

**THE INDIAN CHILD WELFARE  
ACT  
AND THE ADOPTION AND  
SAFE FAMILIES ACT**

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# **Adoption and Safe Families Act ("ASFA")**

The Adoption and Safe Families Act (“ASFA”), Public Law No. 105-89, was enacted into federal law on November 19, 1997. The Act made significant changes to juvenile law practice. In some instances the changes appear to conflict with the mandates of the Indian Child Welfare Act (“ICWA”).

States have incorporated ASFA into their juvenile codes. It is required to receive federal child welfare funding. ASFA does not apply directly to Indian tribes, but may apply in tribal court depending on the existence of Title IV-E Agreements between a State and Tribe. Indian tribes must follow ASFA as a condition to receiving Title IV-E funding through a State.

Two state court decisions have held that state courts must comply with both ASFA and the ICWA, and that provisions of ASFA to not control over or override the ICWA:

*In re J.S. B.*, 691 N.W.2d 611 (South Dakota 2005);

*In re Nicole B.*, 927 A.2d 1194, 1205-08 (Maryland Court of Appeals 2007).

The following outline is taken in part from a paper prepared by David Simmons and Jack Trope of the National Indian Child Welfare Association entitled “P.L. 105-89 Adoption and Safe Families Act of 1997: Issues for States Serving Indian Children.” This report was prepared under a cooperative agreement with the Children’s Bureau, Administration for Children and Families, U.S. Department of Health and Human Services, and the National Resource Center for Organizational Improvement, Edmund S. Muskie School of Public Service, University of Southern Maine.

In considering the impact of ASFA on Indian tribes, the key point to remember is that ASFA imposes a duty on States to adopt policies to implement the Act. The Tribes can work with the State to adopt state policies (licensing of foster homes where the foster parents have a previous criminal history, compelling reasons not to proceed with termination, aggravated circumstances in which reasonable efforts to reunite the family are not required) that recognize tribal traditions and standards and that incorporate the ICWA.

Even if a tribe chooses not to enter into a Title IV-E contract with the State, the State's ASFA policies will still impact Indian children who are within the jurisdiction of the State.



# **Legislative History of ASFA; Adoption of Regulations**

The primary legislative history of ASFA is House Report No. 105-77, 105<sup>th</sup> Cong., 1<sup>st</sup>. Sess. (1997), reprinted at 1997 U.S. Code, Cong. & Admin. News 2739.

There are two mentions of Indian tribes in this report, neither of which have anything to do with the ICWA.

The first is a discussion of creating an Advisory Panel on Kinship Care, with the panel to include “representatives of tribal governments and tribal courts.” (2747).

The second is where the report estimates impacts on “State, local and tribal governments.” No impact on tribal governments is mentioned. (2757-58).

At the end of the House Report, a section is included which addresses changes made by the bill, as reported, in existing laws.

The ICWA is not mentioned in this section.



# **ASFA - The Statute.**

ASFAs are codified in various sections of the Social Security Act. ASFA is printed at 111 Stat. 2115.

ASFA makes no mention of Indian tribes or the ICWA. Section 303(b), which establishes an Advisory Panel on the subject of kinship care, states that the panel shall include “representatives of tribal governments and tribal courts.”<sup>111</sup> Stat. 2130.



Section 202(a) of ASFA adds an additional subsection to 42 U.S.C. § 622(b), which requires States to adopt plans for child welfare services in order to be eligible for federal payment. The previous subsection is amended by adding the word “and” at the end of the subsection. That subsection says the approved plan must “contain a description, developed after consultation with tribal organizations in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act (25 U.S.C. 1901 et seq.).”

# **Federal ASFA Regulations, by ACF.**

The Administration for Children and Families of the Department of Health and Human Services published a final rule on ASFA and State conformity with Title IV-B and IV-E on January 25, 2000. 65 Federal Register 4020-4093.

Portions of these regulations address Indian tribes. The regulations state specifically that ASFA has no impact on the ICWA or State compliance with the ICWA.



For example, at page 4029, the regulations make the following policy statement: “Some commenters also requested that we explain how the requirements of the Indian Child Welfare Act work in context of the ASFA. Although we can affirm that States must comply with ICWA and nothing in this regulation supersedes ICWA requirements, we cannot expound on ICWA requirements since they fall outside our statutory authority.”

# **General Requirements of ASFA.**

# **Purpose of ASFA.**

ASFA was enacted because of specific concerns Congress had with the current foster care system. These concerns and the policies enacted to remedy them include:

1. Children were spending too long in the foster care system, despite previous statutes requiring that children be moved to permanency. Congress declared that foster care should be a temporary solution and of short duration.

2. The system had lost its focus on the best interests of children and had become biased in favor of keeping children with their biological parents (because of the reasonable efforts provision in the Adoption Assistance Act) even though that setting was harmful or even abusive to the children.

3. Congress declared that the health and safety of the child must be the paramount concern of the child welfare system.



4. Permanency planning needed to take place sooner, and efforts to reunite the family needed to have a maximum time period.

5. Permanency planning should not include long-term foster care, and the acceptable permanency options are only adoption, permanent guardianship, and relative care.

