is supposed to consult with Indian tribes in the State in developing its list of aggravated circumstances. *Id.*

B. Potential Conflicts between AFSA and ICWA:

- 1. The Indian Child Welfare Act's requirement of unsuccessful remedial and rehabilitative services to the family is absolute;

there are no exceptions in the ICWA to this requirement. As the Alaska Supreme Court has stated:

“Generally, the state’s duty under the active efforts requirement is not affected by a parent’s motivation or prognosis before remedial efforts have commenced.” *A.A. v. State, DFYS*, 982 P.2d 256 (Alaska 1999).

“Neither incarceration nor doubtful prospects for rehabilitation will relieve the State of its duty under ICWA to make active remedial efforts.” *A.M. v. State*, 891 P.2d 815 (Alaska 1995).

ASFA allows them to be cut off if aggravated circumstances exist.

The Alaska Supreme Court indirectly addressed this conflict in *J.S. v. State*, 50 P.3d 388, 392 (Alaska 2002):

Although this case (an ICWA case) is not governed by ASFA, that act is useful in providing guidance to congressional policy on child welfare issues. It suggests that in situations of adjudicated devastating sexual abuse, such as this one, a person’s fundamental right to parent is not more important than a child’s fundamental right to safety. Therefore, we hold that active efforts to reunify the abusing parent are not required in a situation after there has been a judicial determination that the parent has subjected the child to sexual abuse.”

The South Dakota Supreme Court directly addressed the interaction between ASFA and the ICWA in *People in Interest of J.S.B.*, 691 N.W.2d 611, 617-18

“The primary question here is whether ICWA’s requirement to provide active efforts to prevent the breakup of Indian families is overridden or excused by the provisions of ASFA. . . . In no way does the language of [South Dakota aggravated circumstances statute] relieve DSS of its burden to provide ‘active efforts’ as prescribed by ICWA. In sum, while the presence of ‘aggravated circumstances’ may eliminate the need to provide

‘reasonable efforts’ under [state law], it does not remove DSS’s requirement to provide ‘active efforts’ for reunification under ICWA.

“If it is perhaps open to question whether our Legislature understood the terms ‘reasonable efforts’ and ‘active efforts’ to be interchangeable, we do not think Congress intended that ASFA’s ‘aggravated circumstances’ should undo the State’s burden of providing ‘active efforts’ under ICWA. . . . Because ASFA does not override ICWA, we conclude that the trial court erred in ruling that DSS was relieved of making ‘active efforts’ to reunite J.S.B. with his father.” 691 N.W.2d at 619-20.

C. In states in which courts have addressed this issue, the majority tend to follow the reasoning of the South Dakota Supreme Court. See, e.g. *DHS v Sault Ste. Marie Tribe of Chippewa Indians*, 770 NW2d 853 (2009)(Neither the Adoption and Safe Families Act (ASFA) nor its state law analogues relieve Department of Human Services (DHS) in termination of parental rights proceedings involving Indian child from the requirements of Indian Child Welfare Act (ICWA) to make “active efforts” to provide remedial services and rehabilitative programs, or from the burden of establishing beyond a reasonable doubt “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.” Indian Child Welfare Act of 1978, § 102, 25 U.S.C.A. § 1912; Adoptions and Safe Families Act of 1997, § 471(a)(15)(B), 42 U.S.C.A. § 671(a)(15)(B); M.C.L.A. § 712A.19a(2)(c).)

D. AFSA Priority for Termination of Parental Rights and Adoption as permanent plan is at odds with many Indian tribes who do not support termination of parental rights or adoption.

1. If placement preference of ICWA are followed, Indian children will frequently fall within one of the exceptions to AFSA’s termination of parental rights filing requirements because:

- a. ICWA provides that placement with child’s extended family is a preferred placement. Thus, an Indian child may fall within the “relative exception” to the termination requirement. ORS 419B.498(2)(a)
- b. The higher evidentiary standard applicable to TPRs under ICWA may be a compelling reason not

to file a TPR

- c. The agency's failure to adequately utilize appropriate tribal, extended family and community resources can constitute a failure to provide active efforts as required by the ICWA and thus trigger the "failure to provide services" exception to the TPR. ORS 419B.498(2)(b)(C).

VIII. PLACEMENT

The ICWA sets out placement for Indian child to protect the child's Indian heritage. The placement preferences must be followed absent good cause to contrary. The United States Supreme Court in *Holyfield* noted that Section 1915 of the ICWA was the most important substantive provision imposed on state courts. 104 L.Ed.2d at p. 38.

