

**INDIAN CHILD WELFARE ACT  
SOURCE BOOK  
FOR LEGAL PROFESSIONALS**

**June, 2002**

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## **Acknowledgements**

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### **Disclaimer**

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Nothing contained in this Indian Child Welfare Act Source book (hereinafter Source Book) should be considered the rendering of legal advice. Readers should obtain their own legal advice. The Source Book is intended for educational purposes only. Many of the case quotes are taken directly from the court and are not intended to be relied upon as a substitute for legal advice or research

### **Organization of the Source Book**

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The Source Book is organized by section of the Indian Child Welfare Act of 1978. 25 U.S.C. 1901 *et seq.* (1978)(hereinafter “Act” or “ICWA”). First, the Source Book provides the applicable section of the Act. Second are comments and portions of the BIA Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584-67595 (November 26, 1979). Third are cases relevant to the section. U.S. Supreme Court cases are listed first, when there are any. Remaining cases, mostly state court cases, are organized by the federal circuit within which the state is located.

The Source Book contains all relevant ICWA cases in both federal and state courts in the United States through June 2002. The Source Book does not

contain: California cases (discussed below); cases overturned by a higher court (except if noted); or state or local legislation or laws affecting Indian families.

## **California**

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California law on the ICWA is not included in this Source Book. The six appellate district courts within the State of California are in disagreement about the application of ICWA. The California Supreme Court has yet to rule on a number of disagreements to settle the interpretation and application of the Act in California. Until then, it is impossible to reach a conclusion in determining California's application of the Indian Child Welfare Act.

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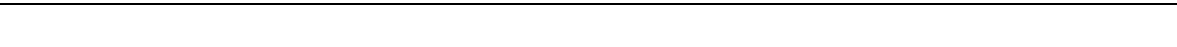
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# Indian Child Welfare Act Outline

## Highlights

September 2001

The Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, et seq. (ICWA or Act) provides procedural safeguards in actions involving Indian Children.

### LAW AND RESOURCES

- A. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et. seq. (ICWA).
- B. BIA Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584-67595 (November 26, 1979).
- C. Code of Federal Regulations, 25 C.F.R. Part 23 (January 13, 1994)(Bureau of Indian Affairs - Indian Child Welfare Act Rules and Regulations).
- D. Indian Child Welfare Act; Receipt of Designated Tribal Agents for Service of Notice, 64 Fed. Reg 11490 (March 9, 1999).
- E. Indian Child Welfare Law Center Website, Judges Checklist initially prepared by Janet C. Werness, Esq., <http://qlrain.net/icwalc/judges.html>.
- F. Department of Interior-Bureau of Indian Affairs Web Page. <http://www.doi.gov/bia>.

### DOES THE ICWA APPLY?

In general, there are three threshold requirements for the ICWA to apply. An "Indian Child" must be involved in a "Child Custody Proceeding" where the child is being removed (involuntary proceeding) from a "parent" or "Indian custodian."

- A. An Indian Child.
  - 1. Indian Child under ICWA is defined as unmarried under 18 and a **member** of a tribe or eligible for membership and a biological child of a member. 25 U.S.C. § 1903(4).
  - 2. The tribe determines whether a child is a member or eligible for membership. 25 U.S.C. § 1903(5).

- B. Applicable Proceeding – “Child Custody Proceeding.” ICWA applies to involuntary proceedings in state court. 25 U.S.C. 1903(1) & 1912(a).
  - 1. Foster Care Placements.
    - a. CHIPS
    - b. Voluntary placement
    - c. Adoptions
    - d. Status offense where placement is at issue
    - e. Guardianship
    - f. Third party custody
    - g. Order for protection
    - h. Involuntary custody disputes intra-family
  - 2. Termination of parental rights either voluntary or involuntary.
  - 3. Exclusions. A custody action between parents, and a placement based upon an act which, if committed by an adult, would be a crime. 25 U.S.C. § 1903(1).
- C. Removal from parent (defined at 25 U.S.C. 1903(9)) or Indian custodian (defined at 25 U.S.C. § 1903(6)).

<b>JURISDICTION – WHAT COURT HAS JURISDICTION UNDER THE ACT?</b>
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- A. Exclusive tribal court jurisdiction if the child is domiciled on or resides on the reservation, or the child is a ward of the court. 25 U.S.C. § 1911(a).
- B. Concurrent tribal and state court jurisdiction if child is domiciled off the reservation. The exceptions to tribal court jurisdictions are objections by either parent, or declination by the tribal court, or good cause exceptions. 25 U.S.C. § 1911(b); Fed. Reg. Vol. 44, No 228, Nov. 1979, C.
- C. Full faith and credit must be given to the public acts, records, and judicial proceedings of any Indian tribe applicable to child custody proceedings by the United States or any state. 25 U.S. C. § 1911(d).
- D. A court shall apply the state or federal standard which has a higher standard of protection to the rights of the parent or Indian custodian. ICWA preempts conflicting state law. 25 U.S.C. § 1921.

## **PROCEDURAL REQUIREMENTS OF THE ACT.**

- A. Notice to parents, Indian custodian and tribes usually 10 days with 20 additional days if requested. 25 U.S.C. § 1912(a). Notice requirements can be found in at Fed. Reg. Vol. 44, Nov. 1979, B.5.
- B. Transfer to tribal court jurisdiction. 25 U.S.C. 1911(a) & (b).
- C. Tribes have a right to intervene in the state court proceeding. 25 U.S.C. 1911(c).
- D. Parents and Indian custodians have a right to legal counsel. 25 U.S.C. § 1912(b). The court may appoint attorney for child if in the child's best interests. *Id.*
- E. Qualified expert witness testimony is required before there can be an out of home placement or a termination of parental rights. 25 U.S.C. § 1912 (e) & (f); *See also*, Fed. Reg., Vol. 55, No. 228, (Nov., 26, 1979), D.4.
  - 1. Foster Care Placements. Burden of Proof for foster care placements is clear and convincing evidence including expert witness testimony that continued custody is likely to result in serious emotional or physical damage to a child. 25 U.S.C. § 1912(e).
  - 2. Termination of Parental Rights. Burden of Proof is beyond a reasonable doubt including expert witness testimony that continued custody is likely to result in serious emotional or physical damage to a child. 25 U.S.C. § 1912(f).
- F. Any party seeking foster care placement or termination of parental rights must prove they provided active efforts to prevent the breakup of the Indian family. 25 U.S.C. § 1912(d).
- G. Parental consent to voluntary foster care placements or voluntary termination of parental rights must be in writing signed before a judge and accompanied by a judge's certification the person understood the contents of the writing. 25 U.S.C. § 1913(a). Voluntary terminations may be withdrawn before a final decree is granted. 25 U.S.C. § 1913(c). A final decree of adoption of an Indian child may be vacated if provisions not followed. 25 U.S.C. § 1913(d).

## **MANDATORY PLACEMENT PRIORITIES OF THE ICWA.**

- A. Adoptive Placement Preferences. 25 U.S.C. § 1915(a).
  - 1. Member of the child's extended family;
  - 2. Other member of the Indian child's Tribe; or
  - 3. Other Indian families.

- B. Foster Care or Pre-adoptive Placement Preferences including a least restrictive setting requirement. 25 U.S.C. § 1915(b).
  - 1. Member of Indian child's extended family;
  - 2. Foster home licensed, approved, or specified by the Indian child's tribe;
  - 3. Indian foster home licensed or approved by an authorized non-Indian licensing authority;
  - 4. 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 law supercedes above placement preferences. 25 U.S.C. § 1915(c).

<b>REMEDIES.</b>
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- A. Invalidation of proceeding and possible return of child. 25 U.S.C. § 1914; 25 U.S.C. § 1916.
- B. Vacation of adoption decree and return of child. 25 U.S.C. § 1913(d).
- C. Malpractice actions.

## **§1901 Congressional Findings.**

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds

(1) that clause 3, section 8, article I of the United States Constitution provides that “the Congress shall have Power...to regulate Commerce...with Indian tribes” and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources.

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

## **RELEVANT CASES**

### **Best Interests of the Child**

#### **United States Supreme Court**

“It is clear that Congress’ concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture. Congress determined to subject such placements to the ICWA’s jurisdictional and other provisions, even in cases where the parents consent to an adoption, because of

concerns going beyond the wishes of individual parents.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

“The numerous prerogatives accorded the tribes through the ICWA’s substantive provisions, e.g. §§ 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over nondomiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court action), 1915(e) (right to obtain record), 1919 (authority to conclude agreements with States), must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

“The act is intended not only to protect the interest of individual Indian children and families but also to protect the interest of the tribes themselves in long-term tribal survival.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

“Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (quoting, Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the national Tribal Chairman’s Association, hearings in front of the Lands of the House Committee on Interior & Insular Affairs, 95<sup>th</sup> Cong., 2d Sess., at 193 (1978)).

### Minnesota Supreme Court and Court of Appeals

In enacting the ICWA, Congress indicated its intent to diminish the effect of having culturally biased government officials, who perceived the necessity of terminating parental rights of Indian citizens through quite different cultural lenses, decided whether to terminate an Indian’s parental rights. *In re M.S.S.*, N.W.2d 412, 417 (Minn. 1991).

## **Constitutionality of the ICWA**

### Supreme Court and Legislation

The Commerce Clause (U.S. Const., art. I, § 8), gives Congress plenary power to regulate Indians on or off a reservation and provided the congressional authority for enactment of the ICWA. H.R. Rep. No. 1386, 95<sup>th</sup> Cong., 2d Sess. 19 (1978), at 15, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7530, 7537-38.

*See also U.S. v. Holliday*, 70 U.S. 407 (1866); *U.S. v. Nice*, 241 U.S. 591 (1916);

Federal legislation with respect to Indian tribes is not based upon impermissible racial classifications, but derives from the special status of Indians as members of quasi-sovereign tribal entities. *United States v. Antelope*, 430 U.S. 641 (1977); *Morton v. Mancari*, 417 U.S. 535 (1974); *See also Washington v.*

*Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979); *Fischer v. District Court*, 424 U.S. 382 (1976); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1976).

Laws that treat Indians as a distinct class do not violate the Due Process Clause of the Fifth Amendment Equal Protection principles. *Morton v. Mancari*, 417 U.S. 535 (1974)(upholding a statutory Indian Preference in hiring by the BIA).

“Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. See *Simmoms v. Eagle Seelatsee*, 244 F. Supp. 808, 814 n.13 (ED Wash. 1965), *aff’d*, 384 U.S. 209 (1966).” *Id.*

The preference is not a racial distinction. It is not directed towards a racial group consisting of Indians; instead, it applies only to members of federally recognized tribes. This operates to exclude many individuals who are racially to be classified as Indians. The distinction is political rather than racial in nature. *Id.*, at f.n. 24.

“As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.” *Mancari*, 417 U.S. 535 (1974).

Section 1901(5) states that judicial bodies have often failed to recognize essential tribal relations of Indian people. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

Congress implied that state courts were part of the problem that the ICWA intends to correct. *Id.*

### Federal Courts

Villages' claims under the Indian Child Welfare Act (ICWA) could be enforced through a § 1983 action, and therefore, declaratory relief that villages' obtained provided basis for award of attorney fees under § 1988. *Native Village of Venetie IRA Council v. State of Alaska*, 155 F.3d 1150 (9<sup>th</sup> Cir. 1998)(Alaska).

Under Oklahoma law, the Tribe was collaterally estopped from relitigating dispute concerning jurisdiction to decide child custody after state court determined it retained jurisdiction. *Comanche Indian Tribe of Oklahoma v. Hovis*, 53 F.3d 298 (10<sup>th</sup> Cir. 1995)(Okla.).

Regulations governing distribution of ICWA funds were valid. *Navajo Nation v. Hodel*, 645 F.Supp. 825 (D.C. Ariz. 1986).

### 1<sup>st</sup> Circuit

The higher standard of proof as required by ICWA does not violate the Equal Protection Clause. Proper inquiry in determination of constitutionality of legislation treating Indians as a distinct class is whether the special treatment could be rationally tied to fulfillment of Congress' unique obligation toward Indians. *In re Marcus S.*, 638 A.2d 1158 (Me. 1994).

### 2<sup>nd</sup> Circuit

Excluding Indian tribes that were not federally recognized from ICWA did not violate equal protection. Since Congress' express purpose in enacting ICWA was to preserve the families and culture of Indian tribes for which the U.S. had historically assumed responsibility and the US had not assumed responsibility for the unrecognized tribes. *In re A.J.*, 169 Vt. 577, 733 A.2d 36 (1999).

### 6<sup>th</sup> Circuit

Law treating Indians as a distinct class does not violate equal protection. Traditional equal protection analysis cannot be applied. *In re Miller*, 451 N.W.2d 576 (Mich. Ct. App. 1990)(quoting *Morton v. Mancari*, 417 U.S. 535 (1974)).

Michigan statute establishing higher standard of proof and greater evidentiary standard for termination of parental rights to American Indian children does not deny equal protection to non-Indian parents. *Id.*

"Applying the rational relationship test for constitutionality of federal laws regarding Indians set forth in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, the *Angus* court concluded that the protection of the integrity of American Indian families is a permissible goal rationally tied to the fulfillment of Congress' unique guardianship obligation toward Indians. *Angus*, supra, 60 Or. App. P. 555-556, 655 P.2d 208 (1983). We agree and, thus, find no denial of equal protection rights for non-Indian parents." *Id.*

### 7<sup>th</sup> Circuit

The ICWA's classification (definition of Indian tribe) is not an impermissible classification based upon national origin as the classification is reasonably connected to preserving the family unit of those having membership in American Indian tribes located in the United States, and is also reasonable connected to guarding against the removal of Indian children from their families within the United States in order to place those children in non-Indian families. The court concluded the ICWA did not apply as the mother's tribe, a Canadian tribe, was not eligible for services from the BIA (not federally recognized). *In re T.I.S.*, 224 Ill. App. 3d 475 (1991).

The Commerce clause gives Congress plenary power to regulate Indians on or off a reservation and provided the congressional authority for enactment of the

ICWA. *In re Eleanor Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (1990)(quoting *Morton v. Mancari*, 417 U.S. 535 (1974)).

The protection of the integrity of Indian families is a permissible goal that is rationally tied to the fulfillment of Congress' unique guardianship obligation toward the Indians and the ICWA, therefore, is constitutional. *Id.*

The ICWA is constitutional because it derives from the special classification of Indians as members of quasi-sovereign tribal entities and it is not based upon an impermissible racial classification. *Id.*

The child's lack of contact with the tribe does not contravene any due process rights of the fourteenth amendment based upon alleged lack of "minimum contacts." *Id.*

### 8<sup>th</sup> Circuit

Article of the South Dakota Constitution constituting a compact with the U.S. does not reserve jurisdiction to state whenever an Indian is off reservation; proper inquiry is whether actions of state would infringe on right of reservation Indians to make and be governed by their own laws. *In re D.L.L.*, 291 N.W.2d 278 (S.D. 1980).

The Band (Mille Lacs) failed to show the age classification in the long term foster care statute limiting foster care to children 12 and over does not rationally relate to and further a legitimate state purpose; the statute's age classification is constitutional. *In re J.B.* No. CX-95-4771995, 1995 WL 450515 (Minn. Ct. App. Aug. 1, 1995). Unpublished decision.

### 9<sup>th</sup> Circuit

Different treatment of Indians and of non-Indians resulting from proof beyond a reasonable doubt requirement of the ICWA, while parental rights of non-Indian may be terminated on clear and convincing evidence, does not violate equal protection guaranty as classification of Indians is classification of sovereign political entity, not suspect racial classification. *State ex rel. Children's Services Div. v. Graves*, 118 Or. Ct. App. 488, 848 P.2d 133 (1993).

"Laws treating Indians as a distinct class do not violate traditional equal protection notions of the Fifth Amendment as the distinction is derived from a special classification of Indians as members of quasi-sovereign tribal entities and is not based upon an impermissible racial classification." *In re Tracy Angus*, 60 Or. App. 546, 655 P.2d 208 (1982)(quoting *Morton v. Mancari*, 417 U.S. 535 (1974)). The Oregon Court of Appeals went to hold: "The protection of the integrity of Indian families is a permissible goal that is rationally tied to the fulfillment of Congress' unique guardianship obligation toward the Indians and the ICWA is therefore not unconstitutional." *In re Tracy Angus*, 60 Or. App. 546, 655 P.2d 208 (1982).

“As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.” *Id.*, (quoting *Morton v. Mancari*, 417 U.S. 535 (1974)).

Discretionary use of hearsay evidence during dispositive phase of a state parental rights termination proceeding conducted pursuant to the ICWA is consistent with fundamental fairness and is not violative of parents’ constitutional rights to due process. *In re J.R.B.*, 715 P.2d 1170 (Alaska 1986).

Where there was no constitutional challenge to statute under which Eskimo mother’s parental rights were terminated, and where termination proceedings were conducted prior to the effective date of ICWA, which provided a higher standard of protection to the rights of parents in termination proceedings involving Indians and native Alaskans, there was no basis for granting mother a new adjudication hearing under the standards of the Act. *E.A. v. State*, 623 P.2d 1210 (Alaska 1981).

### 10<sup>th</sup> Circuit

Trial court’s refusal to apply the ICWA’s “beyond a reasonable doubt” standard of proof in termination of parental rights of non-Indian father did not violate father’s right to equal protection under federal Constitution. *In re M.K.*, 964 P.2d 241 (Okla. Ct. App. 1998).

Termination of non-Indian parents’ parental rights did not result in equal protection violation in violation of edicts of 14<sup>th</sup> amendment. *In re B.N.B.*, 959 P.2d 989 (Okla. Ct. App. 1998).