6. Reasonable efforts to reunify a family are not required where the parent has a pattern of abusive behavior with the child in question, criminal behavior with another child of the parent, or parental rights have previously been terminated to a sibling.

It should be emphasized that Congress did not note any concerns with implementation of the ICWA or how the provisions of that Act are being applied to Indian children, or concerns about Indian children in particular because of the Act.

The provisions of ASFA do not apply to Indian tribes and tribal courts as a general matter. They apply only in two contexts:



a. Tribes that have a direct Title IV-B grant with DHHS (tribes can contract directly with the federal government for Title IV-B monies; no such authority exists for direct contracting for Title IV-E funds, although legislative proposals have been put forward.

b. Tribes which enter into Title IV-E agreements with their State. In each case, the tribe is required to have an approved “child welfare service plan” and such plan must comply with ASFA.

**ASFA - When child considered to  
have entered foster care.**

ASFA is primarily a statute that establishes deadlines for actions which affect foster care of a child. All of these deadlines begin to run from the date a child is considered to have entered foster care.

The earlier of a judicial finding of abuse or neglect, or 60 days from the date the child is removed from the home. Section 103(b); 65 FR 4030.

Tribes commented that these this date should be adjusted for Indian children to accommodate ICWA notice requirements to the tribe and the time it takes the tribe to identify the child as an Indian child. 65 FR 4031.



ACF's response was that the dates are statutory, and that State courts and agencies can take the time it took the State to notify the tribe and the tribe to determine tribal affiliation, when determining appropriate permanency plans for Indian children and other time lines.

**ASFA - Licensing and approval standards for foster care providers.**

Title IV-E requires designation of a State authority or entity that is responsible for establishing and maintaining foster care standards.

ACF's regulations interpret existing law to require that relatives must meet the full licensing requirements that all foster parents must meet. 65 FR 4032. ACF also ruled that there is no difference between "approved" and "licensed" as defined by Section 472(c) of the SSA. ACF refused to allow for provisional licensure or approval, or to establish separate tiers of foster care licensing that would distinguish relatives. *Id.*

Preference must be given to relative caregivers so long as they meet all relevant State child protection standards. 65 FR 4033.

Certain requirements, such as square footage, can be waived for relative caregivers, so long as they do not compromise any safety standards. 65 FR 4033. Such waivers must be granted on a case-by-case basis, however, based on the home of the relative and the needs of the child. This would not allow for general waivers to meet the socio-economic conditions of Indian communities that do not meet strict State licensing standards, as required by the ICWA.

ACF has a comment stating that the provisions of existing Title IV-E regulations, which limits tribal foster care licensing authority to homes that are on or near reservations, is consistent with the ICWA, 25 U.S.C. 1931. 65 FR 4034.

ACF refused to adopt a regulation stating that foster homes approved through the tribal foster care licensing process must meet the same standard as homes approved by the State. ACF stated that Section 1931(b) of ICWA specifically states that for purposes of federal funding, licensing or approval of foster homes by a tribe is deemed equivalent to State licensing. Tribes may therefore have different licensing standards than States under ASFA so long as the safety of foster children is not compromised. 65 FR 4034.

# **ASFA - Permanency Hearings.**

ASFA requires that permanency hearings take place within 12 months after a child has entered foster care, or within 30 days after a court has determined that reasonable efforts to reunify the family are no longer required. Sec. 302; 65 FR 4035.

This provision obviously may impact the requirement of ICWA that the State prove that it has made active efforts to provide rehabilitative and remedial services to the family designed to keep the family together and that such efforts have proved unsuccessful. Case law requires that ICWA's active efforts requirement be met in all cases involving an Indian child.

ACF's response is that ASFA was enacted to encourage States and parents to achieve permanency for children in a more timely manner. Reunification is one permanency option, along with adoption, termination of parental rights, placement with a fit relative, or permanent guardianship. Section 302; 65 FR 4035. Long term foster care is expressly rejected as a permanent living situation for a child. 65 FR 4036.

It is acceptable to extend reunification efforts past the permanency hearing if the parent has been working diligently toward reunification and the State and court expect that reunification can occur within a time frame that is consistent with the child's development needs. 65 FR 4035. This time frame probably applies also in ICWA cases.

Failure by the State to provide a family with the services deemed necessary for the safe return of the child to the family is a reason to justify not proceeding with termination of parental rights under the time frame set out in ASFA. Section 103(a)(3); 65 FR 4090.

Under the ICWA, the Tribe must come forward at an early stage and advocate culturally appropriate services it believes are necessary so the child can return home, and to comment on whether other services in addition to those proposed by the State are necessary for the parent to be successful and obtain return of the Indian child.

# **ASFA - Reunification Efforts.**

One of the main provisions of ASFA allows the State to determine when it no longer has to make reasonable efforts to reunite a child with his or her family. Section 101(a).

These reasons include if continuation of reunification efforts is inconsistent with the permanency plan for the child, or if a court has determined that the parent has subjected the child to “aggravated” circumstances as defined by State law (although ASFA gives examples such as abandonment, murder, torture, chronic abuse and sexual abuse), the parent has murdered or committed voluntary manslaughter of another of his or her children, aided or abetted such murder or manslaughter, committed felony assault on the child or another child of the parent that results in serious bodily injury, or the parental rights of the parent to a sibling have been involuntary terminated. Section 101(a); 65 FR 4053.