A. Adoptive Placement, 25 U.S.C. 1915(a). In order of priority:

1. A member of the child's extended family;
 - a. Extended family included Indian and non Indian family members. See 25 U.S.C. 1903(2).
 - b. Note broad definition of extended family
2. Other member's of the Indian child's tribe;
3. Other Indian families.

B. Foster Care Placement, 25 U.S.C. 1915(b), in order of priority.

1. A member of the Indian child's family;
 - a. Oregon has adopted a statutory provision for foster care payments to relatives of Indian children so that Indian children can be placed in Indian homes pursuant to the ICWA.
2. A foster home licensed, approved, or specified by the Indian child's tribe;
 - a. Tribally licensed foster home do not need to meet the licensing or certification standards of state foster homes in order for state courts to place Indian child in such

homes. 40 Op. Atty. Gen. 461 (1979).

3. An Indian foster home licensed or approved by the state; or,
4. An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

C. Modification of Placement Preferences.

1. Child's Indian tribe can establish a different preference. Agency and state court must follow it so long as the placement is the least restrictive setting appropriate to meet the Indian child's needs.
2. Good Cause to the Contrary provision applies. It may include
 - a. The request of the parents or child of sufficient age. This is not a parental veto of placement designated by Tribe.
 - b. The extraordinary needs of the child as established by qualified expert witnesses, meaning extraordinary physical or medical requirements; BIA Guidelines §F3. Commentary, 44 Fed. Reg. 67,594.
 - 1) A child's need for highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live may constitute good cause.
 - 2) The argument that bonding of an Indian child to his/her non-Indian caregiver or that the non-Indian placement affords the Indian child access to better schooling or sporting activities for the most part has been rejected by the courts. *See e.g., Matter of Custody of S.E.G.*, 521 NW2d 357 (Minn. 1994).
 - c. The Oregon Court of Appeals addressed the issue of good cause in a case held (1) review was limited to examining the record to determine if there was any evidence to support the trial court's factual findings; (2) good cause, as used in section of the Act establishing preferences for the adoptive placements of Indian children, is a legal standard and appellate court consequently reviews a trial

court's good cause determination for errors of law; and (3) trial court's finding that the harm to children would be serious and lasting if they were moved from their foster parents' home was legally sufficient to establish good cause to depart from Act's adoptive placement preferences. *DHS v Three Affiliated Tribes of Fort Berthold*, 236 Or App 535, 238 P3d 40 (2010).

- d. The unavailability of homes meeting the preference criteria after a diligent search has been made.

Diligent search at a minimum means contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact nationally known Indian programs with placement resources. *BIA Guidelines, §F.3. Commentary*, 44 Fed. Reg 67,595.

- e. Burden to show good cause is on the party asking the court not to follow the placement preference. *BIA's Guidelines, §F.3(b)*, 44 Fed. Reg. 67,594.
- f. Burden must be met by clear and convincing evidence. *Matter of Custody of S.E.G.*, 507 NW2d at 878, 878 (Minn. App 1993) *rev'd on other grounds*, 521 NW2d 357 (Minn. 1994).

Active Efforts

ICWA – Active Efforts

25 USC § 1912(d): “ Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that **active efforts** have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”

1. What are “active efforts”?

The ICWA does not define the term.

2. What does the case law say?

Dept. of Human Services v. K.C.J., 228 Or App 70, 207 P3d 423 (2009): “[The] ICWA requires DHS to ‘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.’ 25 USC § 1912(d); see also ORS 419B.498(2)(b)(C) (incorporating that standard into Oregon’s juvenile code). ‘**Active efforts**’ entails more than ‘reasonable efforts’ and ‘impose[s] on the agency an obligation greater than simply creating a reunification plan and requiring the client to execute it independently.’”

State ex rel DHS v. R.O.W., 215 Or App 83, 168 P3d 322 (2007): “The type and sufficiency of efforts that the state is required to make and whether the types of actions it requires parents to make are **reasonable** depends on the particular circumstances.”

In re A.N., 325 Mont. 379, 106 P3d 556 (2005): “The term **active efforts**, by definition, implies heightened responsibility compared to passive efforts. Giving the parent a treatment plan and waiting for him to complete it would constitute passive efforts.”