Requiring that non-Indian mother facing termination of her parental rights prove by clear and convincing evidence that conditions of her life had changed since child was adjudicated deprived, while ICWA provided that termination of Indian parent’s parental rights must be based upon evidence beyond reasonable doubt, did not violate non-Indian mother’s equal protection rights; rational basis exists for Act’s special protection of integrity of Indian families. *In re L.A.Y.*, 959 P.2d 23 (Okla. Ct. App. 1998).

## **§1902. Congressional Declaration of Policy**

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

## RELEVANT CASES

### Best Interests: Purpose of ICWA

Note: There is a disagreement in the courts whether “best interest of Indian children” equates to a state’s “best interest” standard or a different and separate standard defined as the best interests of Indian children are met by placement within the child’s family, extended family, or community.

#### U.S. Supreme Court

The ICWA, “seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society. It does so by establishing a federal policy that where possible, an Indian child should remain in the Indian community, and by making sure that Indian child welfare determinations are not based on ‘a white, middle class standard which, in many cases, forecloses placement with [an] Indian family.’ House Report, at 23, U.S. Code Cong. & Admin News 1978, at 7546.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

“The act is based upon the fundamental assumption that the best interest of the child is that its (the child’s) relationship to the tribe be protected.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)(quoting *In re Appeal in Pima County Juvenile action No. S-903*, 130 Ariz., at 204, 635 P.2d at 189).

#### 6<sup>th</sup> Circuit

The ICWA establishes federal minimum standards for removal of Indian children from their families. The policy of the ICWA as declared by Congress is “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.” *In Re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996).

Section 1914 is ambiguous, so language must be construed to give effect to the legislative intent, which is to ensure compliance with minimum federal standards. Minimum federal standards would be harder to achieve if all parties had to join in an appeal. *In re Krefft*, 384 N.W.2d 843 (Mich. Ct. App. 1986).

The Kentucky Supreme Court recognizing the Existing Indian Family Exception to ICWA applied Kentucky’s best interest standard in a child custody proceeding in a divorce action where the child was a ward of the Tribal court concluding the exception divested the Tribal court of jurisdiction since ICWA did not apply § 1911(a) did not apply to case. *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996).

#### 7<sup>th</sup> Circuit

The underlying rationale of the Act is to discourage Indian child welfare determinations (state best interest standards) from being based on a “white

middle-class standard.” *In Re Tyler James Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996) (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)).

State considerations of best interests are inapplicable to the ICWA’s jurisdictional requirements as the U.S. Supreme Court determined that Congress intended ICWA to have nationwide uniformity of terms and that State laws should not frustrate that intention. *In re Eleanor Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (1990) (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)).

### 8<sup>th</sup> Circuit

“In the Act, Congress announced a two pronged national policy: ‘to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. 25 U.S.C. § 1902.” *In re J.W.*, 528 N.W.2d 657 (Iowa Ct. App. 1995).

### 10<sup>th</sup> Circuit

The trial court erred by failing to demonstrate compliance with the ICWA in a case where the mother’s parental rights to an Indian child were terminated. The ICWA is mandatory, not optional. Being mandatory, this oversight also requires the termination order be vacated. *In re M.D.R.*, 2002 OK CIV APP 75, 50 P.3d 1160 (Okla. Ct. App. 2002).

## **Existing Indian Family Exception**

The Existing Indian Family Exception is a judicially created exception to application of the ICWA. There is a strong disagreement, even within the circuits, whether the exception actually exists or if it completely contradicts the intent of the ICWA. The rationale of the existing Indian family exception appears to contradict the purpose of the Act as shown in the testimony and legislative history of the ICWA. “The purpose of the bill (H.R. 12533), introduced by Mr. Udall et al., is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs.” House Report, at 8 (footnote omitted), U.S.Code Cong. & Admin. News 1978, at 7530. As quoted in the United States Supreme Court decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). This exception fails to recognize a tribes interest in their children which is separate and distinct from parental interests as recognized by Congress in enacting the ICWA and as recognized by the Supreme Court in *Holyfield*. See *Holyfield*, at 49. As noted in *Holyfield* even where a child has no contact with his or her tribe,

the tribe has a real and substantive interest in every such child. *See also*, § 1901 – Supporting Cases, Section A – Purpose of ICWA, for quotes from *Holyfield* regarding tribal interests in their children.

### Supreme Court

“The (ICWA) act is intended not only to protect the interest of individual Indian children and families but also to protect the interest of the tribe themselves in long-term tribal survival.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

“The protection of this Tribal interest is at the core of ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parent.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

### 2<sup>nd</sup> Circuit

The existing Indian family doctrine precludes application of the ICWA when the Indian child’s parent has not maintained a significant social, cultural, or political relationship with her tribe, or when the Indian child has never lived in an Indian environment. *In re Adoption of Baby Girl S.*, 181 Misc.2d 117, 690 N.Y.S.2d 907 (N.Y.Sur. 1999).

### 5<sup>th</sup> Circuit

The adoption did not cause breakup of existing family or remove child from Indian environment and ICWA did not apply where Indian mother asked adoptive couple to take custody of child day after birth and had lived with adoptive couple since. The child was not born on reservation, where child’s paternity was not established, it was questionable whether father was Indian, where mother had not lived on reservation since age nine, had not maintained ties to tribe, and had given no indication, that this would change, and where tribe had not filed formal intervention and declined involvement in the case. *In re Hampton v. J.A.L.*, 658 So.2d 331 (La. Ct. App. 1995).

### 6<sup>th</sup> Circuit

The “existing Indian family” exception directly conflicts with the concept of tribal sovereignty and important public policy of improving tribal ties reflected in ICWA, undercut plain import of statute, and fails adequately to consider interests of tribe in involuntary proceeding. *In re Elliott*, 218 Mich. App. 196, 554 N.W.2d 32 (1996).

Provision of the ICWA (§1911(a)) for retention of exclusive jurisdiction over custody proceeding involving ward of tribal court only applies when an Indian child is being removed from an existing Indian family. The Existing Indian Family Doctrine is an exception to the application of the ICWA and therefore, the Tribal

court does not have jurisdiction of this matter as the Act does not apply to this case. The ICWA should not apply to divest state courts of appropriate jurisdiction to decide custody issues of Indian children by birth whom have not lived in an Indian family for many years. *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996).

Existing Indian family exception renders ICWA inapplicable where the mother is of Indian heritage but does not live on the reservation and has had little or no contact with the Nation for fifteen years, the putative father is non-Indian, the child was voluntarily relinquished at birth and has lived with the prospective adoptive parents throughout these proceedings, and where the tribe didn't attempt to intervene for over a year, and where the mother objects to the tribe's intervention in the proceedings. *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. 1997).

### 7<sup>th</sup> Circuit

The judicially created "existing family exception" is not persuasive and should be rejected as an exception to the application of the ICWA. Application of this exception undercuts the import of ICWA. *In re S.S.*, 252 Ill. App. 3d 33, 622 N.E.2d 832 (1993).

The purpose of the ICWA is to protect Indian children from improper removal from their existing Indian family units, in this case the child is of Indian ancestry, however, the child has lived, except for the first five days of the child's life, with non-Indian adoptive parents in a non-Indian culture. The court finds for these reasons that this adoption proceeding could not constitute the break-up of the Indian family. *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

The Appellate Court in Illinois refused to adopt the Existing Indian Family Doctrine when the issue came before it. The court concluded: "[U]nder ICWA, even in instances where there is a total lack of contact with a child, an Indian tribe has a very real and substantive interest in each child. See *Mississippi Band of Choctaw Indians v. Orrey Curtis Holyfield*, 490 U.S. 30 (1989)." *In re Eleanor Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (1990).

### 8<sup>th</sup> Circuit

The purpose of ICWA is to avoid removing Indian children from their cultural setting and thereby threatening long-term tribal survival and the social and psychological well being of the child. This is not applicable where an Indian child is not being removed from an Indian cultural setting, where the natural parents have no substantive ties to a specific tribe, and where neither of the parents nor their families have resided or plan to reside within a tribal reservation. *In re D.C.C.*, 971 S.W.2d 843 (Mo. Ct. App. 1998).

ICWA is not applicable where an Indian child is not being removed from an Indian cultural setting, where the natural parents have no substantive ties to a specific tribe, and where neither of the parents nor their families have resided or

plan to reside within a tribal reservation. *Ex. rel. C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. Ct. App. 1992).

ICWA's application to a case is only contingent upon whether an "Indian child" is the subject of a "child custody proceeding" as those terms are defined by the act. When assessing ICWA's applicability to a particular case it is incorrect to focus only upon the interests of an existing family exception. *In re Baade*, 462 N.W.2d 485 (S.D. 1990).

### 9<sup>th</sup> Circuit

Indian child does not have to be a part of an Indian family before ICWA applies. *In re Baby Boy Doe*, 123 Idaho 464, 849 P.2d 925 (Idaho, 1993).

ICWA did not apply to custody proceedings involving illegitimate child born to non-Indian mother and father who was 1/8 Indian; father had minimal contacts with child and child had never been exposed to Indian culture. *S.A. v. E.J.P.*, 571 So.2d 1187 (Ala. Ct. App. 1990).

ICWA is inapplicable to adoption preceding when Indian child is not being removed from Indian cultural setting, natural parents have no substantive ties to specific tribe, and neither parents nor their families have resided or plan to reside within tribal reservation. *In re Crews*, 118 Wash.2d 561, 825 P.2d 305 (1992).

The ICWA applies even where the child was not born into an Indian family. *In re T.N.F.*, 781 P.2d 973 (Alaska 1989).

### 10<sup>th</sup> Circuit

Indian father who never had custody of his daughters was not entitled to invalidate foster care placement of daughters under ICWA; children had been removed from custody of non-Indian mother, and act applies only in those situations where Indian children are being removed from existing Indian family environment. *In re S.C.*, 833 P.2d 1249 (Okla. 1992).

ICWA's goals include not only preserving Indian families, but also protecting the tribe's interests in the welfare of its Indian children and the maintenance of its culture. *Ex. rel. Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, 7 P.3d 960 (Ariz. Ct. App. 2000).

The judicially created "existing family exception" limits application of the ICWA to families who have significant contact with their Indian tribes. *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988); *In re Baby Boy L*, 231 Kan. 199, 643 P.2d 168 (Kan. 1982).

Indian Child Welfare Act was not applicable where Indian child had been in custody of her non-Indian mother since 1976, where child was not being removed from custody of Indian parent, and was not being removed from Indian environment. *Ex. rel. Johnson v. Howard*, 741 P.2d 1386 (Okla. 1985).

ICWA only applies in those situations where Indian children are being removed from existing Indian family environments. There is no “break-up” of the Indian family where the family severed ties with the Indian father seven years prior to the proceeding through a divorce and, therefore, no “preventive” services are required. *In re Adoption of D.M.J.*, 741 P.2d 1386 (Okla. 1985).

Unwed father lacked standing to invoke ICWA. Father never had custody, had not acknowledged child, nor established paternity and child never resided in an Indian family. *In re Baby Boy D.*, 742 P.2d 1059 (Okla. 1985).

ICWA was not applicable child was not being removed from custody of Indian parent and was not being removed from Indian environment. *In re D.M.J.*, 741 P.2d 1386 (Okla. 1985).

### **Federal Standards of ICWA Versus State Laws – Pre-emption**

ICWA pre-empts state law unless state law applies a higher standard. The state courts do not have the power to impose state or cultural standards upon the terms in the ICWA. State courts are mandated to use cultural interpretation and standards of the child’s tribe. The ICWA was designed specifically to allow Indian people to use their culture to shape the laws that affect its people. See *also*, §1921.

#### **U.S. Supreme Court**

Congress intended nationwide uniformity of terms when enacting the ICWA. Courts should not look to state law for definition of terms. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

#### **Federal Court**

Comanche tribal custom provides that a child’s paternal aunt assumes immediate role of mother when child’s mother is not available. *In re K.A.W.*, 2 Okla. Tribe. 338, 1992 WL 752134, (Comanche Child. Ct. Feb. 05, 1992)(Tribal Court Case).

#### **2<sup>nd</sup> Circuit**

ICWA doesn’t preempt those provisions of the New York State Family Court Act which are not in conflict with it, and therefore, that the New York statutes can be read so as to harmonize them with ICWA. The application of NY preponderance of the evidence standard to the findings of fact was not in conflict with § 1912(e) of the ICWA. *New York City Dept. of Social Services on Behalf of Oscar C., Jr. v. Oscar C.*, 192 A.D.2d 280, 600 N.Y.S.2d 957 (N.Y.App.Div. 1993).

### 7<sup>th</sup> Circuit

Congress intended the ICWA to provide greater protection to the Indian family than that generally afforded under state statutes. *In re J.J.*, 462 N.W.2d 555 (Wis. Ct. App. 1990).

### 5<sup>th</sup> Circuit

It was error for the trial court to make findings under the state law Family Code because the provisions providing for the involuntary termination of parental rights are in conflict with the ICWA. *In re W.D.H.*, 43 S.W.3d 30 (Tex. Ct. App. 2001).

### 6<sup>th</sup> Circuit

Child custody proceedings involving foster care or termination of parental rights to an Indian child are subject to specific federal standards. Where a state or some other federal law provides a higher standard of protection for the rights of the parent or Indian custodian of an Indian child than the ICWA, the court should apply the higher standard. *In Re Tyler James Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996).

### 8<sup>th</sup> Circuit

The ICWA establishes minimum federal standards for placement of Indian children in adoptive homes which reflect unique values of Indian culture, and only state or federal laws which give higher standard of protection to rights of parent or Indian custodian of Indian children are applicable to child custody proceedings under ICWA. *In re M.T.S.*, 489 N.W.2d 285 (Minn. Ct. App. 1992).

### 9<sup>th</sup> Circuit

Washington's best interest of the child test applies to a nonparent custody proceeding under RCW even if ICWA applies. The fact that ICWA applies should not signal to state courts that state law is replaced by the act's mandate. Well-established principles for deciding custody matters should further the act's goals. *In re Mahaney*, 146 Wash.2d 878, 51P.3d 776 (Wash. 2002).

The trial court made findings on clear and convincing evidence. The court finds that was proper under both the ICWA and a Washington case: *Mahaney*. *Mahaney* held that ICWA does not replace the best interests test of RCW 26.10.100, but merely requires that the foster care finding be made by clear and convincing evidence. *In re Napoleon.*, No. 27195-8-II, 2002 WL 31409959 (Wash. Ct. App. Oct. 25, 2002)(unpublished opinion).

10<sup>th</sup> Circuit

Federal law providing Indian courts with exclusive jurisdiction over custody proceedings involving children on reservation pre-empts state laws. *In re Adoption of Holloway*, 732 P.2d 962 (Utah 1986).

**§1903. Definitions**

For the purposes of this Act, except as may be specifically provided otherwise, the term-

(1) “child custody proceeding” shall mean and include-

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

(ii) “termination of parental rights” which shall mean any action resulting in the termination of the parent-child relationship.

(iii) “preadoptive placement” which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act, which if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) “Extended family member” shall be as defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

(3) “Indian” means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska native Claims Settlement Act.

(4) “Indian child” means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) “Indian child’s tribe” means

(a) The Indian tribe in which an Indian child is a member or eligible for membership or

- (b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;
- (6) “Indian custodian” means any Indian person who has legal custody of an Indian child under tribal custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;
- (7) “Indian organization” means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;
- (8) “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village;
- (9) “parent” means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.
- (10) “reservation” means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;
- (11) “Secretary” means the Secretary of the Interior; and
- (12) “tribal court” means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

**FEDERAL REGISTER (PRETRIAL REQUIREMENTS):**

1. “Child Custody proceeding”

Section B.3(a).

Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses such as truancy and incorrigibility that can only be committed by children and to any juvenile delinquency proceeding that results in the termination of a parental relationship.

Section B.3(b).

Child custody disputes are not included in the Act so long as custody is awarded to one of the parents.

Section B.3(c)

Voluntary placements that do not operate to prohibit the child's parent from regaining custody of the child at any time are not covered by the Act.

Section B.3 commentary

The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child—whether on a permanent or temporary basis.

2. "Extended family member"
3. "Indian"
4. "Indian Child"

Section B.1.(a).

When a State court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the BIA or the child's tribe.

Section B.1.b(i).

The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.

Section B.1.b(ii).

Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the BIA that a child is or is not an Indian is conclusive.

Section B.1 commentary.

The B.1 guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets that criteria.

Section B.1 commentary.

Although tribal verification is preferred, a court may want to seek verification from the BIA in those voluntary placement cases where the parent has requested anonymity and the tribe does not have the system for keeping child custody matters confidential.

Section B.1 commentary.

Under the Act, confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones.

Section B.1 commentary.

Enrollment is not always required in order to be a member of a tribe. It is not the only means nor is it necessarily determinative.

5. “Indian child’s tribe”

Section B.2.

Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.

Sections B.2(c)(i-viii).

In determining which tribe shall be designated the Indian child’s tribe, the court shall consider, among other things, the following factors: length of residence on or near a reservation of each tribe and frequency of contacts with each tribe, child’s participation in activities of each tribe, child’s fluency in the language of each tribe, whether there has been a previous adjudication with respect to the child by a court of one of the tribes, residence on or near one of the tribe’s reservation by the child’s relatives, tribal membership of custodial parent or Indian custodian, interest asserted by each tribe in response to the notice specified in subsection B.2(b) of these guidelines and the child’s self identification.

Section B.2(e).

If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child’s tribe with respect to all subsequent actions related to the proceeding.

Section B.2(e).

If the child becomes a member of a tribe other than the one designated by the court as the Indian child’s tribe, actions taken based on the court’s determination prior to the child’s becoming a tribal member continue to be valid.

Section B.2. commentary.

So long as the special rights of the Indian child’s tribe are respected giving special status to the tribe with the less significant contacts is not prohibited by the Act and may in many instances be a good way of complying with the spirit of the act.