Again, this provision will clearly impact Indian children under ICWA. For example, the ICWA provides no exemption from meeting its rehabilitative efforts requirements just because a parent has had his or her parental rights terminated to another child. A State will probably have to make a specific finding complying with the ICWA (that rehabilitative efforts have been tried previously, were unsuccessful, and further efforts would be useless) before proceeding directly to termination of parental rights of a parent to another Indian child. Case law requires reunification under the ICWA.

Aggravated circumstances justifying avoidance of reunification efforts are left to State law. ACF states that it expects “the State child welfare agency to engage the tribes ... in developing its list of aggravated circumstances.” 65 FR 4053. This is apparently to allow tribes to bring forth a list that will provide compliance with the ICWA. Remember, however, that any tribe that enters into a Title IV-E agreement with a State is bound by the State’s aggravated circumstances list, so it is critical that the tribes be involved.

Failure by a State to “engage” the tribes when developing its list may constitute non-compliance for purposes of federal evaluation of the State’s child welfare plan. Section 622(a)(10).

The only good aspect of this provision from the perspective of tribes and the ICWA is that ASFA establishes an express requirement that the State provide the services necessary to reunite the family (for those families who are not exempted from reunification requirements) before it can proceed to termination. This will put the burden on the State to provide appropriate services in timely fashion for the child and family. It may be up to the Tribe to point out failure to comply with this requirement.

# **ASFA - Termination of Parental Rights.**

ASFA sets deadlines for when termination of parental rights actions must be initiated.

A proceeding must be initiated if a child has been in foster care for 15 of the most recent 22 months, or if the Court has determined that reunification efforts are no longer required. Section 103(a); 65 FR 4059. It does not matter whether a child entered foster care voluntarily or involuntarily. 65 FR 4031. The State of course retains the option to file a TPR petition earlier, when it would be in the best interests of the child. 65 FR 4060.

One of the statutory reasons not to file a TPR petition within the time frames, or at all, is if the child is being cared for by a relative.

Section 103(a). Relative is not defined. So if an Indian child has been placed with a relative in accordance with the placement preferences of the ICWA, it is not required to file a termination petition, under ASFA.

Several tribes asked ACF to make a blanket exemption from the TPR requirement for tribes, because many tribal cultures and traditions do not recognize the concepts of termination and adoption. ACF said there is no statutory authority to make such categorical exclusions, and that an exception from filing a TPR petition must be made on a case-by-case basis, in the case plan. 65 FR 4059.

ACF refused to adopt a definition or examples of what constitutes a “compelling reason” not to file a petition to terminate parental rights.  
65 FR 4061.

ACF confirmed the authority of Indian tribes to determine whether a compelling reason exists in those cases where the tribe has responsibility for care and placement of a child. 65 FR 4061. ACF expressly confirmed the authority of tribes to conduct permanency and termination hearings. 65 FR 4035.

# **ASFA - Permanency Options.**

ASFA limits permanency options to adoptive families, fit and willing relatives, legal guardians, or other “planned permanent living arrangements (not defined)”. Section 107; 65 FR 4035.

ACF refused to exclude any permanency options from consideration, or to identify one permanency goal as the appropriate goal for a specific foster care population. *Id.* Long term foster care is specifically discouraged as a permanent living arrangement. 65 FR 4036. ACF refused to define “another planned permanent living arrangement” under ASFA. *Id.*

Permanency hearings, required within 12 months of foster care placement, must identify one of the preferred permanency options for each child, in the absence of “compelling” reasons. Section 302; 65 FR 4036.

Remember that return to the home - reunification- is an express permanency option. Section 302. Identification by a tribe of another planned permanent living arrangement for a child constitutes a compelling reason for an alternate permanency plan. 65 FR 4089.

# **ASFA - Participation of Foster Parents.**

ASFA expressly grants foster parents a right of notice and the opportunity to participate in review hearings involving a child. Section 104. The section states that this language is not meant to be construed to give the foster parent party status in such participation. *Id.*; 65 FR 4065.

Foster parent custodial right statutes have been a thorn in the side of many Indian tribes under ICWA. Foster parents attempt to achieve psychological parent status or party status under such statutes, even though such status is inconsistent with and undermines the rights of Indian tribes and relatives to Indian children. It is not certain what impact this new requirement will have on ICWA proceedings.

# **ASFA - Cross-Jurisdictional Placements.**

ASFA contains provisions attempting to eliminate cross-jurisdictional barriers to permanent placement of children. Section 202; 65 FR 4080 (1355.34(c)(7)(v)).

This provision may actually help tribes, who have been continually frustrated by the slow actions of State ICPC (Interstate Compact on Placement of Children) offices to move Indian children to relative or tribal approved placements. The regulations allow for penalties to be assessed against States (loss of a percentage of Title IV-E funding) who deny or delay cross-jurisdictional placements of children to approved placements in other jurisdictions. This would presumably include tribes. ICPC agencies currently refuse in many cases to accept tribal home studies of proposed placements.