State ex rel Juv. Dept. v. Charles, 70 Or App 10, 688 P2d 1354: “The language of [25 USC § 1912(d)] is unequivocal: The state ‘shall satisfy the court that **active efforts** have been made to provide remedial services.’ (Emphasis

supplied.) *To do that, the state must show that the efforts have been made but have not worked.* In the present case, the state did not make an explicit showing, but it points to testimony peppered throughout the hearing that indicates that some remedial efforts were made which were arguably unsuccessful and asks us to find on de novo review that the showing required by § 1912(d) was made. We cannot conclude that the diffuse evidence to which the state points amounts to the affirmative showing that Congress contemplated when it enacted § 1912(d).”

E.A. v. State Div. of Family and Youth Services, 46 P3d 986 (Alaska 2002): “We have consistently held that ‘[a] parent’s demonstrated lack of willingness to participate in treatment may be considered in determining whether the state has taken **active efforts**.’ Further, where efforts have been made to address a substance abuse problem, the parent has made no effort to change, and parental rights have already been terminated as to one or more children as a result, the superior court may consider the degree of the state’s efforts to prevent the breakup of the entire family in assessing whether that effort was sufficient under ICWA. DFYS has expended substantial efforts over the last decade to prevent the breakup of E.A.’s family, without success. There is no reason to think that either an additional psychological evaluation or an additional seven months of intervention would have prevented this result. Accordingly, we affirm the trial court’s conclusion that **active efforts** were made.”

3. What does “**ACTIVE EFFORTS – Principles and Expectations**” say?

This document, published by the Oregon Judicial Department, was developed through the collaborative efforts of the federally recognized Tribes of Oregon, the Department of Human Services, and the Citizen Review Board, and provides concrete guidelines for use by courts, DHS staff, and CRBs in evaluating whether “active efforts” have been made in juvenile court dependency cases involving Indian children.

***Qualified Expert Witness
Testimony***

ICWA – Qualified Expert Witness Testimony

1. When is qualified expert witness testimony required?

When an “Indian child” is the subject of a juvenile court dependency case, “qualified expert” testimony is required in shelter hearings, jurisdictional proceedings and any other proceedings that could result in the entry of a juvenile court order requiring or authorizing the temporary out-of-home placement of the child and in termination-of-parental-rights proceedings.

State v. N.L., 237 Or App 133, 239 P3d 255 (2010): “In a case involving an Indian child, the court must comply with ICWA” – *i.e.*, 25 USC § 1912(e) and ORS 419B.370(4) – “***before*** finding the child within its jurisdiction.”

State ex rel Juv. Dept. v. Cooke, 88 Or App 176, 744 P2d 596 (1987): “We agree with the Iowa Supreme [that] ‘[a] proceeding to determine whether the children are in need of assistance due to the mother’s unfitness ***could*** result in temporary foster home placement of these Indian children and clearly falls under the ICWA.’ * * * The law simply does not distinguish * * * between regular juvenile court jurisdiction and ICWA jurisdiction. If the ICWA is to play the role which Congress intended, it must be when the merits [of the jurisdictional allegations] are first decided.”

25 USC § 1903 (1)(i) “[***F***oster care placement” * * * shall mean ***any action*** removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.”

25 USC § 1912 (e) “No ***foster care placement*** may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, ***including testimony of qualified expert witnesses***, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

ORS 419B.340(7) “Foster care placement may not be ordered in a proceeding in the absence of a determination, supported by clear and convincing evidence, including the testimony of expert witnesses, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious or serious physical injury to the Indian child.”

25 USC § 1912 (f) "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, **including testimony of qualified expert witnesses**, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

2. Who qualifies as an expert?

(a) **State ex rel Juv. Dept. v. Charles, 70 Or App 10, 16 n 3, 16-17 688 P2d 1354 (1984), rev dismissed 299 Or 341 (1985):**

"The 'Guidelines for State Courts,' 44 Fed.Reg. 67684 (1979), published by the Department of the Interior, identifies an acceptable expert witness as:

"(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.

"(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child raising practices within the Indian child's tribe.

"(iii) A professional person having substantial education and experience in the area of his or her specialty.' 44 Fed.Reg. at 67593, Nov. 26, 1979.