Section B.2. commentary.

The fact that Congress, in the definition of “Indian child’s tribe”, provided a criterion for determining which is the Indian child’s tribe, is a clear indication of legislative intent that there be only one such tribe for each child.

## RELEVANT CASES

### General

#### Supreme Court

The Supreme Court held in *Holyfield*, Congress intended national uniformity in terms in enacting the ICWA; therefore, courts should not look to state law for definition of terms. “The purpose of ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term (domicile); quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. More specifically, its purpose was, in part, to make clear that in certain situations the state courts did not have jurisdiction over child custody proceedings. Indeed, the congressional findings that are part of the statute demonstrate that Congress perceived the States and their courts as partly responsible of the problem it intended to correct.”

*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

“If Congress had intended a state-defined law definition it would have said so. Where Congress did intend that ICWA terms be defined by reference to other than federal law, it stated this explicitly. See § 1903(2) (“extended family member” defined by reference to tribal law or custom); § 1903 (6) (“Indian custodian” defined by reference to tribal law or custom and to state law).”

*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

### Child Custody Proceeding - Defined

A child custody proceeding, in general, is defined as any temporary placement proceeding where the parent is not able to have the child returned to them upon demand.

#### 4<sup>th</sup> Circuit

The ICWA does not apply in placement based upon an award in a divorce proceeding of custody to one of the parents. *Blandino v. Blandino*, 149 N.C.App. 951, 563 S.E.2d 202 (Va. Cir. Ct. 1999).

### 6<sup>th</sup> Circuit

ICWA doesn't apply where the case doesn't involve the removal of an Indian child from its parent. Here, the grandparents already had custody of the child at the time they filed their motion to modify the judgment of divorce, pursuant to both the limited guardianship and the judgment of the divorce. Therefore, this case doesn't involve a foster care placement proceeding as that term is defined in the act. *In re Davis*, No. 242299, 2003 WL 198011 (Mich. Ct. App. Jan. 24, 2003)(unpublished opinion).

### 8<sup>th</sup> Circuit

ICWA defines "child custody proceeding" to include adoptive placements. *In re S.N.R.*, 617 N.W.2d 77 (Minn. 2000).

"Child custody proceeding" includes foster care placement, which means any removal of an Indian child from its parent for temporary placement in a foster home where the parent cannot have the child returned upon demand, but where parental rights have not been terminated. *Sayers v. Beltrami County*, 481 N.W.2d 547 (Minn. 1992).

Detention hearings (or other hearings) that are a precursor to the "removal of a child from an Indian home" constitute a child custody proceeding and, therefore, require the testimony of a qualified witness. *In re J.A.S.*, 488 N.W.2d 332 (Minn. 1992).

A "child custody proceeding" includes intra-familial disputes between the parents and maternal grandmother who is the current guardian of the children. *In re A.K.H.*, 502 N.W.2d 790 (Minn. 1993).

### 9<sup>th</sup> Circuit

Custody dispute between father and stepfather resulting in award of primary physical custody of child to stepfather was a "foster care placement" to which ICWA applied; if stepfather proved that he was child's "Indian custodian" within meaning of ICWA; that status would make parties coequals under ICWA and remove the protections otherwise applicable to father under that statute. *J.W. v. R.J.*, 951 P.2d 1206 (Alaska 1998).

There are two prerequisites to invoking the requirements of the ICWA. First, it must be determined the proceeding is a "child custody proceeding" as defined by §1903(1). Once it has been determined the proceeding is a child custody proceeding, it must then be determined whether the child is an Indian child as defined by §1903(4), (9). *In re Maricopa County Juvenile Action No. A-25525*, 136 Ariz. 528, 667 P.2d 228 (Ariz. Ct. App. 1983).

### 10<sup>th</sup> Circuit

ICWA applied to juvenile court proceeding to terminate parental rights of divorced noncustodial father of Indian children and allow their adoption by stepfather, even

though case involved interfamily dispute; language defining "child custody proceeding" governed by ICWA excepted only placement as result of juvenile delinquency and custody placement during divorce proceeding, while expressly including adoption proceeding and proceeding to terminate parental rights, which had permanent effect on parent-child relationship. *In re D.A.C.*, 933 P.2d 993, 311 (Utah 1997).

Proceeding in which non-Indian paternal great-aunt and her husband sought guardianship of Indian children after children's mother was murdered was proceeding for "foster care placement" under ICWA, for purposes of determining whether proceeding was required to be transferred to jurisdiction of tribe; children were removed from "Indian custodian" in that tribal tradition dictated that children's maternal Indian aunt was vested with custody following murder. *In re Ashley Elizabeth R.*, 116 N.M. 416, 863 P.2d 451 (N.M. Ct. App. 1993).

The only two requirements necessary for ICWA to apply are that 1) there is a child custody proceeding, which includes termination proceedings and 2) the child custody proceeding includes an Indian child. *In the Interest of H.D., C.D., and C.D.*, 729 P.2d 1234 (Kan. Ct. App. 1986); *Matter of Johanson*, 402 N.W.2d 13 (Mich. Ct. App. 1987).

### **Tribes' right to intervene**

#### **8<sup>th</sup> Circuit**

An Indian tribe has a statutory right to intervene in a custody dispute between the parents and a maternal grandmother, who is the current guardian of the children, when all of the members are Indian. *In re A.K.H.*, 502 N.W.2d 790 (Minn. 1993).

The act provides that Indian tribes are to play a central role in custody proceedings involving Indian Children. Congress recognized the need for Indian tribes to participate in court proceedings to ensure the values being protected are represented by the tribe. *Id.*

### **Exceptions to the ICWA – Divorce and Delinquency**

#### **Federal Court**

Indian Child Welfare Act does not confer jurisdiction on either tribal court or state court to award custody of child in divorce proceedings; therefore, the act afforded no basis for granting tribal member's petition for writ of habeas corpus in Federal court seeking return of his Indian children who had been removed from reservation pursuant to state court custody order. *In re Larch*, 872 F.2d 66 (4<sup>th</sup> Cir. 1989)(N.C.).

### 5<sup>th</sup> Circuit

The ICWA specifically excludes custody proceedings based upon an award of custody to one of the parents in a divorce proceeding. *Barbry v. Dausat*, 576 So.2d 1013 (La. Ct. App. 1991).

### 7<sup>th</sup> Circuit

Child custody disputes arising in the context of a divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents. *Ex. rel D.M.J. Johnson v. Howard*, 741 P.2d 1386 (Okla. 1985); *In re Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991).

### 8<sup>th</sup> Circuit

The ICWA does not apply to paternity actions. *Roe v. Doe*, 2002 ND 136, 649 N.W.2d 566 (N.D. 2002).

The ICWA does not apply to custody disputes in a divorce action initiated by a Native American wife. *Cox v. Cox*, 613 N.W.2d 516 (N.D. 2000).

The ICWA does not apply to award of custody of a child or children to one or the other parent as a result of a divorce proceeding. *Malaterre v. Malaterre*, 293 N.W.2d 139 (N.D. 1980).

A child custody proceeding to determine whether the minors are children in need of assistance where the non-Indian father is the primary custodian and the Indian mother only has custody over the summer is eligible for the protections of the ICWA because only delinquency and dissolution proceedings are excluded from coverage. *In re J.R.H.*, 358 N.W.2d 311 (Iowa 1984).

The ICWA has only made two exceptions, divorce and delinquency. *In re S.S. & R.S.*, 167 Ill. 2d 250, 657 N.E.2d 935 (1995).

The court is not permitted to carve out a third exception, such as interfamily disputes, to this section of the ICWA. Additional exceptions would require new legislation. *In re A.K.H.*, 502 N.W.2d 790 (Minn. 1993).

The ICWA does not apply-this is a custody dispute between parents. *In re K.K.S.* 508 N.W.2d 813 (Minn. 1993).

### 9<sup>th</sup> Circuit

ICWA is not directed at disputes between Indian families regarding custody of Indian children; rather, its intent is to preserve Indian culture values under circumstances in which an Indian child is placed in a foster home or other protective institution. *In re Skillen*, 287 Mont. 399, 956 P.2d 1 (1998).

### 10<sup>th</sup> Circuit

ICWA does not preclude confinement of Indian juvenile alleged to have engaged in delinquent criminal behavior even if the behavior is not serious criminal conduct. *In re T.D.C.*, 748 P.2d 201 (Utah 1988).

Indian Child Welfare Act was not applicable where Indian child had been in custody of her non-Indian mother since 1976, where child was not being removed from custody of Indian parent, and was not being removed from Indian environment. *Ex rel. Johnson v. Howard*, 741 P.2d 1386 (Okla. 1985).

### Extended family

The definition of extended family within the Indian community is typically broader than non-Indian definitions. An Indian family will include grandparents, aunts, uncles, and cousins to the child, or as defined by the child's tribe.

### Supreme Court

"We've had testimony here that in Indian communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or a friend will take that child in. It's the extended family concept." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

### 8<sup>th</sup> Circuit

Extended family definition includes stepparent, but a girlfriend who was never married to the children's father does not fit within the 1903(2) extended family definition. *In re A.E.*, 572 N.W. 2d 579 (Iowa 1997).

The band is not a "relative" under either Minnesota Statutes or the ICWA. *In re J.B.*, No. CX-95-477, 1995 WL 4505515 (Minn. Ct. App. Aug. 1, 1995).

"Extended family member" includes an Indian child's grandparents. *Ex rel. Long v. Geldert*, No. C8-92-1502, 1993 WL 27747 (Minn. Ct. App. Feb 9, 1993).

### "Indian"

Eligibility for membership in a federally recognized tribe is a touchstone for the definition of an Indian child and consequently the application of the ICWA. However, it is not necessary a child be enrolled for the ICWA to apply. The child need only be eligible for tribal membership.

### 6<sup>th</sup> Circuit

An Indian parent, who was eligible for membership in two tribes but never took steps to enroll as a member in either tribe, never met the prerequisite of being an

enrolled member of an Indian tribe under 1903(3). *In re Shawboose*, 438 N.W.2d 272 (Mich. Ct. App. 1989).

### 7<sup>th</sup> Circuit

Mother who claimed membership in Canadian Indian tribe had burden of proving that tribe was recognized by the Department of Interior and consequently she qualified as Indian under Indian Child Welfare Act. *In re Stiarwalt*, 190 Ill. App. 3d 547, 546 N.E.2d 44 (1989).

### 8<sup>th</sup> Circuit

A couple who are members of a tribe not recognized by the Secretary of Interior are not entitled to preference in adoptive placement under ICWA. *In re H.N.B.*, 619 N.W.2d 340 (Iowa 2000).

The ICWA does not govern termination of mother's parental rights, where minor child is not an enrolled member of an Indian tribe, and only evidence of mother's enrollment was her testimony that she believed that she could have been enrolled because she received funding from the tribe at one time. *In re A.S.*, 614 N.W.2d 383 (S.D. 2000).

The ICWA applies when the mother is a Native American and the children are enrolled in a tribe. *In re T.T. and T.T.* No.C0-95-780, 1995 WL 579255 (Minn.App). Oct 03, 1995).

### 10<sup>th</sup> Circuit

Without sufficient evidence of Indian heritage, ICWA is inapplicable. *In the Baby Boy W*, 831 P.2d 643 (Okla. 1992).

## **"Indian Child"**

A child will be an "Indian Child" if the child is a member in a federally recognized tribe or the child has at least one parent that is a member in a federally recognized tribe. The tribe is the final authority in determining its members. Membership does not equal enrollment.

### 8<sup>th</sup> Circuit

Under the act, an Indian child is any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. *Gilbert v. Long*, No. C8-92-1502, 1993 WL 27747 (Minn. App. Feb. 09, 1993).

### 9<sup>th</sup> Circuit

There are two prerequisites to invoking the requirements of the ICWA. First, it must be determined that the proceeding is a "child custody proceeding" as defined by §1903(1). Once it has been determined that the proceeding is a child custody proceeding, it must then be determined whether the child is an Indian child as defined by §1903(4). *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 136 Ariz. App. 258, 667 P.2d 228 (Ariz. Ct. App. 1983).

### **Determination of "Indian child" status**

### 2<sup>nd</sup> Circuit

Testimonies of mother's unsworn statements were insufficient to establish that children were members of or eligible for membership with a tribe. *In re Philip Jaye J., Jr.*, 256 A.D.2d 1201, 684 N.Y.Slip Op. 11803 (N.Y. App Div. 1998).

Trial court had duty to provide notice under the ICWA once it had reason to believe children of Indian ancestry were involved in termination of parental rights proceeding, based on father's statement to psychologist during family evaluation he was "full-blooded Mohican." *In re J.T.*, 166 Vt. 173, 693 A.2d 283 (1997).

ICWA does not apply to children born out of wedlock to a non-Indian mother until and unless the putative Indian father acknowledges and establishes paternity. *In re Adoption of Christopher*, 662 N.Y.S.2d 366 (N.Y. Fam. Ct. 1997).

If the child's tribe is not federally recognized then the ICWA does not apply. *In re Chloe G.*, 1997 WL 752736, (Conn. Super. Ct. Oct. 30, 1997).

### 3<sup>rd</sup> Circuit

Family court was not in violation of federal law by initially not applying the ICWA in termination of parental rights and adoption proceedings of infant; neither judge nor adopting parents had reason to believe that infant was an Indian child. *In re Adoption of Child of Indian Heritage*, 219 N.J. Super. 28, 529 A.2d 1009 (N.J. Super. App. Div. 1987).

### 4<sup>th</sup> Circuit

The trial court did not err in failing to apply the ICWA. In order for the ICWA to apply, it is not enough for the father to claim that he is American Indian. The father, because he is the party seeking to invoke the ICWA, had the burden to show that the Act applies. The respondent failed to provide any supporting evidence to prove that the ICWA applied to him. *In re Thomas Clifford Williams*, 149 N.C.App. 951, 563 S.E.2d 202 (N.C. Ct.App. 2002).

### 6<sup>th</sup> Circuit

The trial court did not err in determining that the ICWA did not apply where mother claims that she believes that her family has Native American heritage, but parents are not enrolled in any tribe, nor are the children. *In re Jordan*, Nos. 20773, 20786, 2002 WL 121211, (Ohio Ct. App. Jan. 30, 2002)(unpublished opinion).

The fact that the minor may have Indian heritage does not qualify him as an Indian child under 1903(4). *In re Johanson*, 402 N.W.2d 13 (Mich. Ct. App. 1987).

The trial court erred by not conclusively determining whether the child was an Indian child. The prosecutor was notified that the children may be from a specific tribe and no action was taken to determine if the children were Indian. This constituted a reversible error. *In re N.E.G.P.*, 245 Mich. App. 126, 626 N.W.2d 921 (2001).

Showing that an Indian child might have Indian heritage, isn't enough to qualify the child as an Indian child under the ICWA. *In re T.B.*, No. 240310, 2002 WL 31931551 (Mich. Ct. App. Nov. 15, 2002)(unpublished opinion).

The evidence showed, at best, that the child may have Indian heritage, that alone does not qualify her as an Indian child as defined by the under the ICWA and no other evidence showing that the child is an Indian child under the ICWA. *In re Bonsell*, Nos. 210428, 210758, 1998 WL 1988422 (Mich. Ct. App. Dec. 29, 1998)(unpublished opinion).

The ICWA doesn't require reversal because there is no indication that the child is an Indian child as defined by the ICWA. *In re Blount*, No. 197066, 197070, 1998 WL 1997610 (Mich. Ct. App. Feb. 6, 1998)(unpublished opinion).

### 7<sup>th</sup> Circuit

A mother and child constitute a family; where the mother is a Native American, the mother and child constitute an Indian family for the purposes of initiating ICWA. *Ex. rel. D.S., and D.E.S. v. St. Joseph County*, 577 N.E.2d 572 (Ind. 1991).

In the absence of conclusive findings by the tribe or BIA as to a child's eligibility for membership, the trial court must determine if the child is an "Indian Child." *In re M.S. et al., Minors v. A.S.*, 706 N.E.2d 524 (Ill. App. Ct. 1999).

Where a party claims applicability of ICWA, the court must determine if child involved in custody or adoption proceeding is "Indian child" within the meaning of Indian Child Welfare Act. *In re M.S. et al., Minors v. A.S.*, 706 N.E.2d 524 (Ill. App. Ct. 1999).

The ICWA does not apply until the court determines that the children are Indian children. The person asserting the application of the ICWA has the burden of

producing evidence of eligibility. *In re J.D.B.*, 584 N.W.2d 577 (Iowa Ct. App. 1998).

Fleeting references to Indian heritage do not trigger compliance with the ICWA; no notice to the tribe is necessary where there are no specific mentions of any tribe or band. *In re R.A.*, 610 N.W.2d 230 (Wis. Ct. App. 2000, an unpublished opinion).

Some evidence must establish the child is Indian. *In re M.N.W.*, 577 N.W.2d 874 (Iowa Ct. App. 1998).

### 8<sup>th</sup> Circuit

The court did not err in denying mother's request to continue or dismiss the case; the children involved are not Indian Children. The mother raised an indication that they may have an Indian connection. The mother did not prove that she was a member of a tribe. ICWA does not apply until the court determines the children are Indian. *In re C.L.*, No. 00-2059, 2001 WL 729326 (Iowa Ct. App. June 29, 2001)(unpublished opinion).

ICWA doesn't apply where nothing in the record suggests the children were members of an Indian tribe, or eligible for membership in an Indian tribe. Counsel's unsupported and vague statements were insufficient to suggest "Indian child" status. *In re A.L.*, 623 N.W.2d 418 (N.D. 2001).