# **ASFA - Kinship Care**

This subject may or may not be a concern. In the legislative history of ASFA Congress noted the increasing use of relative placements for child care (between 1986 and 1990, kinship care rose from 18% of the average State foster care caseload to 31%), and that no evaluation had ever been conducted of its effectiveness, what happened to the kids, how safe it was, etc. Congress therefore established an advisory committee to evaluate kinship care and report back to Congress. The deadline for the advisory committee's report was October 1, 1998. No committee has yet been established.

# **Multi-Ethnic Placement Act.**

This is not directly related to ASFA but the new ACF regulations also addressed compliance with the Multi-Ethnic Placement Act, which prohibits discrimination on the basis of race or national origin in the placement of children. Pub. L. No. 104-188. This Act has raised some concern about how it interacts with the ICWA, since Native Americans are defined as a race under the Act's regulations.

The ACF regulation on implementation of this Act states specifically that compliance with the ICWA does not constitute a violation of the Act. 65 FR 4082 ( 1355.38). This is important because violations of the Act can lead to the imposition of financial penalties on States.

# **Tribal Courts and ASFA.**

Tribal Courts are not generally subject to ASFA. However, under Title IV-B or Title IV-E, Indian tribes may become subject to the requirements of ASFA.

The good news is that Tribal Courts can entertain child custody proceedings under ASFA, and under Title IV-E. In those cases, the Tribal Court must make appropriate ASFA findings in its court orders, since Tribal Court cases will be counted in the annual audit of the State's performance under ASFA.

Tribal children in the state court system, until the case is transferred to tribal court, at least, are subject to ASFA requirements (as well as ICWA requirements).

Some tribes have chosen to establish a two-tier juvenile system - one tier following ASFA requirements; and one tier following different tribal requirements, for children who are not subject to Title IV-E.

Some tribes have chosen to fund specific children from tribal sources and remove the child from the IV-E system where complying with ASFA requirements could be a problem.

The main issue under IV-E and under the ICWA in transferring a case to tribal court is still the availability of services and programs from the State, once the case has been transferred to Tribal Court.

# **Tribal Court Findings Required by ASFA.**

The Tribal Court must hold hearings in an appropriate time frame and comply with the permanency provisions of ASFA.

A permanency hearing must be held within 12 months of the child coming into care, and every 12 months thereafter.

The Court must identify a preferred permanency alternative - return to family, placement with a relative, adoption, or permanent guardianship, based on the child's individual needs. Tribal social services must provide specific information to the court so the judge can make an appropriate finding on this issue, with justification for the alternative selected.

The Court should also make a finding about how the selected permanency alternative will protect the safety of the child.



The Tribal Court must make findings regarding the suitability of continuing reunification efforts to keep the child and family together.

If petitioned by any party to stop reunification efforts, or if one of the conditions that automatically stop reunification efforts (i.e., termination of parental rights to a sibling), the court must make a specific determination that it would be appropriate to continue reunification efforts, and why.

If reunification efforts are to continue, the Court should make a determination or statement about how long those efforts are likely to continue, whether the parents are diligently working to obtain return of their children, and whether return of the children to the home is likely within a reasonable period of time, given the child's perspective.

It would be appropriate for the Court to make a finding on whether the services proposed by social services for the family are those most likely to lead to reunification of the family, if provided.

This finding can be made at the initial jurisdiction hearing or at a review hearing, if appropriate.

This finding must be made before allowing termination of parental rights or another permanency alternative to proceed.

If the child has been in foster care for 15 of the last 22 months, or if aggravated circumstances as defined by ASFA and/or by state statute or regulation exist, the Tribal Court must order that a termination of parental rights proceeding be initiated, unless compelling circumstances not to exist.

Compelling circumstances not to proceed with termination of parental rights must be determined on a case-by-case basis. A blanket rule that we don't believe in termination is not acceptable. The specific reasons why termination would not be appropriate in a specific case must be spelled out, and the court must find that these reasons justify not proceeding with termination. In most cases it will be the job of social services to provide the recommendation and documentation to support this finding.

Remember that placement with a relative and reunification of the family are the best reasons not to proceed with termination.

The Tribal Court must also make a specific determination, based on individual circumstances, as the preferred permanency alternative.



Again, placement with a relative is the preferred alternative.

If the Court or social services determines that a permanency alternative such as permanent guardianship is preferred to termination and adoption (see, termination not always required for adoption), the specific reasons why termination is not in the child's best interests (e.g., continued contact with family and culture, retention of tribal benefits) should be documented by the Court.

# Conclusion

ASFA can be applied in most cases to be consistent with the ICWA and existing tribal policy and laws.

There are elements of ASFA, such as not allowing a child to languish in out-of-home care, that are in the best interests of the child. The key is to make these requirements work in a culturally appropriate context.

## **Indian Child Welfare Act Case Update January 2006 to Present**

**by Craig J. Dorsay, Attorney**

I was surprised when I pulled up all of the Indian Child Welfare Act cases in Westlaw to find there were 1183 decisions since January 2005, and 808 since January 2006. Contrast this with 500 reported ICWA decisions in the first 20 years of the Act. The good news is that over 3/4 of these new cases are “unreported” cases from the California State appellate courts, almost all on the issue of whether proper notice was given to the tribe under the ICWA. I don’t know why California courts have such a hard time giving proper notice under the Act.