"The 'guidelines' are not rules and expressly state that they are not intended to have legislative effect. 44 Fed.Reg. 67684 (1979). **We decline to adopt the specific recommendations of the 'guidelines,' but we agree with the general proposition that an expert witness within the meaning of that term in 25 U.S.C. § 1912(e) must possess special knowledge of social and cultural aspects of Indian life.**"

* * * * *

Neither the plain language nor the legislative history of the provision clarifies whether proof that continued custody of a child is likely to result in serious emotional or physical damage requires expert testimony. There might well be cases where the state could make such a showing by merely presenting physical evidence or lay testimony. Nonetheless, the legislative history does indicate that Congress intended "**qualified expert witness**" to refer to an expert with particular and significant knowledge of and sensitivity to Indian culture.

"In the present case, two experienced social workers testified for the state in support of foster care placement. **Although the state argues that both witnesses possessed "expertise beyond normal social worker qualification," neither of them possessed specialized knowledge of social or cultural aspects of Indian life.** Although the state's case does not fail solely because it did not present expert testimony within the meaning of the act, we conclude that, in the light of the contrary testimony of the mother's expert, the state failed to carry its burden to show by *clear and convincing evidence* that the continued custody of the child by the mother was likely to result in serious emotional or physical damage to the child. In fact, the trial court's reliance on the testimony of the state's social worker unfamiliar with Indian culture represents the very problem Congress attempted to solve with passage of the ICWA. See n. 3, *supra*. The failure of the state to produce the kind of competent evidence that the ICWA requires necessitates reversal."

(b) **State ex rel Juv. Dept. v. Charles, 106 Or App 637, 641, 810 P2d 393 (1991):**

Before a court may seek foster care placement of an Indian child, it must be satisfied by clear and convincing evidence, **including testimony of a qualified expert on Indian culture**, that continued custody by the parents is likely to result in serious physical or emotional damage to the child. * * *. Mother and the state produced expert witnesses who testified about Indian culture and placement of the child. **Although experts qualified to talk about Indian culture are required under ICWA, * * * the court need not accept an expert's opinion regarding placement.** The expert testimony is intended to provide the court with information regarding the relevant Indian culture. * * *."

(c) **State ex rel Juv. Dept. v. Tucker, 76 Or App 673, 683-84, 710 P2d 793 (1985), rev den 300 Or 605 (1985):**

"We do not question the holding in *Charles* or its statement of a general proposition. However, we conclude that this case presents an exception. As noted in *Charles*, the House Report for the Indian Child Welfare Act identifies the problem sought to be resolved by the '**qualified expert witness**' provision:

"The courts tend to rely on the testimony of social workers who often lack the training and the insights necessary to measure the emotional risk the child is running at home. In a number of cases, the AAIA [Association of American Indian Affairs] has obtained evidence from competent psychiatrists who, after examining the defendants, have been able to

contradict the allegations offered by the social workers. Rejecting the notion that poverty and cultural differences constitute social deprivation and psychological abuse, the association argues that the state must prove that there is actual physical or emotional harm resulting from the acts of the parents.' 70 Or.App. at 16 n. 3, 688 P.2d 1354.

"The problem was identified as cultural bias, and the solution was to require qualified expert witnesses to provide the testimony necessary to prove that continued custody of the parents or Indian custodians is likely to result in serious physical or emotional damage to the child. Consistently with the purpose of the "qualified expert witness" provisions, the "guidelines for state courts," 44 Federal Register 67584 (1979), promulgated by the BIA, state that the persons who are "most likely" to meet the requirements for a qualified expert witness possess special knowledge of the social and cultural aspects of Indian life. 44 Federal Register 67593. That is the general proposition the *Charles* court agreed with.

"However, when cultural bias is clearly not implicated, the necessary proof may be provided by expert witnesses who do not possess special knowledge of Indian life. Here, the issue before the court was whether the continued custody of the child by mother would result in serious emotional harm to the child because of mother's mental illness. There was no dispute about that condition or its severity. Termination or not had nothing to do with mother's fitness to care for the child according to the cultural dictates of her tribe. We hold that the state's experts provided proof beyond a reasonable doubt that the continued custody of the child by mother would inflict severe emotional damage on the child."

(d) *State ex rel CSD v. Campbell*, 122 Or App 371, 374-75, 857 P2d 888, rev den 318 Or App 61 (1993):

"Mother argues that *State ex rel. Juv. Dept. v. Charles*, 70 Or App 10, 688 P.2d 1354 (1984) *rev dismissed* 299 Or. 341, 701 P.2d 1052 (1985), controls. We disagree. In *Charles*, which involved cultural bias, we said that a "**qualified expert witness**" must possess special knowledge of social and cultural aspects of Indian life. 70 Or.App. at 16 n. 3, 688 P.2d 1354.