A judicial determination must be made establishing that juveniles are Indian children before invoking the provisions of the ICWA. The fact that the tribe intervened, as it had a right to do, does not imply that the children are Indian children. *Ex. rel Travis I. v. Peggy F.*, No. A-94-350, A-94-3511995, 1990 WL 33322 (Neb. Jan. 24, 1995).

Where the father's tribe has been dissolved and is not recognized by the department of the interior and where the children are not eligible for membership in the mother's tribe, the children are not Indian children as defined by ICWA. *In re Interest of J.L.M.*, 451 N.W.2d 377 (Neb. 1990).

ICWA is not applicable until the court determines the children are Indian as defined by the Act. *In re J.D.B.*, 584 N.W.2d 577 (Iowa Ct. App. 1998); *In re the Interest of A.M.*, No. 99-141, 2000 WL 378250 (Iowa Ct. App. April 12, 2000).

The party asserting applicability of ICWA is responsible for proving that the child meets the criteria under ICWA. *In re A.S.*, 614 N.W.2d 383 (S.D. 2000); *In re J.D.B.*, 584 N.W.2d 577 (Iowa Ct. App. 1998); *In re A.M.*, 455 N.W.2d 572 (Neb. 1990).

Where there is no evidence in the record as to whether the court made a finding on whether or not the child is an Indian child, the case must be remanded to the trial court for the purpose of making the determination. *In re C.R.M.*, 307 N.W.2d 131 (S.D. 1981).

It is within the court's discretion to determine Indian heritage. *In re M.S.*, 706 N.E.2d 524 (Ill. App. Ct. 1999).

An unsupported statement that the child is an Indian is not reason for the court to believe the child is an Indian Child. *In re C.N.*, 196 Ill. 2d 181, 752 N.E.2d 1030 (2001).

ICWA is not applicable when an Indian mother claims that she believes that she, herself, may be enrolled in a tribe but there is no additional evidence offered to support this claim. *In re A.S.*, 614 N.W.2d 383 (S.D. 2000).

The party asserting applicability of the ICWA has the burden of proving that the child meets the criteria under ICWA. *In re A.S.*, 614 N.W.2d 383 (S.D. 2000); *In re J.D.B.*, 584 N.W.2d 577 (Iowa Ct. App. 1998); *In re A.M.*, 455 N.W.2d 572 (Neb. 1990).

Before trial court is required to apply standard for termination of parental rights set out in Indian Child Welfare Act, some evidence must show that child is Indian and that Act applies. *In re B.R.B.*, 381 N.W.2d 283 (S.D. 1986).

### 9th Circuit

The trial court erred by applying the heightened standards of the ICWA where it has only been established that the child may be an Indian child. More specific information is required before the respondent judge can implicitly find that Noah is an Indian child. *Ariz. Dep't. of Econ. Sec. v. Hon. Deborah Bernini*, 202 Ariz. 562, 48 P.3d 512 (Ariz. Ct. App. 2002).

Because the father made no claim that the child was a member of any tribe, he was required to produce evidence sufficient to show both that child was eligible for membership in a federally recognized tribe and that child was the biological child of a tribal member. The trial court did not have a basis on which to conclude that ICWA applied and it was entitled to proceed with the adoption under state law. *In re Hoffmann*, 176 Or.App. 311, 31 P.3d 510 (Or. Ct. App. 2001).

The tribe's determination that child is a member is conclusive. Consequently, the tribe must be allowed to intervene in the proceeding. *In re Adoption of Riffle*, 277 Mont. 388, 922 P.2d 510 (Mont. 1996).

Testimony of president of village council of the Chignik village in Alaska established that the child was an "Indian child" within the meaning of ICWA. The court did not err in denying mother's petition to set aside the court's order for foster care, because the child was not eligible for enrollment under the ICWA, at the time of the placement. *State ex rel. Juvenile Dept. of Lane County v. Tucker*, 76 Or. App. 673, 710 P.2d 793 (1985).

Tribe's written confirmation that father was an enrolled member of the tribe and that child was eligible for enrollment established that the child was an "Indian child; Father was not required to file a paternity action or to seek legal custody of the child in order for the child to be an "Indian Child" under the ICWA. *Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, 7 P.3d 960 (2000).

Minors' enrollment status is dependent on the non-Indian father, who is the sole custodian of the minors, and the children, therefore, are not Indian children for purposes of the ICWA. *In re Matter of the Appeal in Maricopa County Juvenile Action No. JS-7359*, 766 P.2d 105 (Ariz. Ct. App. 1988).

There is no requirement in the ICWA that tribes make conclusive determination of child's eligibility for membership in the tribe as proof that the child is an "Indian child." Provisions in Bureau of Indian Affairs (BIA) guidelines requiring state court to give conclusive effect to determination by Indian tribe as to child's eligibility for membership is an aid to state courts in deciding when to apply the ICWA. *In re Baby Boy Doe*, 123 Idaho 464, 849 P.2d 925 (1993).

### 10<sup>th</sup> Circuit

The ICWA does not apply where the child isn't eligible for membership in an Indian tribe as required for her to be an Indian child under the act. For enrollment, the father's tribe requires that the child must have an enrolled parent listed on their birth certificate. The child in this case does not and therefore is not eligible for enrollment and is not an Indian Child. *In re C.R.*, No. 97766, 2003 WL 292251 (Okla. Ct. App. Jan. 10, 2003) (unpublished opinion).

The ICWA does not apply when neither of the parents are enrolled members of a tribe. *D.S. v. State*, NO. 981480-CA, 2000 WL 33244187 (Utah May 11, 2000).

The ICWA does not apply to adoption of a baby, without unwed father's consent, where there is no evidence that the baby's father, baby's mother, or the baby are members of an Indian tribe or eligible for membership with an Indian tribe. *In re Adoption of Baby Boy W.*, 831 P.2d 643 (Okla. 1992).

## **Tribe determines Indian status**

### 6<sup>th</sup> Circuit

The issue of whether the children are Indian is for the tribe to determine. *In re Shawboose*, 438 N.W.2d 272 (Mich. Ct. App. 1989).

The question of whether a person is a member of a tribe, under ICWA, is for the tribe itself to answer. *In re N.E.G.P.*, 245 Mich. App. 126, 626 N.W.2d 921 (2001).

### 9<sup>th</sup> Circuit

The commissioner of the superior court erred in determining that the child was not a member of, or eligible for membership in the Leech Lake Band of the Ojibwe. The tribal determination that a child is a member or eligible for membership in that tribe is conclusive evidence that a child is an Indian child under the ICWA. *In re A.L.W.*, 108 Wash.App. 664, 32 P.3d 297 (Wash. Ct. App. 2001).

## Enrollment/membership

### Minnesota

#### 2<sup>nd</sup> Circuit

The ICWA does not apply when the mother provides no information indicative of her or the children's tribal membership the Tribal Nation does not disclose any tribal assertion of the child's membership in the tribe. *In re Daniel C.*, 63 Conn. App. 339, 776 A.2d 487 (2001).

#### 6<sup>th</sup> Circuit

The trial court did not abuse its discretion in failing to give the appellant a second chance enroll her child in a tribe because she had already failed to effect enrollment and there was too much uncertainty surrounding the outcome of efforts. *In re Prevost*, No. 234101, 2002 WL 194787 (Mich. Ct. App. Jan. 25, 2002)(unpublished opinion).

Tribal membership is not defined by enrollment in the tribe, respondent's lack of membership in an Indian tribe is not dispositive of the question whether the children qualify as Indian children. *In re Jackson*, No. 226886, 2001 WL 1134949 (Mich. Ct. App. Sept. 25, 2001)(unpublished opinion).

The equal protection clause of the constitution has bearing only on discrimination regarding places of public accommodation and public services, not on the alleged claims of unequal application of the laws. It also requires discriminatory intent. The respondent alleges no discriminatory intent, so the issue is without merit. With respect to the ICWA, the Indian tribe, not the court determined that Johnson and his children were not eligible to join the tribe. *In re Donaldson*, No. 199148, 1997 WL 33343387 (Mich. Ct. App. Oct. 7, 1997)(unpublished opinion).

Enrollment is not always required to be a member of a tribe. *In re H.D.*, 729 P.2d 1234 (Kan. App. 1986); *In re Maynard*, 592 N.W.2d 751 (Mich. Ct. App. 1999).

The court is not required to apply ICWA to proceeding to terminate parental rights of mother of child of Indian heritage; mother and child did not join Cherokee nation until after the proceeding. *In re Johanson*, 156 Mich. App. 608, 402 N.W.2d 13 (1986).

Ignoring the statement of a parent that her child may be Indian contravenes the congressional objective of the ICWA. *In re Maynard*, 592 N.W.2d 751 (Mich. Ct. App. 1999).

#### 7<sup>th</sup> Circuit

In the absence of a conclusive finding of child's eligibility for membership in particular tribe, either by that tribe or by BIA, trial court in child protection

proceeding must determine if child is “Indian child” with the meaning of ICWA. *Ex rel. M.S. v. A.S.*, 706 N.E.2d 524 (Ill. Ct. App. 1999).

8<sup>th</sup> Circuit

The tribal determination that a child is a member or eligible for membership in that tribe is conclusive evidence that a child is an “Indian Child”. *In re S.N.R.*, 617 N.W.2d 77 (Minn. Ct. App. 2000).

The court must determine whether a tribe has concluded that a child is a member of, or eligible for membership in, and Indian Tribe. *Id.*

9<sup>th</sup> Circuit

Child was “Indian child” under ICWA, where trial court found that father, an Indian, was one of child’s natural parents. *In re Baby Boy Doe*, 123 Idaho 464, 849 P.2d 925 (Idaho 1993).

10<sup>th</sup> Circuit

Absent evidence that child was “Indian child,” ICWA was not applicable to parental rights termination proceeding; although mother and father informed caseworker and also testified that each had Indian heritage. *In re A.G.*, 899 P.2d 319 (Colo. Ct. App. 1995).

If a child is not qualified for enrollment in his tribe, he is not considered to be an Indian child within the meaning of the ICWA and, therefore, the ICWA does not apply to proceedings regarding the child. *In re Emery Titus Colnar*, 757 P.2d 534 (Wash. Ct. App. 1988).

Trial court should not have concluded that children who were subject of termination proceeding were Indian children within meaning of ICWA and should not have applied the Act to termination proceeding in the absence of evidence establishing children's membership or eligibility for membership in Indian tribe and in the absence of evidence establishing mother's membership or eligibility for membership in Indian tribe. *In re A.E.*, 749 P.2d 450 (Colo. Ct. App. 1987).

**Indian child’s tribe – Significant Contacts**

An Indian Child usually is a member of one tribe. However, when a child’s Indian tribe is in question, all tribes shall be notified until the child’s tribe has been determined.

7<sup>th</sup> Circuit

While a child can only be a member of one tribe, both tribes should be noticed until it is determined in which tribe, if any, the child has more significant contacts. *Interest of J.W.*, 498 N.W.2d 417 (Iowa Ct. App. 1993).

## **Indian child's tribe - Tribal authority**

### **7<sup>th</sup> Circuit**

An Indian tribe has the authority to determine its own membership. *Ex rel. Tracy Angus*, 655 P.2d 208 (Or. Ct. App. 1982); *In re J.W.*, 498 N.W.2d 417 (Iowa Ct. App. 1993); *In re Maynard*, 592 N.W.2d 751 (Mich. Ct. App. 1999); *In re H.D.*, 729 P.2d 1234 (Kan. Ct. App. 1986).

## **Indian Custodian**

The legislative history of the ICWA explains that Indian families have a tradition far different from that of the majority culture. Traditionally the entire extended family aided in raising the children. Indian Custodians are those parents would consider part of their extended family.

### **3<sup>rd</sup> Circuit**

The Indian adoptive parent had standing to rely upon and demand compliance with provisions of ICWA, with respect to action to terminate her parental rights in Indian child. *In re Adoption of K.L.R.R.*, 356 Pa. Super. 555, 515 A.2d 33 (1986).

### **9<sup>th</sup> Circuit**

Maternal aunt and foster parent of Indian child, who did not have legal custody under state law, was not an "Indian custodian" within the meaning of ICWA so as to be entitled to statutory notice prior to termination of the foster care placement. *In re Charloe*, 52 Or. App. 843, 629 P.2d 1319, (1981); *State ex rel. Juvenile Dept., Multnomah County v. England*, 292 Or. 545, 640 P.2d 608 (Or. 1982).

Custody dispute between father and stepfather resulting in award of primary physical custody of child, an Alaska Native, to stepfather was a "foster care placement" to which ICWA applied; if stepfather proved that he was child's "Indian custodian" within meaning of ICWA; that status would make parties coequals under ICWA and remove the protections otherwise applicable to father under that statute. *J.W. v. R.J.*, 951 P.2d 1206 (Alaska 1998).

Protections of ICWA were not intended to apply to prospective adoptive parents against whom adoption decree was vacated when natural parent is seeking custody; thus, such prospective adoptive parents were not "Indian custodian" within purview of such Act. *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982).

## **Indian organization**

### **Indian tribe**

An Indian tribe can be defined as a group of Indians that is recognized by the federal government as constituting a distinct and historically continuous political

entity. The Department of the Interior makes these decisions and includes only tribes that are located within the United States.

### **Eligibility of Tribes**

Rolling River Band is not federally recognized, and therefore, the Band is not defined as an “Indian tribe” for purposes of application of the ICWA. *In re Stiarwalt*, 190 Ill. App. 3d 547 (1989).

It is a question of fact whether a tribe is eligible for services from the BIA. The parents have the burden of proof to show their tribe falls within the eligibility requirements for services from the BIA. *Id.*

A tribes eligibility for services from the Department of the Interior must be argued at the trial court level or the issue is waived on appeal. *In re T.I.S.*, 224 Ill. App. 3d 475 (1991).

#### **2nd Circuit**

The BIA does not recognize the Traditional Abenaki of Mazipskwik as a Federal Indian Tribe, and while they may be an Indian “group”, they do not qualify for the protections of the ICWA. *In re Adoption of Christopher*, 662 N.Y.S.2d 366 (N.Y. Fam. Ct 1997).

If the BIA does not recognize an Indian group as an Indian tribe then, they do not qualify for the protections of the ICWA. *Id.*

#### **6<sup>th</sup> Circuit**

Remand is not required to determine the status of the mother’s tribe because the juvenile court found the mother’s tribe is not included on the list of Indian tribes recognized by the Secretary of the Interior. *In re Green*, No. 207029, 1998 WL 1991255 (Mich. Ct. App. July 7, 1998)(unpublished opinion).

### **Canadian Tribes**

#### **2<sup>nd</sup> Circuit**

The Clear Sky of Onondaga Nation in Oshweken, Ontario, Canada was “Indian Tribe” within the meaning of the ICWA. Due to the significant historical connections between New York members of Onondaga community and the Onondaga Nation in Ontario the Ontario band belongs to a continuous community that transcended “international borders”. *In re Adoption of Linda J.W.*, 179 Misc. 2d 96, 682 N.Y.S.2d 565 (N.Y. Fam. Ct. 1998).

### 7<sup>th</sup> Circuit

Mother who claimed membership in Canadian Indian tribe had burden of proving that tribe was recognized by the Department of Interior and consequently she qualified as Indian under Indian Child Welfare Act. Indian Child Welfare Act. *In re Stiarwalt*, 190 Ill. App. 3d 547, 546 N.E.2d 44 (1989).

ICWA is not applicable to Canadian tribes. *Id.*

ICWA's classification (definition of Indian tribe) is not an impermissible classification based upon national origin as the definition is reasonably connected to preserving the family unit of those having membership in American Indian tribes located in the United States, and in guarding against the removal of Indian children from their families within the United States in order to place those children in non-Indian families. The court concluded the ICWA did not apply as the mother's tribe a Canadian tribe was not eligible for services from the BIA (not federally recognized). *In re Petition to Adopt T.I.S.*, 224 Ill. App.3d 475, 586 N.E.2d 690 (1991).

Biological parent has the burden to prove that the Indian tribe of which she was a member fell within eligibility requirements of the Department of the Interior for ICWA protection. Parents acknowledgement that tribe was ineligible for services from the Department of Interior waived issue of whether tribe was eligible for services under treaties in which the tribe allegedly had a successor interest. *Id.*

The person claiming membership in a Canadian Indian tribe has the burden to prove that the tribe was recognized as eligible for services to Indians by Department of Interior under the ICWA. *In re Stiarwalt v. Stiarwalt*, 190 Ill.App.3d 547, 546 N.E.2d 44 (1989).

## Parent

### 2<sup>nd</sup> Circuit

ICWA does not apply to children born out of wedlock to a non-Indian mother until and unless the putative Indian father acknowledges and establishes paternity. *In re Adoption of Christopher*, 662 N.Y.S.2d 366 (N.Y. Fam. Ct. 1997).

### 8<sup>th</sup> Circuit

A father that had not established paternity was not entitled protection under the ICWA. His parental rights were not being terminated upon adoption of the child; his parental rights had never been established. *In re J.A.V.*, 536 N.W.2d 896 (Minn. 1995).

### 9<sup>th</sup> Circuit

Custody dispute between unmarried parents, both Indians, qualified for exception from applicability of ICWA for awards of custody to parents in divorce

proceedings; any award of custody in dispute between two Indian parents would result in safeguarding children's best interests and children remaining in Indian homes and villages, and BIA interpreted exception as applying to all custody disputes between Indian parents. *John v. Baker*, 982 P.2d 738 (Alaska 1999).

If a child is born out of wedlock to a non-Indian mother the provisions of the ICWA are not applicable until the putative Indian father acknowledges or establishes paternity. *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 136 Ariz. 528, 667 P.2d 228 (Ariz. Ct. App. 1983).

### 10<sup>th</sup> Circuit

Unwed father lacked standing to invoke ICWA. Father never had custody, had not acknowledged child, nor established paternity and child never resided in an Indian family. *In re Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla.1985).