One other initial observation. Many of the cases cited below are from States that do not have a significant body of ICWA case law. While many ICWA issues have been addressed and settled in States with significant Indian populations, each State must address the application of the ICWA, and so new States are addressing ICWA issues that have been settled in other States.

The following case update is organized by Section number of the ICWA.

### **25 U.S.C. § 1903(1) - definition of child custody proceeding:**

*Starr v. George*, 175 P.3d 50, 54-55 (Alaska 2008). No exception for grandparent disputes from definition of child custody proceeding and coverage under the ICWA.

*Cherino v. Cherino*, 176 P.3d 1184 (N.M.App. 2007). ICWA does not apply to the award of custody to one of the parents in a divorce proceeding.

*In re N.B.*, \_\_\_ P.3d \_\_\_, 2007 WL 2493906 (Colo. App. 2007). ICWA applies to step-parent adoption.

*In re Nicole B.*, 927 A.2d 1194 (Md. App. 2007). ICWA applies to a permanency planning hearing, where children had been placed in the home of a relative guardian and parents could not have the children returned upon demand. ICWA applies to relative placements, in this case an aunt.

*Whitworth v. Whitworth*, 222 S.W.3d 616 (Tex. App. 1 Dist. 2007). ICWA does not apply in a divorce custody proceeding. There is not merit to the argument that placement in a divorce should, under the ICWA, be based on preservation of the child’s Indian culture.

*McLean v. Bell*, 827 N.Y.S.2d 242 (N.Y.A.D. 2 Dept. 2006). The ICWA does not apply to a request for visitation only.

*In re Adoption of R.L.A.*, 147 P.3d 306 (Okla. App. 2006). Court rejects existing Indian family

exception to the ICWA. The divorce exception to application of the ICWA does not cover step-parent adoptions. Where the child is going to be adopted by a step-parent or extended family member, and not by the parent, the ICWA applies.

*In re Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605 (Cal. App. 3 Dist. 2006). Declines to adopt the existing Indian family exception.

*Ex parte C.L.J.*, 946 So.2d 880 (Ala. App. 2006). Existing Indian family exception applies only to the voluntary relinquishment of an illegitimate Indian child by a non-Indian mother.

*Baby Boy C. v. Tohono O'odham Nation*, 27 AD3d 34 (N.Y. App. Div. 1<sup>st</sup> Dept. 2005). Comprehensive decision rejecting application of the existing Indian family exception.

### **25 U.S.C. § 1903(4) - definition of Indian child:**

*In re A.W.*, 741 N.W. 2d 793 (Iowa 2007). State law identifies ethnic children who are considered Indian by a tribal community as an Indian child under the ICWA, and the tribe as the Indian child's tribe under the Act. To the extent the child is not a member of a federally recognized tribe, this classification is race based and violate equal protection.

*In re Adoption of Sacha*, 876 N.E.2d 897 (Mass. App. 2007). Canadian Indian does not qualify as an Indian child under the ICWA.

*Alyssa B. V. DHSS*, 165 P.3d 605 (Alaska 2007). Native Hawaiians are not Indians under the ICWA.

*In re T.L.G.*, 108 P.3d 156 (Wash. App. 2005). Enrollment is not the only method to establish membership in an Indian tribe.

*In re Deese*, 2006 WL 1652731 (Mich. App. 2006). ICWA does not apply to the Lumbee Tribe, a non-federally recognized Indian tribe.

### **25 U.S.C. § 1903(6) - definition of Indian custodian:**

*Gilbert M. v. State*, 139 P.3d 581 (Alaska 2006). Grandfather did not have standing to appeal daughter's termination of parental rights under the ICWA. Grandfather, who had temporary physical custody of grandchild for a time, was not an Indian custodian once he was incarcerated for life, and had not been found to be an Indian custodian before he was arrested. Tribe had not given or confirmed his temporary custody of the grandchild under the law of the tribe.

### **25 U.S.C. § 1903(8) - definition of Indian tribe:**

*In re A.C.*, 65 Cal. Rptr. 767 (Cal. App. 3 Dist. 2007). ICWA does not apply to non-federally recognized tribes.

**25 U.S.C. § 1911(a) - tribal jurisdiction:**

*In re J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007). Child was not domiciled on reservation. Child lived with father off-reservation. No tribal court jurisdiction over father where he did not have sufficient minimum contacts with the Tribe. No full faith and credit to tribal court order on father. Tribal Court could not declare off-reservation child a ward of the tribal court, after a state court petition regarding the child had been filed. Under *Montana*, the father did not consent to tribal court jurisdiction by entering into marriage with a tribal member, and allowing the child to receive services from the tribe, where the father and child never resided on the reservation. The father had not availed himself of the benefits and protections of the laws of the reservation.

**25 U.S.C. § 1911(b) - transfer of jurisdiction:**

*In re N.V.*, 744 N.W.2d 634 (Iowa 2008). Transfer of jurisdiction approved at an advanced stage of the proceeding, on the day of the termination hearing. State statute implementing the ICWA does not contain a time limitation on requesting transfer, and good cause section does not contain language stating that a last-second petition to transfer constitutes good cause to deny transfer. Evidence supported finding that neither the parties nor the witnesses would suffer undue hardship if the case were transferred to tribal court.