"In *State ex rel. Juv. Dept. v. Tucker*, *supra*, we clarified and distinguished our holding in *Charles*: "[W]hen cultural bias is clearly not implicated, the necessary proof may be provided by expert witnesses who do not possess special knowledge of Indian life." 76 Or.App. at 683, 710 P.2d 793. The issue in *Charles* was cultural bias. The termination of parental rights in *Tucker*, as in this case, was due to the mother's mental illness. Here, the state has presented evidence beyond a reasonable doubt that mother's emotional illness, mental

deficiency, neurological disorders, and failure to adjust to these conditions, combined to leave her incapable of parenting for extended periods of time. Mother presented no evidence or witnesses to refute those claims or to show that the issue was cultural bias rather than her mental illness. We conclude that continued custody by mother would likely result in serious damage to the child. That ruling is consistent with the evidence and with 25 U.S.C. § 1901, et seq.”

(e) *Dept. of Human Services v. K.C.J., 228 Or App 70, 73-74, 207 P3d 423 (2009):*

“* * * [U]nder ICWA, before a court may terminate parental rights, it must determine ‘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.’ * * * . That determination must be ‘supported by evidence beyond a reasonable doubt, including testimony of **qualified expert witnesses.**’ 25 U.S.C. § 1912(f). Such a witness ‘must possess special knowledge of social and cultural aspects of Indian life.’ *Amador*, 176 Or App at 243, 30 P3d 1223 (quoting *State ex rel. Juv. Dept. v. Charles*, 70 Or App 10, 17 n. 3, 688 P2d 1354 (1984), *rev dismissed*, 299 Or. 341, 701 P.2d 1052 (1985)). **‘Where cultural bias is not implicated,’ however, ‘the expert witness need not possess special knowledge of Indian life.’** *State ex rel SOSCF v. Lucas*, 177 Or App 318, 326 n 5, 33 P3d 1001 (2001), *rev den*, 333 Or 567, 42 P3d 1245 (2002); *accord State ex rel Juv. Dept. v. Tucker*, 76 Or App 673, 683, 710 P2d 793 (1985), *rev den*, 300 Or 605, 717 P2d 1182 (1986). **Nevertheless, an expert witness is still necessary, and the expert must testify as to whether serious emotional or physical damage to the child is likely to occur if the child remains in the custody of the parent and must have substantial expertise in his or her area of specialty, although ‘[t]he expert need not express a conclusion on the ultimate question that the trial court must decide.’** *Lucas*, 177 Or App at 326, 33 P3d 1001. **‘Rather, * * * it is sufficient if the expert’s testimony supports the court’s determination * * *.’**”

3. What if the judge disagrees with the expert’s opinion/testimony?

Placement Preferences

ICWA – Placement Preferences

1. The statutory requirements.

25 USC § 1915: Placement of Indian children

(a) Adoptive placements; preferences. In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

- (1) a member of the child's extended family;
- (2) other members of the Indian child's tribe; or
- (3) other Indian families.

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

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

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

(d) Social and cultural standards applicable. The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and

cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability. A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

2. Current case law.

Dept. of Human Services v. Three Affiliated Tribes of Fort Berthold Reservation, 236 Or App 535, 238 P3d 40 (2010) (that serious and lasting harm would result from the removal of two Indian children from their current home constituted "good cause" for departing from the placement preferences established by the ICWA)

THE COURT OF APPEALS' SUMMARY:

The Three Affiliated Tribes of Fort Berthold Reservation (the tribes) appeal a judgment in which the trial court concluded that "good cause" under the Indian Child Welfare Act (ICWA) existed to designate the adoptive placement for two Indian children as the home of their current foster parents rather than the home designated by the tribes. On appeal, the legal issue is whether "good cause" exists to depart from ICWA's placement preferences. 25 USC § 1915(a). *Held:* (1) The Court of Appeals was bound by the trial court's findings of fact, because they were supported by evidence in the record, but independently assessed whether those findings were sufficient to support the trial court's legal conclusion that "good cause" existed under the circumstances of this case. (2) The trial court explicitly accepted as credible and persuasive expert testimony that "the harm to [the children] will be serious and lasting, if they are moved from [foster parents'] home." That finding, substantiated by evidence in the record, was legally sufficient to establish "good cause" for purposes of 25 USC section 1915(a).