### Reservation

### Secretary

### Tribal court

## **§ 1911. Indian Tribe Jurisdiction Over Indian Child Custody Proceedings**

**A. Exclusive Jurisdiction:** An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

**B. Transfer of Proceedings: Declination by Tribal Court.** In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.

**C. State Court Proceedings; Intervention.** In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian tribe, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

**D. Full Faith and Credit to Public Acts, Records, and Judicial Proceedings of Indian Tribes.** The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

## **FEDERAL REGISTER**

1. Exclusive Jurisdiction.

Section B.4(a).

If either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.

Section B.4(b).

If the child is a ward of the tribal court, the state court proceeding shall be dismissed.

2. Transfer of Proceedings

Section C.1.

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding.

C.1 commentary.

Although the Act does not explicitly require transfers of petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask for transfer good cause exists to deny the request.

Section C.2(a).

Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to such transfer, the court declines jurisdiction or the court determines that good cause to the contrary exists for denying the transfer.

Section C.2(b).

Since the Act gives the parents and the tribal court of the Indian child's tribe an absolute veto over transfers, there is no need for any adversary proceedings if the parents or the tribal court opposes transfer. Where it is proposed to deny transfer on the grounds of good cause, however, all parties need an opportunity to present their views to the court.

Section C.3(a).

Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

Section C.3(b).

Good cause not to transfer the proceeding may exist if any of the following circumstances exist:

- (i) the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing; or
- (ii) the Indian child is over twelve years of age and objects to the transfer; or
- (iii) the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses; or
- (iv) the parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

Section C.3(c).

Socio-economic conditions and the perceived adequacy of tribal or BIA social services or judicial systems may not be considered in a determination that good cause exists.

Section C.3(d).

The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.3 commentary.

The determination that a case should not be transferred because a child's contacts with a reservation are so limited can be made by the parent who has a veto over the transfer and only when there is no parent available to make that decision do the BIA guidelines recommend that a State court make that determination.

3. State Court Proceedings; Intervention

C.4 commentary.

In keeping with the intent of Congress, Section 1911(b) has been revised to require the tribal court to decline the transfer affirmatively if it does not wish to take the case.

4. Full Faith and Credit to Public Acts, Records, and Judicial Proceedings of Indian Tribes.

<b>RELEVANT CASES</b>
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**Exclusive Jurisdiction**

A tribe has exclusive jurisdiction to determine the custody of Indian children in child welfare situations with Indian children domiciled on the reservation.

**Supreme Court**

“The purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term (domicile); quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. More specifically, its purpose was, in part, to make clear that in certain situations the state courts did not have jurisdiction over child custody proceedings. Indeed, the congressional findings that are part of the statute demonstrate that Congress perceived the States and their courts as partly responsible of the problem it intended to correct.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

The Supreme Court recognizing a long history of case law establishing exclusive Tribal court jurisdiction over children in child custody proceedings stated, “In enacting the ICWA congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to states.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

“1911(a) & (b) set out jurisdictional standards for the ICWA. (a) Gives exclusive jurisdiction to tribal courts with children that are domiciled within the boundaries of the reservation. (b) Gives concurrent but, presumptive jurisdiction to the tribal court when the Indian child is not domiciled on the reservation.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

Tribal jurisdiction is not meant to be defeated by individual members of the tribe. Congress was not only concerned with Indian families, but also about the impact

on the tribes themselves of the large numbers of Indian children adopted by non-Indians.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

Considerations of the best interests of the child are relevant for placement decisions but not jurisdictional issues. Therefore, bonding and length of placement are improper issues to consider in deciding jurisdiction. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (*affirming the reasoning and conclusion in In re Halloway*, 732 P.2d 962 (Utah 1986): *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981), cert. denied *sub nom. Catholic Social Services v. P.C.*, 455 U.S. 1007 (1982); *In re Adoption of Baby Child*, 102 N.M. 735, 700 P.2d 198 (App. 1985)).

“1913(a), requires that a consent for adoption be recorded before ‘a judge of a court of competent jurisdiction.’ In the case of reservation domiciled children that could be only the tribal court. The children therefore could not be made non-domiciliary of the reservation through any such state-court consent.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

### Federal Courts

In order for this Court to place these Indian children in a home other than with their natural parents, they must have been declared "wards" of the Court. *Powell v. Crisp*, No. E19902539C0AR3CV, 2000 WL 1545064 (Tenn. Ct. App Oct. 18, 2000).

The ICWA gives Indian tribes exclusive jurisdiction to determine the custody of Indian children in child welfare situations. *LaBeau v. Dakota*, 815 F. Supp. 1074 (D. Mich. 1993).

A non-Indian grandmother who got custody through the tribal court and went to the tribal court to adjust the custody agreement, waives any objection to the tribal court’s jurisdiction due to her voluntary submission to it. *Id.*

### 6<sup>th</sup> Circuit

Provision of the ICWA (§1911(a)) for retention of exclusive jurisdiction over custody proceeding involving ward of tribal court only applies when an Indian child is being removed from an existing Indian family. The Existing Indian Family Doctrine is an exception to the application of the ICWA and therefore, the Tribal court does not have jurisdiction of this matter as the Act does not apply to this case. The ICWA should not apply to divest state courts of appropriate jurisdiction to decide custody issues of Indian children by birth whom have not lived in an Indian family for many years. *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996).

### 8<sup>th</sup> Circuit

Tribal court did not have exclusive jurisdiction, pursuant to the ICWA over child custody proceeding involving illegitimate child whose biological father was Indian, where child was not removed from existing Indian family. *Claymore v. Serr*, 405 N.W.2d 650 (S.D. 1987)(*overruled by In the Matter of the Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990)).

Implied consent to exclusive jurisdiction will be inferred from abandoning children on the reservation. *In re R.I.*, 402 N.W.2d 173 (Minn. Ct. App. 1987).

### 9<sup>th</sup> Circuit

Where the child is a ward of the court, the court has exclusive jurisdiction; jurisdiction will remain with the tribe, even if the mother is given physical custody of the child and they move off of the reservation. *In re M.R.D.B.*, 241 Mont. 455, 787 P.2d 1219 (Mont. 1990).

Village council operated under the code or custom of an "Indian tribe" and, under the ICWA was vested with exclusive jurisdiction as a "tribal court" over matter of custody of Indian child and, in absence of a waiver, was not precluded from claiming same in proceedings in state court to place child in foster care and terminate natural mother's parental rights. *In re J.M.*, 718 P.2d 150 (Alaska 1986).

### 10<sup>th</sup> Circuit

The tribal court has exclusive jurisdiction over child custody dispute that originated in tribal court through the voluntary actions of the mother. *Goslin v. Kickapoo Nation*, NO. 98-4107-SAC, 1998 WL 1054223 (Kan. Dec. 2, 1998).

## **State Court Proceedings – Concurrent Jurisdiction**

The state and tribal courts have concurrent jurisdiction when an Indian child is not domiciled within the boundaries of the reservation. A state court cannot transfer a child custody proceeding to a tribal court if it originated in state court and either parent objects to the transfer.

### Supreme Court

"1911(a) & (b) set out jurisdictional standards for the ICWA. (a) Gives exclusive jurisdiction to tribal courts with children that are domiciled within the boundaries of the reservation. (b) Gives concurrent but, presumptive jurisdiction to the tribal court when the Indian child is not domiciled on the reservation." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

Considerations of the best interests of the child are relevant for placement and not jurisdictional issues. Therefore, bonding and length of placement are improper issues to consider in deciding jurisdiction. *Mississippi Band of Choctaw*

*Indians v. Holyfield*, 490 U.S. 30 (1989) (affirming the reasoning and conclusions in *In re Holloway*, 732 P.2d 962 (Utah 1986); *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981), cert. denied sub nom. *Catholic Social Services v. P.C.*, 455 U.S. 1007 (1982); *In re Baby Child*, 102 N.M. 735, 700 P.2d 198 (App. 1985)).

### Federal Court

A state court has a right and a need to determine its own jurisdiction in Indian child adoption cases brought before it; a judge making such a determination clearly would be acting within the scope of his judicial capacity. *Navajo Nation v. District Court for Utah County*, 624 F. Supp. 130 (D. Utah 1985).

§1914 provides minimum federal standards in state Indian child custody proceedings; however, it does not oust states of traditional jurisdiction over Indian children. *Morrow v. Winslow*, 94 F.3d 1386, 1391 (10<sup>th</sup> Cir. 1996)(Okla.).

District Court had subject matter jurisdiction insofar as mother alleged that state proceeding violated the Indian Child Welfare Act. *Roman-Nose v. New Mexico Dept. of Human Services*, 967 F.2d 435 (10<sup>th</sup> Cir. 1992)(Okla.).

The ICWA allows federal courts to invalidate state court proceedings involving the termination of parental rights in an Indian child. *Umtuch v. Hoyt*, 163 F.3d 609 (9<sup>th</sup> Cir. 1998)(Or.).

First impression issues, if substantial, should not support an attorney's fee award against a losing plaintiff. *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10<sup>th</sup> Cir. 1985)(Kan.).

Federal court lacks jurisdiction to determine whether the determination of the tribal court in a child custody proceeding violates due process. Federal courts do not have jurisdiction to review child custody decisions that are within the jurisdiction of the tribal court. *Sandman v. Dakota*, 816 F. Supp. 448 (D. Mich. 1992).

### 8<sup>th</sup> Circuit

Although habeas corpus relief was available to determine validity of California custody decree, father should have exhausted his tribal remedies by appealing tribal court's decision before seeking habeas relief in federal court. *DeMent v. Oglala Sioux Tribe*, 874 F.2d 510 (N.D. 1989).

A county cannot be held liable in a negligence action for decisions made by the tribal court about its members pursuant to ICWA. *Sayers v. Beltrami County*, 481 N.W.2d 547 (Minn. 1992). The court did not abuse its discretion in refusing to reassume jurisdiction over the minor Indian child subsequent to a tribal court ruling. *In re C.C.T.L.*, No. C3-88-253, 1988 WL 53115 (Minn. App. May 31, 1988).

Proceedings as a result of emergency removal give state courts concurrent jurisdiction. *In re R.I.*, 402 N.W.2d 173 (Minn. Ct. App. 1987).

Because prior proceedings did not meet the requirements [within the ICWA], the trial court did not err in concluding reopening the proceeding was mandated. *Gilbert v. Long*, No. C8-92-1502, 1993 WL 27747 (Minn. App. Feb. 09, 1993).

### 9<sup>th</sup> Circuit

The superior court did not lack jurisdiction over the termination proceeding. The tribe representatives signed a stipulation that was approved by the superior court, that the tribe was contacted regarding the stability of the current placements and that the tribe is in agreement with the state's handling of the situation, including the boys' placement with non-Native families. There is evidence that the tribe reserved the right to petition that the proceedings be transferred to the tribal court but there is no indication that a petition was ever filed. Also, a petition under §1911 was never filed. Therefore the superior court had jurisdiction over the termination proceedings. *J.S. v. State of Alaska*, 50 P.3d 388 (Alaska 2002).

ICWA did not bar state court jurisdiction over State's suit on behalf of Indian mother against non-Indian father regarding paternity and custody of child, as proceeding would not terminate parental rights. *State v. Zaman*, 190 Ariz. 208, 946 P.2d 459, 254 (1997).

The language and structure of section 1911 reflect congressional intent that all tribes, regardless of their P.L. 280 status, be able to accept transfer jurisdiction of ICWA cases from state courts. *In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

As the language in section in §1911 makes clear, congress intended P.L 280 to affect tribes' exclusive jurisdiction under subsection 1911(a), but did not intent P.L 280 to affect transfer jurisdiction under subsection 1911(b). *Id.*

Subsection 1911(b) authorizes transfer to tribal courts regardless of whether or how P.L. 280 otherwise affects the tribes' jurisdiction. *Id.*

### 10<sup>th</sup> Circuit

Federal habeas corpus relief is not available under the Indian Civil Rights Act to test the validity of a child custody decree of an Indian tribal court. *Goslin v. Kickapoo Nation*, NO. 98-4107-SAC, 1998 WL 1054223 (Kan. Dec 02, 1998).

## **State Court Proceedings – Domicile**

A child's domicile is that of his/her parents. However, some courts have held that if the child is abandoned, he/she takes the domicile of the person that is standing as guardian to the child.

### Supreme Court

A child who is born off of the reservation to parents domiciled on the reservation is considered to be domiciled on the reservation for purposes of the ICWA,

despite the preferences of the parents to have the State court retain jurisdiction. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

The Supreme Court held in *Holyfield* Congress intended national uniformity in terms in enacting the ICWA; therefore, courts should not look to state law for definition of terms. “The purpose of ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term (domicile); quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. More specifically, its purpose was, in part, to make clear that in certain situations the state courts did not have jurisdiction over child custody proceedings. Indeed, the congressional findings that are part of the statute demonstrate that Congress perceived the States and their courts as partly responsible of the problem it intended to correct.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

### 7<sup>th</sup> Circuit

The tribe is not entitled to exclusive jurisdiction if the Indian child is not domiciled on the reservation. This section only pertains to such warship orders of the tribal court that are entered while the child is residing or domiciled on the reservation. *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

A non-Indian father, domiciled in Illinois, who has sole custody of his children determines that the domicile of the children is in Illinois. As a child’s domicile is usually that of the custodial parent. *In re S.S. & R.S.*, 167 Ill. 2d 250, 657 N.E.2d 935 (1995).

Usually, the domicile of a child shifts to the non-custodial parent when the custodial parent has died, but it does not shift if the non-custodial parent has abandoned the child. In the case of abandonment, the child takes the domicile of the person who stands in loco parents. A limitation of this rule is that non-native people cannot use it against Indians in a scheme to facilitate the adoption of Indian children. *Id.*

If there is no abandonment, children are domiciled where the non-custodial parent is domiciled upon the custodial parent’s death. If this domicile is on a reservation the tribal court has exclusive jurisdiction. *Id.*

### 8<sup>th</sup> Circuit

Children are not domiciled on the reservation where the mother returned to the reservation very late in the proceeding in attempt to gain ICWA standing, but had no intent to make reservation her place of domicile. *In re S.G.V.E.*, 2001 SD 105, 634 N.W.2d 88 (S.D. 2001).

Where there is no evidence to show that the child or the natural mother have ever resided on or were ever domiciled within the reservation of the tribe, §1911(a) is not applicable. Where §1911(a) is not applicable, the court can look

to see if §1911(b) will apply. *Ex. rel. C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. Ct. App. 1992).

Where the child is domiciled within the reservation the tribe is granted exclusive jurisdiction under §1911 (a). An illegitimate child has the same domicile as the mother. For the purposes of ICWA, persons can reside in one place, but be domiciled in another. *In re of G.R.F.*, 569 N.W.2d 29 (S.D. 1997).

### 9<sup>th</sup> Circuit

The language of §1911(b) reflects congressional intent that all tribes be able to accept transfer of jurisdiction of ICWA cases from state courts. §1911(b) authorizes transfer to tribal court regardless of whether or how P.L. 280 otherwise affects the tribes' jurisdiction. The lower court erroneously concluded that under §1911(b) the tribe could not claim jurisdiction and therefore, did not make a decision on denial for good cause. On remand, the trial court should inquire whether good cause exists to transfer jurisdiction to the tribe. *In re C.R.H.*, 29 P.3d 849 (Alaska 2001)(red's *Native Village of Newnan v. State, Dep't of Health & Soc. Servs.*, 722 P.2d 219 (Alaska 1986)).

A tribe has concurrent jurisdiction over an Indian child who is domiciled off of the reservation. *In re Maricopa County Juvenile Action No. JS-7359*, 766 P.2d 105 (Ariz. Ct. App. 1988).

An illegitimate child of un-emancipated Indian minor takes the domicile of their Mother. *In re Appeal of Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981), cert. denied *sub nom. Catholic Social Services of Tucson v. P.C.*, 455 U.S. 1007, cited with approval in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30(1989). See also for similar reasoning and conclusions *In re Halloway*, 732 P.2d 962 (Utah 1986); *In re Baby Child*, 102 N.M. 735, 700 P.2d 198 (App. 1985)).

### 10<sup>th</sup> Circuit

Appellant's concerns about the outcome in tribal court did not constitute good cause for the state court to retain jurisdiction. *State ex rel. Children, Youth, and Families Dept. v. Andrea M.*, 129 N.M. 512, 10 P.3d 191 (N.M. Ct. App. 2000).

Federal law providing Indian courts with exclusive jurisdiction over custody proceedings involving children on reservation preempts state laws. *In re Halloway*, 732 P.2d 962 (Utah 1986), cited with approval in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30(1989). See also for similar reasoning and conclusions *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981), cert. denied *sub nom. Catholic Social Services v. P.C.*, 455 U.S. 1007 (1982); *In re Baby Child*, 102 N.M. 735, 700 P.2d 198 (App. 1985)).

A child by parents under Utah law acquires domicile of foster parents. However, adoption proceeding was pre-empted by federal law providing tribal courts with exclusive jurisdiction of Indian children domiciled on the reservation. *In re*

*Halloway*, 732 P.2d 962 (Utah 1986), cited with approval in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30(1989). See also for similar reasoning and conclusions *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981), cert. denied sub nom. *Catholic Social Services v. P.C.*, 455 U.S. 1007 (1982); *In re Baby Child*, 102 N.M. 735, 700 P.2d 198 (App. 1985)).

Where Indian mother gave her residence as Pueblo, there was no evidence in record to indicate that mother was not resident and domiciliary of Pueblo, baby child then assumed mother's domicile and became domiciliary of Pueblo; thus, jurisdiction over adoption proceedings was exclusive in tribal court. *In re Baby Child*, 102 N.M. 735, 700 P.2d 198 (N.M. Ct. App. 1985), cited with approval in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30(1989). See also for similar reasoning and conclusions *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981), cert. denied sub nom. *Catholic Social Services v. P.C.*, 455 U.S. 1007 (1982); *In re Halloway*, 732 P.2d 962 (Utah 1986).