*In re Interest of Lawrence H.*, 743 N.W.2d 91 (Neb. App. 2007). The trial court must rule on a motion to transfer jurisdiction before proceeding to a termination hearing. Denial of transfer of jurisdiction is reviewed for abuse of discretion. It was abuse of discretion for the tribal court to delay ruling on the motion to transfer for 22 months - until termination was completed and a permanent placement had been made.

*In re M.M.*, 65 Cal. Rptr. 3d 273 (Cal. App. 1 Dist. 2007). Once a case has been transferred to tribal court under the ICWA, and the tribal court has accepted jurisdiction, there can be no appeal of the juvenile court's decision to transfer. The juvenile court loses jurisdiction over the case once it has been transferred, and the Court of Appeals cannot issue orders to the tribal court. The party opposing transfer should have moved for a stay of the transfer order, to allow appeal before transfer of jurisdiction was completed.

*In re Welfare of Children of R.M.B.*, 735 N.W.2d 348 (Minn. App. 2007). Transfer at an advanced stage of the proceeding, the disposition stage, is appropriate. Each stage of an ICWA proceeding - foster care and termination - is separate and requires separate notice, and a motion to transfer is appropriate at each stage. Transfer of jurisdiction may be appropriate at placement, to protect the child's cultural and tribal ties.

*In re J.L.A.*, 153 P.3d 570 (Kan. App. 2007). Transfer to tribal court and acceptance of jurisdiction by the tribal court renders state appeal of the transfer decision moot.

*In re Welfare of Child of T.T.B. & G.W.*, 724 N.W.2d 300 (Minn. 2006). Good cause to deny

transfer of jurisdiction to tribal court exists where parents waited 6 months and tribe waited 8 months to petition for transfer, to the day of the permanency hearing.

*Ex parte C.L.J.*, 946 So.2d 880 (Ala. App. 2006). Granting transfer of jurisdiction to tribal court over the objection of the GAL, without holding a hearing, requires reversal of that order.

*In re Welfare of Child of T.T.B.*, 710 N.W.2d 799 (Minn. App. 2006). The party opposing transfer of jurisdiction to the tribal court must present evidence of undue hardship. The order to grant transfer of jurisdiction is reviewed for abuse of discretion. A distance of 400 miles to the reservation is not undue hardship on witnesses, and the transfer petition was not filed at an advanced stage of the proceeding when it was filed 6 days after the amended petition was filed with the court.

*In re M.A.*, 40 Cal. Rptr. 3d 439 (Cal. App. 3 Dist. 2006). The Tribe is entitled to transfer of jurisdiction in a Public Law 280 State even though it had not reassumed exclusive jurisdiction under Section 1918. By requesting and obtaining transfer, the tribal court assumed concurrent jurisdiction over the child.

#### **25 U.S.C. § 1911(c) - intervention, application of the ICWA:**

*In re C.P.*, 641 S.E.2d 13 (N.C. App. 2007). The tribe can intervene under the ICWA at any point in the proceeding, even on appeal. The burden is on the party advocating the ICWA to prove it applies.

*In re Adoption of Kenten H.*, 725 N.W.2d 548 (Neb. 2007). ICWA applies only prospectively, after showing the ICWA applies. Adoption completed before proof of ICWA status is shown does not require invalidation of adoption decree.

*Matter of Petition of Phillip A.C.*, 149 P.3d 51 (Nev. 2006). Testimony of tribal enrollment officer, by affidavit, is admissible evidence of membership status of child. Appellate court can't second guess internal membership decision-making of tribe.

#### **25 U.S.C. § 1911(d) - full faith and credit:**

*Starr v. George*, 175 P.3d 50 (Alaska 2008). Tribal Council resolution approving adoption by maternal grandparents ex parte without notice to paternal grandparents violated due process and therefore not entitled to full faith and credit.

*In re J.D.M.C.*, 739 NW2d 796 (S.D. 2007). No full faith and credit for tribal court order concluding that court had personal jurisdiction over non-Indian father who had married a tribal member, but had never resided on the reservation, and never availed himself of tribal benefits or protections.

#### **25 U.S.C. § 1912(a) - notice:**

*In re Jose C.*, 66 Cal. Rptr. 3d 355 (Cal. App. 5<sup>th</sup> Dist. 2007). Enrollment is not a prerequisite to notice under the ICWA. Some tribes don't have written rolls, and others list only persons who were members on a certain date.

*People ex rel. J.O.*, 170 P.3d 840 (Colo. App. 2007). Notice only to the BIA, where the father identified himself as Apache, was not sufficient under the ICWA. Notice to the BIA did not include the father's identification of himself as Apache.

*In re J.T.*, 65 Cal. Rptr. 3d 320 (Cal. App. 1 Dist. 2007). Notice just to the BIA is not sufficient notice under the ICWA.

*In re A.C.*, 65 Cal. Rptr. 3d 767 (Cal. App. 3 Dist. 2007). No notice is required to non-federally recognized Indian tribes. ICWA does not apply to them. Court can allow those tribes to appear as an interested party under state law, however.

*In re Cody B.*, 63 Cal. Rptr. 3d 652 (Cal. App. 4 Dist. 2007). Notice to the tribe is required after an adoption of an Indian child has been vacated.

*Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007). Notice in voluntary proceedings as required by State ICWA, does not conflict with the ICWA.

*Nicole K. v. Superior Court*, 53 Cal. Rptr. 3d 251 (Cal. App. 3 Dist. 2007). Notice sent to the wrong address was inadequate under the ICWA, and the error was not harmless.

*People ex rel. S.P.M.*, 153 P.3d 438 (Colo. App. 2006). Notice with no information about biological mom's ancestors was deficient under the ICWA. Separate notice is required when state moves to a termination proceeding. Tribe does not waive its right to notice under the ICWA by not responding to notice of earlier foster care proceeding. Sufficiently reliable information of possible Indian status requires notice under the ICWA.

*In re Welfare of C.B.*, 143 P.3d 846 (Wash. App. 2006). Where state notified all possible tribes, and sent notice a second time to those tribes that did not respond, and local LICWAC determined that the child was not an Indian child, notice complied with the ICWA.

*In re Interest of Walter W.*, 719 N.W.2d 304 (Neb. App. 2006). Failure to notify tribe requires vacating termination order under the ICWA.

*In re Interest of Dakota L.*, 712 N.W.2d 583 (Neb. App. 2006). Notice must be given of removal of an Indian child from the family residence. Notice to the Tribe's ICWA specialist may not be adequate notice under the ICWA if that person is not the Tribe's officially designated ICWA notification agent. Notice must be sent to the Tribe under the ICWA. Case remanded to find out if the ICWA specialist was the proper person to notify.

*In re Enrique O.*, 40 Cal. Rptr. 3d 570 (Cal. App. 5 Dist. 2006): Notice under the ICWA is not required in delinquency cases.

**25 U.S.C. § 1912(d) - “active efforts” and reunification attempts:**

*In re J.S.*, 177 P.3d 590, 594 (Okla. App. 2008). The analogy of active efforts under the ICWA and the old saying that “You can lead a horse to water, but you can’t make him drink,” is that active efforts under the ICWA requires the State agency to lead the horse to water so the client can take advantage of the services offered.

*In re Interest of Walter W.*, 744 N.W.2d 55, 60-61 (Neb. 2008). Active efforts in a termination case must be shown by clear and convincing evidence.

*People ex rel. K.D.*, 155 P.3d 634 (Colo. App. 2007). ICWA’s active efforts requirement is equivalent to the State’s reasonable efforts requirement for reunification.

*In re A.H.D.*, 178 P.3d 131, 135 (Mont. 2008). Except in a proceeding subject to the ICWA, the department may at any time, pursuant to ASFA, make a request for a determination that preservation or reunification services need no longer be provided.

*State ex rel. V.H.*, 154 P.3d 867 (Utah App. 2007). State made adequate efforts to reunify the family where the state provided programs and father was either unwilling or unable to change the conditions that led to removal of the children from him, and he remained a threat to the children.

*In re T.L.G.*, 108 P.3d 156 (Wash. App. 2005). Evidence of services has to be proven by clear and convincing evidence. Trial court did not establish that parents were offered all reasonably available services to correct parental deficiencies.

*In re Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605 (Cal. App. 3 Dist. 2006). Clear and convincing evidence of active efforts must be shown to remedy deficiencies of non-custodial parent in proposed step-parent adoption.

*In re H.J.*, 149 P.3d 1073 (Okla. App. 2006). Evidence of reunification and active efforts has to be shown by clear and convincing evidence in a termination proceeding.

*In re J.S.B.*, 691 N.W.2d 611 (S.D. 2005). Active efforts under the ICWA required, even where State would be relieved of its obligation to provide further reunification services under ASFA. ASFA does not relieve state social services of its responsibilities under the ICWA.

*In re Nicole B.*, 927 A.2d 1194 (Md. App. 2007). Active efforts under the ICWA requires more efforts than a reasonable efforts standard does, but it does not require futile efforts. ASFA’s reasonable efforts standard and circumstances where reunification efforts can be halted does not override the requirements of the ICWA that active efforts be made to reunify the family.

**25 U.S.C. § 1912(e), (f) - expert opinion:**

*Steven H. v. Ariz. Dept of Economic Security*, 173 P.3d 479 (Ariz. App. 2008). Termination reversed because no expert opinion given on the ICWA standard that continued custody by the parent is likely to result in serious emotional or physical damage to the child. Expert opinion must address not only whether parents' conduct will result in damaging of child, but also whether the parents cannot be persuaded to modify their conduct.

**25 U.S.C. § 1912(e) - foster care placement:**

*In re Interest of Dakota L.*, 712 N.W.2d 583 (Neb. App. 2006). Juvenile court erred when it proceeded under foster care petition without ICWA language. The petition must plead correct facts under the ICWA.

**25 U.S.C. § 1912(f) - termination of parental rights:**

*In re R.T.R., Jr.*, \_\_\_ P.3d \_\_\_, 2008 WL 1734896 (Or App. 2008). Termination of parental rights not justified just because of meth use. ICWA standard must be met.

*In re G.F.*, 923 A.2d 578 (Vt. 2007). It was harmless error for the trial court to apply a clear and convincing standard to termination of parent rights to an Indian child, where the Court's review shows that the evidence met the higher standard of evidence beyond a reasonable doubt.