EXCERPTS FROM OPINION:

The parties' competing contentions present two issues of first impression in Oregon that we must resolve: (1) What considerations properly bear on a court's determination of the existence of "good cause" for purposes of 25 USC section 1915(a)? (2) What is the proper appellate standard of review of a trial court's "good cause" determination? The resolution of those two questions determines our disposition here.

Before addressing those two questions in detail, we begin with a general overview of the ICWA provisions and policies that inform our inquiry. ICWA embodies a congressional policy

"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 * * *."

25 USC § 1902. To further that policy, ICWA establishes preferences for the adoptive placements of Indian children. ***Specifically, 25 USC section 1915(a) provides:***

"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."

Section 1915(a) embodies the federal policy that, "where possible, an Indian child should remain in the Indian community" and is "[t]he most important substantive requirement imposed on state courts." *Mississippi Choctaw Indian Band v. Holyfield*, 490 US 30, 36-37, 109 S Ct 1597, 104 L Ed 2d 29 (1989). ***In practical terms, section 1915(a) establishes a presumption that an adoptive placement in accordance with the preference criteria is in an Indian child's best interests.*** [Citation omitted.]

Although that presumption may be rebutted if the court determines that "good cause" exists, ICWA does not define the term "good cause" as used in section 1915(a) and does not identify the considerations on which a good cause determination may be predicated.* * *

* * * * *

**** * * [W]e conclude that "good cause" as used in the placement preferences of section 1915(a) is a legal standard and that, consequently, we review a trial court's "good cause" determination for errors of law.*** More particularly, that means that we must determine whether the facts, as found by the trial court and as supported by evidence in the record, are legally sufficient to establish "good cause" to depart from ICWA's placement preferences.

* * * In this case, * * * we need not identify the universe or totality of considerations that might bear on "good cause." That is so, because, regardless of whether, as an abstract proposition, in a different case or on a different record other considerations might properly pertain to a "good cause" determination, the trial court's "good cause" determination in this case was ultimately predicated on a consideration that is legally sufficient by itself to establish "good cause" and that is supported by evidence in this record.

Here, as noted, the trial court emphasized in its findings that "the harm to [K] and [I] will be serious and lasting, if they are moved from [foster parents'] home" and that, in grandparents' home, "[K] and [I] will be exposed to biological family, a circumstance which Ms. Strickland credibly testified will damage [K]." Given those findings, which were based substantially on the trial court's assessment of expert testimony, the court concluded that "the harm to these children in removing them from their home outweighs any other consideration by a degree of magnitude." ***Thus, the court's reasoning demonstrates that its "good cause" determination was fundamentally predicated on two considerations: (1) the serious and lasting harm that will result from the removal of the children from their current home and (2) the significant potential that the preferred caretakers will engage in conduct or conditions will exist in their home that would be seriously detrimental to the children.***

We agree with the trial court that both of those considerations are pertinent in determining whether good cause exists to depart from ICWA's placement preferences. We

further conclude that, regardless of the trial court's assessment of the latter, the former is conclusive.

We fully appreciate the fundamental and compelling policies that underlie ICWA. We are also mindful of the tribes' expressed concerns that those policies can be subverted or eroded through judicial decision-making that partakes of cultural biases, either implicit or explicit, especially with respect to "good cause" determinations. Further, we are fully cognizant from our extensive experience in juvenile dependency matters that in virtually every case involving a change of custody from a well-established placement, the affected child or children will suffer some degree of emotional distress and dislocation. The nature, severity, and durability of that harm can vary greatly from case to case.

We are mindful of all of those things--and of our sworn obligation to apply ICWA consistently with that statute's mandates. But ICWA does not mandate effectuation of its placement preferences in every case. Rather, the statute explicitly provides that, notwithstanding a strong presumption of deference to the placement preferences, the presumption can, in special cases, be overcome by a showing of "good cause." ***"Good cause" properly and necessarily includes circumstances in which an Indian child will suffer serious and irreparable injury as a result of the change of placement. Here, as noted, the trial court explicitly accepted as credible and persuasive expert testimony that "the harm to [the children] will be serious and lasting, if they are moved from [foster parents'] home." That finding, substantiated by evidence in this record, is legally sufficient to establish "good cause" for purposes of 25 USC section 1915(a)***

(Footnotes omitted; emphasis in bold italics added).