### **State Court Proceedings – Limits**

The ICWA applies only to child custody hearings as defined by the ICWA. The ICWA does not apply to divorce proceedings, nor does it divest state courts of jurisdiction, in a child custody proceeding when the children are residing off the reservation.

#### **Federal Court**

A tribal court acted outside of its jurisdiction when it determined custody in a divorce proceeding where the father was non-Indian and never resided on the reservation. *DeMent v. Oglala Sioux Tribe*, 874 F.2d 510 (N.D. 1989).

#### **7<sup>th</sup> Circuit**

§1911(a) pertains to orders of the tribal court that are entered while the child is residing or is domiciled on the reservation; therefore, in this case, the tribe did not have exclusive jurisdiction. *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

#### **8<sup>th</sup> Circuit**

This act makes no reference to exception for custody disputes within the extended family. Congress did, however, explicitly exclude custody disputes resulting from divorce proceedings and juvenile delinquency actions from the protections of the Act. *In re A.K.H.*, 502 N.W.2d 790 (M.N. 1993).

This act leaves no provisions for divorce custody cases. *Desjarlait v. Desjarlait*, 379 N.W.2d 139 (M.N. 1985)

### 10<sup>th</sup> Circuit

ICWA's congressional intent was not to divest jurisdiction, established at time action was filed, if there was change in parties' domicile during pendency of case. Children's court had concurrent jurisdiction with Cherokee tribal court at time that abuse and neglect proceedings were brought; Children's court retains jurisdiction. *Spear v. McDermott*, 121 N.M. 609, 916 P.2d 228 (N.M. Ct. App. 1996).

### **State Court Proceedings – Wards of Tribal Court**

The Tribal Court retains jurisdiction over children who are wards of the court.

### 5<sup>th</sup> Circuit

Because the child was a ward of the council, exclusive jurisdiction was established in the Council. The fact that non-Indian defendants already had physical custody of child did not preclude Council from exercising its exclusive jurisdiction. *Owens v. Willock*, 690 So.2d 948 (La. Ct. App. 1997).

### 6<sup>th</sup> Circuit

Provision of ICWA, § 1911(a) for Tribal court retention of exclusive jurisdiction over custody proceeding involving ward of tribal court did not apply as the Kentucky Supreme Court recognizes the Existing Indian Family Exception to ICWA. In this case, ICWA did not apply to the case due to the exception; and therefore, § 1911(a) did not apply to the case. *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996).

### 8<sup>th</sup> Circuit

A tribe doesn't have exclusive jurisdiction under 1911(a) of ICWA where the children are not domiciled and do not reside on the reservation, and where they are not wards of the tribal court. Children are not domiciled on the reservation where the mother returned to the reservation very late in the proceeding in attempt to gain ICWA standing, but had no intent to make reservation her place of domicile. *In re S.G.V.E.*, 2001 SD 105, 634 N.W.2d 88 (S.D. 2001).

### **Transfer of Proceedings - Generally**

Transfer of proceedings will hinge on the domicile of the child. If the Indian child is domiciled on a reservation the tribal court has exclusive jurisdiction and any state court proceeding must be transferred to tribal court. If the Indian child is domiciled off of the reservation the state court and tribal court have concurrent jurisdiction and the state court shall transfer jurisdiction to the tribal court absent objection by parent objects to the transfer or good cause to the contrary.

### U.S. Supreme Court

Congressional objectives make clear that a rule permitting individual parents to defeat the ICWA's jurisdictional scheme would be inconsistent with the statute's purpose. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

Considerations of the best interests of the child are relevant for placement decision but not jurisdictional issues. Therefore, bonding and length of placement are improper issues to consider in deciding jurisdiction. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), (*affirming the reasoning and conclusions in In re Halloway*, 732 P.2d 962 (Utah 1986); *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981), cert. denied *sub nom. Catholic Social Services v. P.C.*, 455 U.S. 1007 (1982); *In re Adoption of Baby Child*, 102 N.M. 735, 700 P.2d 198 (App. 1985)).

State considerations of best interests are inapplicable to the ICWA's jurisdictional requirements. The U.S. Supreme Court determined that Congress intended ICWA to have nationwide uniformity of terms and State laws should not frustrate that intention. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

### Federal Court

Transfer of jurisdiction over children of one-quarter Indian blood to Indian tribal court was not "pursuant to law," as required for tribal court to exercise jurisdiction pursuant to tribal code. Parents were not consulted prior to transfer and clearly would have objected had they been given opportunity; under the Indian Child Welfare Act, the matter could not be transferred without consent of parents. *Brown on behalf of Brown v. Rice*, 760 F. Supp. 1459 (D. Kan. 1991).

### 6<sup>th</sup> Circuit

A Tribe may have declined jurisdiction because an Indian parent is not an enrolled member of the tribe or because the Indian parent has more affiliation with another tribe. *In re Shawboose*, 438 N.W.2d 272 (Mich. Ct. App. 1989).

### 7<sup>th</sup> Circuit

Under §1911 (b), "either parent or the Indian custodian or the Indian child's tribe" may request a transfer of jurisdiction. The mother in this case was therefore entitled to request a transfer of jurisdiction. The state court, once asked by the mother to transfer jurisdiction, should ascertain whether the tribal court is declining jurisdiction. *In re Shawnda G.*, 247 Wis.2d 158, 634 N.W.2d 140 (Wis. Ct. App. 2001).

Tribal court is the appropriate forum even when the child has had no contact with the tribe or reservation since birth and even though the Indian parents did not

want tribal involvement with their children who were never residents of the reservation. *In re Eleanor Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (1990).

Evidence must be presented at trial to determine Native American heritage before the court can transfer to a tribal court. *In re M.S.*, 301 Ill. App. 3d 998, 705 N.E.2d 162 (Ill. Ct. App. 1999).

Considerations of the best interests of the child are relevant for placement and not jurisdictional issues. *In re Eleanor Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (1990).

### 8<sup>th</sup> Circuit

The court did err in denying the tribe's intervention in the proceedings where the tribe adequately explained its intentions that it was not seeking any involvement in the termination proceedings. *In re D.W.*, No. 00-1677, 2001 WL 710205 (Iowa Ct. App. June 13, 2001)(unpublished opinion).

Where §1911(a) is not applicable, the court can look to see if §1911(b) will apply. According to §1911(b), the case must be transferred "upon the petition of either parent," the Indian custodian, or the Indian child's tribe in the absence of "good cause" to the contrary. Section 1911 (b) expressly requires a petition to transfer be tendered to effectuate this section of the Act. *Ex. rel. C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. Ct. App. 1992).

Where the Indian appellant is not given reasonable notice and the judge dismisses jurisdiction without receiving evidence, the hearing is insufficient to constitute the evidentiary hearing as required by §1911(b) of ICWA. *Ex. rel. Crystal W.H., v. Cheryl W.H. and Oglala Sioux Tribe*. NO. A-93-974, 1994 WL 528574 (Neb. Nov 16, 1994).

### 9<sup>th</sup> Circuit

Section 1911(b) does not apply to the preadoptive placement proceedings after parental rights have been taken away from the Indian parents, the tribe has been given sufficient notice, and the foster placement has occurred. *In re A.P.*, 289 Mont. 521, 962 P.2d 1186 (Mont. 1998).

There is no due process where no hearing is held and a legitimate request for appointment of counsel is ignored. *In re G.L.O.C.*, 205 Mont. 352, 668 P.2d 235 (Mont. 1983).

Superior court can not transfer termination of parental rights proceeding to tribal court on Alaska native village's petition without first determining that tribe is authorized by Secretary of Interior to reassume jurisdiction over child custody matters. *In re K.E.*, 744 P.2d 1173 (Alaska 1987).

Indian tribe was not entitled to transfer of child custody matter from Superior Court to tribe where the particular tribe had not been approved by the Secretary of United States Department of the Interior to reassume jurisdiction of custody

matters. *Native Village of Nenana v. State, Dept. of Health & Social Services*, 722 P.2d 219 (Alaska 1986).

Considerations of the best interest of the child are relevant for placement and not jurisdictional issues. Therefore, bonding and length of placement are improper considerations in considering jurisdiction. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), (affirming the reasoning and conclusions in *In re Halloway*, 732 P.2d 962 (Utah 1986); *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981), cert. denied *sub nom. Catholic Social Services v. P.C.*, 455 U.S. 1007 (1982); *In re Adoption of Baby Child*, 102 N.M. 735, 700 P.2d 198 (App. 1985)).

### 10<sup>th</sup> Circuit

Plain language of the ICWA, establishing concurrent but presumptively tribal jurisdiction in child custody proceeding involving Indian child not domiciled on reservation, gives either parent absolute veto power over transfer of jurisdiction to tribal court. *In re D.A.C.*, 933 P.2d 311 (Utah 1997).

Considerations of the best interests of the child are relevant for placement and not jurisdictional issues. Therefore, bonding and length of placement are improper considerations in determining jurisdictional issues. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), (affirming the reasoning and conclusions in *In re Halloway*, 732 P.2d 962 (Utah 1986); *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981), cert. denied *sub nom. Catholic Social Services v. P.C.*, 455 U.S. 1007 (1982); *In re Adoption of Baby Child*, 102 N.M. 735, 700 P.2d 198 (App. 1985)).

Proceeding in which non-Indian paternal great-aunt and her husband sought guardianship of Indian children was required to be transferred to tribal court, unless there is “good cause” not to transfer. *In re Ashley Elizabeth R.*, 116 N.M. 416, 863 P.2d 451 (N.M. Ct. App. 1993).

Under ICWA, trial court did not have authority to transfer jurisdiction of adoption proceedings to tribal court. Because it was not “foster care placement” proceeding or “termination of parental rights” proceeding within the meaning of the act. *In re J.B.*, 900 P.2d 1014 (Okla. Ct. App. 1995).

Indian tribe essentially declined jurisdiction by intervening in a dependency and neglect action regarding an Indian child, and thus trial court was not required to transfer the case to the tribe for resolution under the ICWA. *People ex rel. A.N.W.*, 976 P.2d 365 (Colo. Ct. App. 1999).

In order to comply with the ICWA, the trial court must obtain a declination of jurisdiction from the tribal court, not the tribe, or make a finding that good cause exists not to transfer the case to tribal court. *In re C.Y.*, 22 Kan. App. 2d 941, 925 P.2d 447 (1996).

Petition to transfer jurisdiction to court of Indian offenses was properly denied where non-Indian mother of illegitimate child objected to transfer of proceeding for adoption of child to court of Indian offenses and, as specifically provided by

the ICWA, such a transfer could not be made over her objection. *In re Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982).

Trial court did not abuse its discretion in denying transfer of dependency and neglect case involving Indian child to tribal court; proceedings were at advanced stage and tribe's motion, filed over three years after tribe received notice of dependency and neglect petition, was untimely. *In re A.T.W.S.*, 899 P.2d 223 (Colo. Ct. App. 1994).

Tribe did not intervene until one year after receiving notice of proceedings; this is not a "good cause" not to transfer jurisdiction. *In re J.L.P.*, 870 P.2d 1252 (Colo. Ct. App. 1994).

Provision of the ICWA requiring that a case involving the foster care placement of Indian children be transferred to the jurisdiction of the tribe was not applicable where initial placement of children in foster care took place prior to enactment of the Act. *In re J.L.G.*, 687 P.2d 477 (Colo. Ct. App. 1984).

### **Transfer of Proceedings - Parental Objection**

If either parent objects to the transfer from state court to tribal court when the Indian child is domiciled off of the reservation and the action is started in state court then the state court is prohibited from transferring jurisdiction to the tribal court.

#### **2<sup>nd</sup> Circuit**

Transfer to tribal court of a proceeding brought by non-Indians to adopt the infant child of a part-Indian mother was not appropriate even if the ICWA applied, where the mother filed an affidavit which clearly stated that she objected to transfer. *In re Baby Girl S.*, 181 Misc. 2d 117, 690 N.Y.S.2d 907 (N.Y. Sup. Ct. 1999).

#### **6<sup>th</sup> Circuit**

Pursuant to §1911(b), a mother's objection to the transfer of jurisdiction from the county to the tribe is sufficient under the statute to negate the transfer. *In re Spang*, No. 95-2, 1995 WL 776051 (Ohio Dec. 6, 1995).

The findings that the parent had the power to object and did object, and the child had a lack of contact with the tribe were sufficient to deny transfer. *Id.*

#### **8<sup>th</sup> Circuit**

The statute does not require parent give consent to the transfer of jurisdiction to the Tribal Court. A transfer is required when a parent has made no objection. *In re C.C.T.L.*, C3-88-253, 1988 WL 53115 (Minn. Ct. App. May 31, 1988).

The states do not have the discretion to determine whether a transfer should take place if either parent objects to the transfer, parents objection mandates retention of the action in state court. *In re R.I.*, 402 N.W.2d 173 (Minn. 1987).

The trial erred when it granted the tribes renewed motion to transfer despite mother's proper objection pursuant to 1911(b). The plain language of the statute makes it clear that a parent's objection to transfer prevents such transfer, and there is no authority for the proposition that termination erases from the record a timely objection by a parent cited to appear in the proceeding. *In re K.D.*, 2001 SD 77, 630 N.W.2d 492 (SD 2001).

The juvenile court did not lack jurisdiction where the Indian parent and child, at the time of the voluntary termination proceedings, resided in and were domiciled in Bismarck. Especially where the parent has previously objected to the tribe having jurisdiction. *In re L.D.R.T.*, 391 N.W.2d 594 (N.D 1986).

Regardless of his misconduct, the natural father has veto power under ICWA to prevent transfer to tribal court. *In re A.E.*, 572 N.W.2d 579 (Iowa 1997).

### 9<sup>th</sup> Circuit

The district court properly exercised jurisdiction where mother and children lived off of reservation, non-Indian father objected to the initial transfer to tribal court and tribe declined to take jurisdiction of the matter, even though parents and children were enrolled members of Northern Cheyenne Tribe. *In re W.L.*, 260 Mont. 325, 859 P.2d 1019 (1993).

The court did not err when it used the best interest of the child as "good cause" in determining not to transfer jurisdiction to the tribal court. *In re T.S.*, 245 Mont. 242, 801 P.2d 77 (1990).

A non-Indian father's objection to the Indian mother's request for transfer to a tribal court mandated the retention of jurisdiction of the state court. *In re Maricopa County Juvenile Action No. JS-7359*, 766 P.2d 105 (Ariz. Ct. App. 1988).

A state court must transfer jurisdiction absent objection of either parent. *Id.*

### 10<sup>th</sup> Circuit

Provision of ICWA permitting either parent to object to transfer of custody matter to tribal court where subject child is not domiciled in and does not reside on reservation of child's tribe did not permit father to block transfer of custody proceeding to Navajo Nation Family Court where record was silent as to child's domicile, parents were both enrolled members of the Navajo Nation and domiciled within or proximity to the Navajo Nation. *State ex rel. Children, Youth, and Families Dept. v. Andrea M.*, 129 N.M. 512, 10 P.3d 191 (N.M. Ct. App. 2000).

## Transfer of Proceedings - Timeliness

The timeliness of a request to intervene may be a consideration in determining good cause not to transfer. However, the BIA guidelines state that timeliness may only be taken into consideration when the case has progressed into the advanced stages of litigation and it would not be in the best interest of the child to allow the transfer.

### 2<sup>nd</sup> Circuit

Good cause not to transfer exists when the putative father notifies the court for the first time of Indian heritage the day before the finalization of adoption and one month after a full evidentiary hearing regarding the best interests of the minor. *In re Christopher*, 662 N.Y.S.2d 366 (N.Y. Fam. Ct. 997).

### 6<sup>th</sup> Circuit

There is no abuse of discretion when a district court denies a motion for rehearing due to lack of ICWA compliance when Indian mother only became aware of her Indian heritage, and only informed the court of this heritage, after the termination hearing. *In re Johanson*, 402 N.W.2d 13 (Mich. Ct. App. 1987).

Good cause existed not to transfer this case to a tribal court because the petitioner did not file a petition promptly after receiving notice of the hearing and the proceeding was already at an advanced stage. *In re Sanchez*, NO. 98-T-0104, 1999 WL 1313630 (Ohio Ct. App. Dec. 23, 1999).

### 7<sup>th</sup> Circuit

The 2 ½ year delay of notification to the state court (and the bonding between the Foster parents and the child during that time) that child was an Indian does not constitute “good cause” not to transfer to tribal court. *In re Eleanor Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (1990).

A brief that is filed five years into the case, which is the first time in five years that a claim of Native American heritage has been made before the court, is too late in the process to ensure that compliance with ICWA and appropriate procedural steps are followed. *In Re Britniya R.A.*, 610 N.W.2d 230 (Wis. Ct. App. 2000, an unpublished opinion).

### 8<sup>th</sup> Circuit

It is in the discretion of the courts to deny motions as untimely, but courts must understand the importance of allowing the tribe to determine issues according to tribal law. *In re B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990).

Good cause exists to deny transfer of jurisdiction where the Tribe appeared at certain hearings, requested continuance on the transfer issue because its position on the transfer issue could change (depending on tribal elections), and

after requesting continuance on the issue a second time Tribe failed to appear for the third hearing. Thus, the tribe demonstrated that its position on the transfer issue had in fact changed and by this time the proceedings were in its advanced stages. *In re K.T.*, No. 02-0952, 2002 WL 1758435 (Iowa Ct. App. July 31, 2002) (unpublished opinion).