*People ex rel. K.D.*, 155 P.3d 634 (Colo. App. 2007). No special knowledge of Indian life is required by an expert witness under the ICWA where parent's emotional illness required termination.

*In re Welfare of Children of S.W.*, 727 N.W.2d 144 (Minn. App. 2007). An expert with substantial experience in Indian affairs and Indian children qualifies as an expert, even though he or she is not a member of the child's tribe.

*In re T.L.G.*, 108 P.3d 156 (Wash. App. 2005). Trial court did not establish that parental deficiencies could not be remedied in the near future. Termination reversed. Trial court did not establish that the parents were offered all reasonably available services necessary to correct parental deficiencies.

**25 U.S.C. § 1914 -invalidation of violations of the ICWA:**

*In re P.E.M.*, 734 N.W.2d 487 (Iowa App. 2007). Where Oglala Sioux Tribe did not appear at any hearings, there was no provision under state law to appear by telephone at a termination hearing, there is no reason to delay termination hearing further for alleged non-compliance with the ICWA.

*In re Welfare of Children of S.W.*, 727 N.W.2d 144 (Minn. App. 2007). Violation of ICWA in earlier stage of proceeding does not require invalidation of subsequent termination proceeding

that complied with the ICWA.

*In re Adoption of Kenten H.*, 725 N.W. 2d 548 (Neb. 2007). Two year period for invalidation of adoptions under the ICWA does not require that the invalidation action be completed within two years, only that it be commenced within two years. No invalidation of adoption decree where Indian status under the ICWA was not established until after consents to adoption filed and adoption decree entered.

*Matter of Petition of Phillip A.C.*, 149 P.3d 51 (Nev. 2006). Tribe has independent status to contest adoption for violation of ICWA. ICWA does not require tribe to bring invalidation action in conjunction with parent or Indian custodian.

*DHSS v. Native Village of Curyung*, 151 P.3d 388 (Alaska 2006). Village can bring suit under § 1983 as parens patriae to allege violations of the ICWA. Because Village is not a person, village cannot bring suit under § 1983 for ICWA violations against the tribe.

*In re Adoption of Erin G.*, 140 P.3d 886 (Alaska 2006). One year state statute of limitations applies to challenge adoption decree entered under the ICWA.

*In re Nicole B.*, 927 A.2d 1194 (Md. App. 2007). State court proceeding invalidated and remanded where trial court closed CINA case upon award of custody to guardians, without having determined whether active efforts to reunify the Indian family under the ICWA had been provided and proved unsuccessful.

### **25 U.S.C. § 1915 - Placement preferences:**

*Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007). Placement preferences of the ICWA apply to both voluntary and involuntary proceedings.

### **25 U.S.C. § 1915(a) - Adoptive placement, good cause:**

*In re Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605 (Cal. App. 3 Dist. 2006). Good cause to deviate from placement preferences does not apply in a step-parent adoption, where the child will stay with one of the parents. Good cause only applies when the child is being placed outside the biological parents.

*In re Adoption of B.G.J.*, 133 P.3d 1 (Kan. 2006). Appellate review of whether good cause existed to avoid the placement preferences is for substantial abuse of discretion. If the trial court fails to properly apply the statutory factors of the ICWA with regard to placement, the trial court's decision is clearly erroneous. Where the mother was adamant as to the placement of her child, and the tribe was unable to offer a specific suitable family as an alternative, good cause to deviate from the placement preferences exists.

### **25 U.S.C. § 1915(b) - Foster placement, good cause:**

*Seminole Tribe v. Dept. of Children & Families*, 959 So.2d 761 (Fla. App. 4 Dist 2007). Indian foster family designated by tribe could not meet child's unique medical needs, due to drug abuse. Child required medical foster family.

*Cutright v. State*, 244 S.W.2d 702 (Ark. App. 2006). Failure to make specific findings of good cause to disregard tribe's placement preference was clearly erroneous and violates the ICWA. The tribe's stated preference invokes the ICWA's placement preferences. The best interest of the child standard does not apply in ICWA placement decisions, as good cause not to follow the placement preferences.

**25 U.S.C. § 1916(a) - right of parent after adoption vacated:**

*In re Cody B.*, 63 Cal. Rptr. 3d 652 (Cal. App. 4 Dist. 2007). No notice required, where adoption has been vacated, to parent whose parental rights have been terminated, as a "presumed parent." This issue was decided only under state law, and this section of the ICWA was not addressed in this decision.

**Interstate Compact on Placement with Children:**

*Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007). ICPC notice and certification must certify compliance with the ICWA, and placement preferences, as part of the process.

**Uniform Child Custody Jurisdiction and Enforcement Act:**

*Ex parte Rich*, 953 So.2d 409 (Ala. App. 2006). State UCCJEA, which requires abstention in certain cases where tribal court has jurisdiction, does not require abstention for tribal court custody decisions not covered by the ICWA.

**Miscellaneous:**

*State ex rel. Sec., Dept. of Social and Rehabilitative Services v. Hill*, 130 P.3d 1248 (Kan. App. 2006). State law allows state to seek reimbursement from parents for costs of temporary custody. State can seek reimbursement of such costs under state law only up to the date the ICWA becomes applicable (when it is determined the child is an Indian child, not when a court order has been entered).