A tribe's motion to intervene is too late where the case has already been pending for 14 months and the mother's parental rights had actually been terminated for two months; the tribe had notice of the proceedings since October 1999 and offered no explanation as to why it waited so long to request jurisdiction. *In re S.G.V.E.*, 2001 SD 105, 634 N.W.2d 88 (S.D. 2001).

Where the tribe waits 21 months from the removal of the child from the home before making a motion to transfer, and where the tribe has not approached the mother to address specific problems, where the tribe is unfamiliar with the extent of the mother's tribal contacts and where the tribal representative have never met the child there is good cause to deny a transfer to tribal court. *In re Y.V.* NO. 1999-4199-672, 1999 WL 1255722 (Iowa Ct. App. Dec 27, 1999).

The tribe didn't make a timely motion to intervene. The court has found that the language of the BIA guidelines apply not only to the degree to which termination proceedings have advanced, but also apply to the degree in which the child in need of assistance proceedings have advanced. *In re M.M.*, NO. 98-1944, 1999 WL 1157441 (Iowa Ct. App. Dec. 13, 1999).

Rosebud's motion to transfer jurisdiction over custody determination of Indian child to tribal court was timely; where less than one month after receiving notice of petition alleging child was abused and neglected Tribe moved to intervene, and transfer jurisdiction. The Indian child was entitled to evidentiary hearing to establish good cause not to transfer jurisdiction over custody determination to Rosebud Sioux Tribe, where child lived outside the reservation. Also, the Indian child must be given adequate notice of hearing on Tribe's motion to transfer the case to Tribal court or an opportunity to be heard. *In re M.C.*, 504 N.W.2d 598 (S.D. 1993).

The timeliness of a request to intervene may be a consideration in determining good cause not to transfer, in keeping with the terms in the BIA guidelines that good cause may exist if the proceeding were at an "advanced stage". *In re A.L.*, 442 N.W.2d 233 (S.D. 1989).

### 9<sup>th</sup> Circuit

The superior court did not err in retaining jurisdiction because the Nation did not present its motion to transfer until too late in the proceedings. Also, the tribe had not been notified as required by ICWA, however found out about the proceeding in some unknown way but did not present the court with a motion to transfer to tribal court until a hearing held in Nov. 2000. *In re Napoleon.*, No. 27195-8-II, 2002 WL 31409959 (Wash. Ct. App. Oct. 25, 2002)(unpublished opinion).

The circuit court did not err in denying transfer of jurisdiction where the tribe waited until the advanced stages of the proceeding to make a motion to transfer. In this case the tribe waited 18 months after notice of the dependency action and nearly all the evidence had all ready been heard. *In re Lucas*, 177 Or. App. 318, 33 P.3d 1001 (Or. Ct. App. 2001).

A request by a tribe is untimely; untimeliness constitutes good cause to deny transfer when the request is made after a delay of sixteen months. *In re Robert T.*, 246 Cal. Rptr. 168 (Cal. Ct. App. 1988).

### 10<sup>th</sup> Circuit

Best interests of child should not be factor in court's determination of whether to grant tribe's motion to transfer jurisdiction in dependency and neglect proceeding to tribal court. *In re A.T.W.S.*, 899 P.2d 223 (Colo. Ct. App. 1994).

Trial court did not abuse its discretion in declining to transfer parental termination proceeding involving Indian child to tribal court where mother's oral request for transfer was made after trial had commenced and tribe had executed written waiver of participation in proceeding. *In re Laurie R.*, 107 N.M. 529, 760 P.2d 1295 (N.M. Ct. App. 1988).

Trial court did not abuse its discretion in denying Pueblo's petition to transfer parental rights termination proceedings to tribal court when tribe let two years go by, after notice, and then filed a petition to transfer. *In re Maricopa County Juvenile Action No. JS-8287*, 171 Ariz. 104, 828 P.2d 1245 (Ariz. App. 1991).

An Indian mother's request to transfer four years into the proceedings is seen as an attempt to manipulate the system. *In re J.W.*, 528 N.W.2d 657 (Iowa Ct. App. 1995), unpublished opinion.

### **Transfer of Proceedings - Good Cause**

Good cause not to transfer jurisdiction to a tribal court is not defined in the ICWA. However, the Federal Register gives limited examples of when good cause may exist: the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing; or the Indian child is over twelve years of age and objects to the transfer; or the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses; or the parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

### Supreme Court

Considerations of the best interests of the child are relevant for placement decisions but not jurisdictional issues. Therefore, bonding and length of placement are improper issues to consider in deciding jurisdiction. *Mississippi*

*Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), (affirming the reasoning and conclusions in *In re Halloway*, 732 P.2d 962 (Utah 1986); *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981), cert. denied *sub nom. Catholic Social Services v. P.C.*, 455 U.S. 1007 (1982); *In re adoption of Baby child*, 102 N.M. 735, 700 P.2d 198 (App. 1985)).

### 2<sup>nd</sup> Circuit

Good cause not to transfer exists when the putative father notifies the court for the first time of Indian heritage the day before the finalization of adoption and one month after a full evidentiary hearing regarding the best interests of the minor. *In Christopher*, 662 N.Y.S.2d 366 (N.Y. Fam. Ct. 1997).

### 4<sup>th</sup> District

Transfer to the tribal court would cause undue hardship when all of the witnesses, as well as records of treatment and evaluation, are located in South Carolina and the tribal court is located several thousand miles away in South Dakota. *Chester County Dept. of Social Services v. Coleman*, 399 S.E.2d 773 (S.C. 1990).

Good cause may arise from geographical obstacles. *Id.*

Good cause is not defined in the Act, but the legislative history states that the term was designed to give state courts flexibility in determining the disposition of a placement proceeding involving an Indian child. *Id.*

### 7<sup>th</sup> Circuit

Under §1911(b), children not domiciled within the reservation, jurisdiction must be transferred to the tribal court upon a petition by either the parent or the tribe and absent good cause not to transfer to the tribal court. *In re D.S., and D.E.S. v. County Department of Public Welfare of St. Joseph County*, 577 N.E.2d 572 (Ind. 1991).

The 2 ½ year delay of notification to the state court (and the bonding between the Foster parents and the child during that time) that child was an Indian does not constitute “Good Cause” not to transfer to tribal court. ICWA states that an Indian child’s tribe shall have a right to intervene at any point in the proceedings. A hearing must be held with counsel representing both parents to determine whether good cause exists not to transfer to the tribal court. The burden of good cause is on the party opposing the transfer. Socioeconomic conditions and/or the perceived adequacy of tribal social services may not be considered in determining good cause. *In re Elenor Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (Ill. 1990).

“Considerations involving best interest of the child are relevant not to determine jurisdiction but to ascertain placement.” Bonding and length of placement are

improper considerations in deciding good cause not to transfer proceedings. *In re Elenor Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (Ill. 1990).

The best interests of the child may be used to determine good cause. The Indian mother's history of drug use, repeated incarceration, suicide attempt, and abandonment of the minor for seven years constituted good cause not to transfer. *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

Good cause to deny transfer of proceedings to tribal court is not present when a tribe has requested transfer to the proceedings in a timely manner after the tribe has been notified by registered mail with return receipt requested of the proceedings. *In re Mikayla v. State*, 539 N.W.2d 338 (Wis. 1995).

The 'good cause' exception is discretionary. It is designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. Until a tribe is able to present a plan that will continue to provide for the child's needs and takes into account his wishes, the late intervention is disruptive and not in the child's best interests and contrary to the intent and purpose of the ICWA. *In re Cody v. Mille Lacs Band of Chippewa Indians*, 618 N.W.2d 274 (Wis. Ct. App. 2000).

*Forum non convenience*, one reason for good cause is undue hardship, which would occur when all of the witnesses reside in the state court's jurisdiction. In determining good cause, the court should look at the non-binding BIA guidelines. *In re adoption of S.S.*, 167 Ill.2d 250, 657 N.E.2d 935 (1993).

*Forum non conveniens* doctrine to deny transfer should not be imposed merely because the tribal court is in another state. *In re Eleanor Armell*, 194 Ill. App. 3d 31, 550 N.E. 3d 1060 (1990).

### 8<sup>th</sup> Circuit

A year and a half after the placement, the trial court's finding of good cause to deny the transfer to tribal court is consistent with the guidelines for application of the ICWA. *Gilbert v. Long*, No. C8-92-1502, 1993 WL 27747 (Minn. App. Feb. 09, 1993).

The circuit court entered a detailed memorandum analyzing each of the factors of good cause not to transfer, but found for the following reasons: the proceedings were not in advanced stages, J.L. is not over 12 years of age, J.L. is less than five and his mother is available, the Standing Rock Sioux has a tribal court and could entertain this action. *In re J.L.*, 2002 SD 144, 654 N.W.2d 786 (S.D. 2002).

Although the best interests of the child are a valid consideration in determining the issue of good cause under §1911(b), the court can't rely on that standard merely to insure that the child has a better home or someone better to care for the child. *In re J.L.*, 2002 SD 144, 654 N.W.2d 786 (S.D. 2002).

In Considering "Good cause" may exist the Court looked at a combination of factors including: location of the witnesses and evidence, lack of participation by

the tribe or the natural parents, and the fact that no petition to transfer was ever filed. *Ex rel. of C.E.H. v. L.M.W. and R.H.*, 837 S.W.2d 947 (Mo. Ct. App. 1992).

Good cause is not defined in the Act, but the legislative history states that the term was designed to give state courts flexibility in determining the disposition of a placement proceeding involving an Indian child. *In re A.L.*, 442 N.W.2d 233 (S.D. 1989).

Pursuant to §1911(b), if good cause can be shown not to transfer the case to tribal court, jurisdiction will remain with state courts. *Ex rel. Interest of C.W., M.W., K.W., and J.W. v. D.W.*, 479 N.W.2d 105 (Neb. 1992).

Good cause to deny transfer of the proceedings to tribal court, under §1911(b), was shown by no evidence that the tribe had authorized the petition for transfer or the proceedings accepted or approved by the tribal court. *In re Bird Head*, 331 N.W.2d 785 (Neb. 1983).

A tribe's failure to show numerous times at hearings, despite continuances, and the tribe's failure to provide evidence of the minor's Indian heritage are good cause not to transfer jurisdiction to the tribal court. *In re J.D.B.*, 584 N.W.2d 577 (Iowa Ct. App. 1998).

Good cause to deny the transfer of jurisdiction exists in the fact that transferring jurisdiction would result in undue hardship to the child and witnesses. All the evidence is located in Iowa, and all the essential witnesses, except the mother reside in Iowa. The Sac and Fox tribe doesn't have the power to subpoena people outside of its jurisdiction. *In re B.M.*, 532 N.W.2d 504 (Iowa Ct. App. 1995).

Good cause not to transfer a case to tribal court exists when the tribe makes the motion for transfer late in the proceedings, the transfer would result in undue hardship to the parties and the witnesses, and the bulk of the evidence is located in Iowa and the majority of witnesses reside in Iowa. *In re J.W.*, 528 N.W.2d 657 (Iowa Ct. App. 1995).

The burden is on the state to show good cause with clear and convincing as the standard. *In re M.E.M.*, 195 Mont. 329, 635 P.2d 1313 (1981).

Good cause has been shown to deny the transfer. The tribe's contact has been with the mother, not the family unit; meanwhile the State of Iowa through its social agency has had extensive contact with the family unit. The bulk of the evidence and the majority of the witnesses will come from Iowa. The cultural and socio-economic consideration used by the juvenile court to justify its second dispositional order placing these children in a white foster home would be clearly inappropriate under ICWA; they are not to be considered when removing an Indian child. *In re J.R.H.*, 358 N.W.2d 311 (Iowa 1984).

Good cause existed not to transfer proceedings to terminate grandmother's custodial rights in two minor Indian children to tribal court; children were over five years of age and had little or no contact with tribe, evidence in case could not be adequately presented to tribal witnesses, and petition was untimely. *In re J. J.*, 454 N.W.2d 317 (S.D. 1990).

Guardian ad litem's unfounded claim that Indian tribe would not provide medical care adequate to address Indian child's needs, and fact Indian tribe had not specifically assured it would be able to meet the child's medical needs, did not establish good cause for denying transfer of the child dependency proceeding from the juvenile court to the tribal court. *Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, 7 P.3d 960 (Ariz. Ct. App. 2000).

### 9<sup>th</sup> Circuit

Parents' wishes may constitute "good cause" in determining placement, but the parents' wishes and the removal of children from the reservation does not make ICWA inapplicable. *In re M.*, 832 P.2d 518 (Wash. Ct. App. 1992).

### 10<sup>th</sup> Circuit

Best interests of the child is a factor to consider in denying transfer of jurisdiction to the tribal court, under authority of the Oklahoma Supreme court in, *In re N.L.*, best interests of the child should be considered. *In re S.W.*, 2002 OK CIV APP 26, 41 P.3d 1003 (Okla. Ct. App. 2002).

Presence of witnesses and parties in Okmulgee County, and best interests of Indian child, supported finding good cause to deny mother's request to transfer proceeding on petition alleging Indian child was deprived from trial court in Okmulgee County to tribal court in Kay County. *In re N.L.*, 754 P.2d 863 (Okla. 1988).

Good cause exists where state had extensive contact with the family unit compared to the limited contact with the tribe and the majority of evidence and witnesses are in the state. *In re N.L.*, 754 P.2d 863 (Okla. 1988).

A request by the tribe for transfer was untimely; therefore, constituted good cause not to transfer when the request was made on the day of the termination hearing. *Wayne R.N.*, 757 P.2d 1333 (N.M. Ct. App. 1988).

Good cause may arise from geographical obstacles. *Id.*

## **State Court Proceedings: Tribal Intervention**

Even if a tribe fails to intervene at the beginning of a court proceeding the tribe is not precluded from later intervening.

### 2<sup>nd</sup> Circuit

Indian tribe could intervene in a proceeding brought by non-Indians to adopt the infant child of a part-Indian mother, where intervention served the interest of conserving judicial resources and those of the litigants and where the tribe had sufficient interest in the proceeding, even though the ICWA did not apply. *In re Baby Girl S.*, 181 Misc.2d 117, 690 N.Y.S.2d 907 (N.Y. 1999).

### 7<sup>th</sup> Circuit

The court found that ICWA was not applicable where parent made unsubstantiated allegation of Native descent late in termination of parental rights proceedings, and social worker contacted two tribes alleged to be child's tribe. One sent back letter saying the children were not eligible for enrollment, and the other tribe did not respond. *In re M.S. et al., Minors.*, 301 Ill. App. 3d 998, 706 N.E.2d 524 (1999).

### 8<sup>th</sup> Circuit

The ICWA applies to intra family custody disputes between parents and the Grandmother where Grandmother qualifies an Indian custodian and a "Foster Care" provider within the definition of ICWA. Therefore, the tribes was allowed to intervene. *In re the Custody of A.K.H.*, 502 N.W.2d 790 (Minn. 1993).

A tribal court's request for intervention one month after receiving notice is timely. *In re M.C.*, 504 N.W.2d 598 (S.D. 1993).

### 9<sup>th</sup> Circuit

The state's interest requiring attorney representation is not as substantial as the tribal interests in participating in ICWA proceedings. *State ex rel. Juvenile Dept. of Lane County v. Shuey*, 119 Or. App. 185, 850 P.2d 378 (1993).

Intervention by tribe into adoption proceeding involving Indian child was necessary to preserve tribe's interest in its member. *In re J.R.S.* 690 P.2d 10 (Alaska 1984).

Parents could not raise issue of the trial court's denial of intervention by tribe under ICWA in the termination of parental rights action on appeal; tribe was the party in interest who had to raise the issue on appeal. *S.H. v. Calhoun County Dept. of Human Resources*, NO. 2000042, 2001 WL 498979 (Alaska Ct. App. May 11, 2001).

The parents who sought voluntarily to terminate their parental rights to children who were members of Oglala Sioux Tribe could not raise on appeal the issue of trial court's denial of Tribe's motions to intervene and for transfer of jurisdiction to tribal court pursuant to ICWA, as Tribe was not a party to appeal. *R.B. v. State Dept. of Human Resources*, 669 So.2d 187 (Ala. Civ. App. 1995).

### 10<sup>th</sup> Circuit

Even if a tribe fails to intervene at beginning of guardianship proceeding involving Indian child, it is not precluded from intervening at later point in the absence of express waiver of right to intervene. *In re Q.G.M.*, 808 P.2d 684 (Okla. 1991).

Indian tribe was not entitled either to notice of adoption proceedings, or to intervene in proceedings, of children who were placed for adoption prior to date on which they became eligible for tribal membership; extensive custody hearings

had been conducted prior to date children became tribal members in which relatives, who were also tribal members, had participated. *People, Dept. of Social Services in Interest of A.E.V.*, 782 P.2d 858 (Colo. Ct. App. 1989).

Indian tribe that failed to intervene in adoption proceeding did not waive its right to intervene on appeal; tribe's waiver of right to intervene had to be express. *In re Begay*, 107 N.M. 810, 765 P.2d 1178 (N.M. Ct. App. 1988).

### **Full Faith and Credit to Public Acts**

Under the ICWA, state court must give full faith and credit to public acts, records and judicial proceedings of Indian tribes.

#### **Federal Court**

Indian Child Welfare Act does not confer jurisdiction on either tribal court or state court to award custody of child in divorce proceedings; therefore, the act afforded no basis for granting tribal member's petition for writ of habeas corpus seeking return of his Indian children who had been removed from reservation pursuant to state court custody order. *In re Larch*, 872 F.2d 66 (N.C. 1989).

Because it was under §1911(d) that the district court awarded declaratory relief, the villages' §1983 claims based upon violations of that provision provided a basis of the award of attorney's fees. *Native Village of Venetie IRA Council v. Alaska*, 722 P.2d 219 (Alaska 1986).

All tribal remedies must be exhausted before a filing in the district court for relief will be granted. *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (N.D. 1989).

#### **8<sup>th</sup> Circuit**

Full faith and credit is extended to tribal custody proceedings. *Wilson v. Marchington*, 127 F.3d 805 (Wash. 1997).

Deference must be given to tribal jurisdiction if child custody proceedings and the state court must uphold and give effect to Tribal Court orders. *In re C.C.T.L.* NO. C3-88-253, 1988 WL 53115 (Minn. App. Ct. 1988).

#### **10<sup>th</sup> Circuit**

In a case that requires the application of the ICWA, although Indian tribes and nations are not states whose judgments are entitled per se to full faith and credit, ICWA specifically directs that "every state...shall give full faith and credit to the judicial proceedings of any Indian tribe applicable to Indian custody proceeding of any other entity." As required by the statute, the child custody orders rendered by the Tribal Court are entitled to full faith and credit, so long as they comply with the requirements of the Foreign Judgment Act. *In re Searle*, 436 Utah Adv. Rep. 10, 38 P.3d 307 (Utah Ct. App. 2001).

## **§1912 Pending Court Proceedings**

(a) Notice; time for commencement of proceedings; additional time for preparation. In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, that the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such a proceeding.

(b) Appointment of counsel. In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to Section 13 of this title.

(c) Examination of reports or other documents. Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

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

(e) Foster care placement orders; evidence; determination of damage to child. No foster care placement may be ordered in such proceeding in the absence of a

determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

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

## FEDERAL REGISTER

### 1. Notice

#### Section B.5(a).

In any involuntary child custody proceeding, the state court shall make inquires to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.

#### Section B.5. Commentary

The act requires notice to the parent or Indian custodian. At a minimum, parents must be notified if termination of parental rights is a potential outcome since it is their relationship to the child that is at stake. The Indian custodians must be notified of any action that could lead to the custodians' losing custody of the child. Providing notice to both parents and Indian custodians is keeping with the spirit of the Act. For that reason, these guidelines recommend notice be sent to both.

#### Section B.5(b).

Notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested.

The notice shall be written in clear and understandable language and include the following information:

- i. the name of the Indian child;
- ii. his or her tribal affiliation;
- iii. a copy of the petition, complaint or other document by which the proceeding was initiated;
- iv. the name of the petitioner and the name and address of the petitioner's attorney;

- v. a statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding;
- vi. a statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them;
- vii. a statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings;
- viii. the location, mailing address and telephone number of the court;
- ix. a statement of the rights of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court;
- x. the potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians;
- xi. a statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

Section B.5(g).

If the court or the petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that BIA personnel arrange to have the notice explained to that person in the language that he or she best understands.

Section B.6(b).

The proceeding may not begin until all of the following dates have passed:

- i. ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice,
- ii. ten days after the Indian child's tribe (or the Secretary if the Indian child's tribe is unknown) has received notice,

- iii. thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding, and
- iv. thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.

2. Appointment of counsel

Section B.5(f).

If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel.

3. Examination of reports or other documents

Section D.1

Each party has a right to examine all documents filed with the court and no decision of the court shall be based on any report or other document not filed with the court.

4. Active Efforts; remedial services, and rehabilitative programs; preventive measures; and burden of proof necessary.

Section D.2.

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

D.2 commentary.

This section also recommends that the petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home for the child.

D.2 commentary.

The term "individual Indian caregivers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed. "Family

breakup” is sometimes used as a synonym for divorce. In the context of this statute, however, it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child’s emotional or physical health.

5. Foster care placement orders; evidence; determination of damage to child.  
Section D.3(a).

The standard of proof requirement to issue an order effecting a foster care placement is “clear and convincing”, supported by one or more qualified expert witness, that continued custody of the child by the parent or the Indian custodian is likely to result in serious emotional or physical damage to the child.

Section D.3(c).

- i. Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child.
- ii. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.

D.3 commentary.

The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decision.

D.3 commentary.

Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress. The focus must be on whether the particular conditions are likely to cause serious damage.

Section D.4(a).

Removal must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether

continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.

Section D.4(b).

Qualified expert characteristics may include:

- 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 rearing practices within the Indian child's tribe; and
- iii. a professional person having substantial education and experience in the area of his or her specialty.

D.4 commentary.

The party presenting the expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by non-experts.

D.4 commentary.

The second subsection makes clear that knowledge of tribal culture and child-rearing practices will frequently be very valuable to the court.

## 6. Parental rights termination orders; evidence; determination of damage to child.

Section D.3(b).

The standard of proof required for a termination of parental rights is "beyond a reasonable doubt", supported by one or more qualified expert witness, that continued custody of the child by the parent or the Indian custodian is likely to result in serious emotional or physical damage to the child.

<b>RELEVANT CASES</b>
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### **Notice - Generally**

The parents of an Indian child or an Indian custodian is entitled to notice of involuntary child custody proceedings. Notice given to tribe must inform tribe of its right to intervene.

#### **6<sup>th</sup> Circuit**

Where appellate made no mention that child was enrolled or enrollable in a tribe in earlier proceedings and where in this proceeding, appellant does not contend that the child is enrolled or enrollable the circuit court's decision will not be reversed on the grounds of failure to inquire whether the child is an Indian child. In this case it appears that the appellate simply attacks on a technical failure, but doesn't show that the ICWA would otherwise apply making it a harmless error. *In re K.S.*, No. 234282, 2002 WL 743180 (Mich. Ct. App. Apr. 23, 2002)(unpublished opinion).

If there is no evidence that the tribe has been contacted the case should be remanded with instructions for petitioner to provide proper notice to the Eastern Band of Cherokee Indians, or provide proof that it has already done so and that the tribes have either declined to intervene or have failed to respond. *In re Purdy*, No. 225936, 2001 WL 694038 (Mich. Ct. App. Mar. 30, 2001)(unpublished opinion).

Under ICWA, the secretary must receive notice of the proceedings; the tribe, if known, must also receive notice of the proceedings and the trial can't proceed until ten days after receipt of notice by the parent or the Indian custodian and the tribe or secretary. This requirement was not complied with so the court determined that the case must be remanded so that the proper notice can be given to the Anishinabee tribe. *In re N.E.G.P.*, 245 Mich. App. 126, 626 N.W.2d 921 (Mich. Ct. App. 2001).

If the petitioner failed to comply with the order to ascertain a determination of tribal relationship of respondent with tribe, the case must be remanded to the trial court with instructions for it to determine whether respondent's children are Indian. *In re Yeary*, No. 224475, 2001 WL 753900 (Mich. Ct. App. Feb. 9, 2001)(unpublished opinion).

Where the father did not request adjournment to investigate, and did not raise the issue of Indian heritage at trial the issue is not preserved for appeal even where the mother's lawyer raised the question in the lower court. *In re Ruse*, No. 213504, 1999 WL 33437997 (Mich. Ct. App. Aug. 10, 1999)(unpublished opinion).

#### **7<sup>th</sup> Circuit**

When an Indian child is involved in a termination of parental rights proceeding, the tribe must be notified of the pending proceedings and of their right of intervention, by registered mail with return receipt requested. Evidence of proper

notice to the tribe must be placed in the record to determine proper notice was effectuated. *In re D.S.*, 577 N.E.2d 572 (Ind. 1991).

Noncompliance with ICWA cannot be raised for the first time on appeal. Tribal notification and other procedural steps regarding ICWA should be taken prior to a termination of parental rights proceeding. *In re R.A.*, 610 N.W.2d 230 (Wis. Ct. App. 2000, an unpublished opinion).

### 8<sup>th</sup> Circuit

While a child can only be a member of one tribe, both tribes should be sent notice until it is determined in which tribe, if any, the child has more significant contacts. *In re J.W.*, 498 N.W.2d 417 (Iowa Ct. App. 1993).

### 9<sup>th</sup> Circuit

An Indian child's tribe, under the ICWA, is entitled to notice of a proceeding for voluntary termination of parental rights. *Catholic Social Services, Inc. v. C.A.A.*, 783 P.2d 1159 (Alaska 1989).

Where proceeding for foster placement is an emergency, ICWA notice requirement that no proceeding can be held unless parent has been given ten days notice by registered mail or, if parent cannot be found, Secretary of the Interior has been notified are not applicable. *D.E.D. v. State*, 704 P.2d 774 (Alaska 1985).

Technical compliance with the ICWA notice provisions is not required if there has been substantial compliance. *In re M.S.S.*, 86 Wash. App. 127, 936 P.2d 36 (Wash. Ct. App. 1997).

ICWA applied to determine validity of non-Native American mother's consent to termination of her parental rights and to adoption of Indian child. The consents were invalid in that none contained required judicial certification. *In re Baby Boy Doe*, 127 Idaho 452, 902 P.2d 477 (Idaho 1995).

### 10<sup>th</sup> Circuit

If no objection to notice is made at trial, this issue is waived on appeal. *In re Adoption of D.M.J.*, 741 P.2d 1386 (Okla. 1985).

## **Notice - Requirement**

Notice is required on every case involving an Indian Child.

### 2<sup>nd</sup> Circuit

Since mother's tribes had not been recognized by the BIA, mother's child did not qualify as an "Indian child" for purposes of ICWA, and tribe did not have to be

notified of termination of parental rights proceedings. *In re A.J.*, 169 Vt. 577, 733 A.2d 36 (Vt. 1999).

Notice of TPR for father's youngest children was not necessary where father did not give additional information about his ancestry and where family court's research demonstrated that father and children could not be identified as tribal members. *In re T.R.*, 163 Vt. 596, 653 A.2d 777 (Vt. 1994).

### 3<sup>rd</sup> Circuit

Trial court had no reason to notify the BIA of termination of parental rights proceeding; where the court wasn't provided with any information suggesting Indian ancestry, family's background did not suggest any Indian heritage, and parents and children had never lived on or near Indian reservation. *In re Guardianship of J.O.*, 327 N.J. Super. 304, 743 A.2d 341 (2000).

### 6<sup>th</sup> Circuit

In any involuntary proceeding where the court knows or has reason to know that an Indian child is involved, proper notice should be given to the tribe, and if the specific tribe cannot be determined, notice should be given to the Secretary of the Interior. *In re IEM*, 233 Mich. App. 438, 592 N.W.2d 751 (Mich. Ct. App. 1999).

A statement by the mother that the minor may have Indian heritage triggers the notice requirement of ICWA. *Id.*

### 7<sup>th</sup> Circuit

Fleeting references to Indian heritage do not trigger compliance with the ICWA; no notice to the tribe is necessary where there are no specific mentions of any tribe or band. *In re R.A.*, 610 N.W.2d 230 (Wis. Ct. App. 2000, an unpublished opinion).

### 8<sup>th</sup> Circuit

Court can provide notice late in the proceeding as long as that is the first point at which the court knew the ICWA may apply. *In re J.D.B.*, 584 N.W.2d 577 (Iowa Ct. App. 1998).

### 9<sup>th</sup> Circuit

In any proceeding including the termination proceeding where the court "knows or has reason to know" that the child is a member of an Indian tribe, notice of the pendency of the proceeding shall be sent by registered mail. If a parent raises the issue of a child's possible Indian heritage as late as the termination hearing, a reason to believe that the child qualified as an Indian child was appropriately

and, therefore, triggered notice. *In re Dependency of Colnar*, 52 Wash. App. 37, 757 P.2d 534 (1988).

### **Notice - Adequate Notice**

Notice must inform parents and tribe of proceeding and of the tribe's right to intervene. ICWA states that notice must be served by registered mail with return receipt requested. However, some courts have held that personal service or first class mail is adequate.

#### **1<sup>st</sup> Circuit**

State court retains jurisdiction where prior to termination proceeding neither the court nor DSS knew that the children were Indian despite the fact that the tribe did not receive notice of earlier care and protection proceedings. *In re Adoption of Arnold*, 50 Mass. App. Ct. 743, 741 N.E.2d 456 (2001).

#### **5<sup>th</sup> Circuit**

Failure to notify tribe its motion to intervene in parental termination proceeding had been granted did not harm father, as tribe had been served with amended notice of trial setting and took no further action with regard to its intervention in termination proceedings, and tribe had not otherwise complained of trial court's having conducted the termination hearing without its involvement. *In re W.D.H.*, 43 S.W.3d 30 (Tex. Ct. App. 2001).

#### **6<sup>th</sup> Circuit**

Sufficient notice, under the ICWA, was provided when the petitioner provided the U.S. department of the interior, BIA, and certain tribes with notice of the proceedings by certified mail return receipt requested. *In re M.M.*, No. 231800, 231805, 2002 WL 1360392 (Mich. Ct. App. June 21, 2002)(unpublished opinion).

When the tribe of a child is unknown, ICWA doesn't require that petitioner demonstrate receipt of notice by all tribes notified by the BIA. Because actual notice to the Cherokee tribes and the BIA was demonstrated in this case, petitioner's substantial compliance with the notice requirements was sufficient to satisfy the ICWA. Therefore there is no violation under §1914. *In re TM*, 245 Mich. App. 181 (Mich. Ct. App. 2001).

The trial court did not err in failing to provide the tribe with notice after a petition requesting termination of father's parental rights was filed. The tribe was given notice after the preliminary hearing and the tribe declined to intervene because the children were not enrolled or eligible for enrollment; it was not necessary to notify the organizations after petitions for TPR were filed. *In re Bennett*, Nos. 233095, 233096, 233097, 2002 WL 1387078 (Mich. Ct. App. Nov. 6, 2001)(unpublished opinion).

Because the court notified the Ojibwa tribes of Michigan and the BIA by registered mail, but no response was received there was no violation of the ICWA notice requirements. The identity of the mother's tribal ancestry was determined, therefore no notice to the Secretary of the Interior was established. *In re Echter*, No. 225368, 225369, 225370, 2001 WL 672870 (Mich. Ct. App. May 1, 2001).

The family court did not err in failing to notice the Ottawa tribe where the father failed to state he had a possible relationship with the tribe until closing arguments where the father provided no explanation as to why he thought he may have a possible relationship with that tribe and never requested adjournment to further investigate the situation. *In re Dixon*, No. 228232, 2002 WL 740105 (Mich. Ct. App. Feb. 20, 2001)(unpublished opinion).

### 7<sup>th</sup> Circuit

Notice must be reasonably calculated to afford respondent actual notice and the opportunity to be heard. *Smith v. Tisdal*, 484 N.E.2d 42 (Ind. Ct. App. 1985).

Fleeting references to Indian heritage do not trigger compliance with the ICWA; no notice to the tribe is necessary where there are no specific mentions of any tribe or band. *In re R.A.*, 610 N.W.2d 230 (Wis. Ct. App. 2000, an unpublished opinion).

### 8<sup>th</sup> Circuit

Where notice was sent to tribe one year before final adjudication, and tribe did not intervene, fact that notice came after parents' first court appearance did not prejudice tribe. *In re S.Z.*, 325 N.W.2d 53 (S.D. 1982).

Where notice to tribe informed tribe of the nature of the proceeding, and notice granted tribe right to intervene, and where parents stipulated that they did not want proceeding transferred to tribal court and did not alter their position until after the decree of termination, the trial court erred when it said notice was inadequate and transferred case to tribal court. *Id.*

Notification of parental termination delivered by first class mail is in compliance with the ICWA. *In re V.R.*, No. C2-90-1765, 1991 WL 42614 (Minn. Ct. App. Apr. 2, 1991).

Personal service qualifies as notice under the ICWA. *In re M.E.B.*, Nos. C6-90-2370, C3-90-2388, 1991 WL 34689 (Minn. Ct. App. Mar. 19, 1991).

### **Notice - Inadequate Notice**

Failure to inform tribe of their right to intervene deems notice inadequate. Inadequate notice does not automatically constitute reversible error.

### 2<sup>nd</sup> Circuit

The child's tribe was entitled to notice under the ICWA and the proceedings are to be remanded to give the tribe the opportunity to intervene. If the tribe does not intervene the original orders will stand. *In re M.C.P.*, 153 Vt. 275, 571 A.2d 627, (1989).

### 6<sup>th</sup> Circuit

It is not the responsibility of the respondent to establish the applicability of ICWA, the parties do not have a burden until notice has been provided and a tribe has failed to respond. A telephone call to the tribe does not constitute proper notice. *In re IEM*, 233 Mich. App. 438, 592 N.W.2d 751 (1999).

The courts failure to adhere to the inquiry and notice requirements at the subsequent preliminary hearing alone may have constituted reason to invalidate the proceedings. *In re Elliott*, 218 Mich. App. 196, 554 N.W.2d 32 (Mich. Ct. App. 1996).

### 7<sup>th</sup> Circuit

Service by publication in an Indiana newspaper to confer personal jurisdiction over an Alaskan resident is insufficient. *Smith v. Tisdal*, 484 N.E.2d 42 (Ind. Ct. App. 1985).

While a termination hearing may not be held until ten days after tribal receipt of notice pursuant to 1912(a), failure to comply with this provision does not constitute automatic reversal. *In re Kyle S.*, 192 Wis.2d 767 (Wis. Ct. App. 1995) an unpublished opinion.

### 8<sup>th</sup> Circuit

Filing of certified mail receipt as to notice to Indian tribe of termination of parental rights hearing was not acceptable proof of service of notice by mail; no copy of what was mailed was attached, no affidavit was filed verifying what was mailed, there was no showing that the tribe was advised of its right to intervene. *In re J.W.*, 498 N.W.2d 417 (Iowa Ct. App. 1993).

Failure to serve tribe with registered, return receipt mail and failure to give notice to the Secretary of the Interior that identity of the child's tribe couldn't be determined deprives the court of jurisdiction in the termination of parental rights proceedings of an Indian child. *People ex rel. South Dakota Dept. of Social Services in Interest of C.H.*, 510 N.W.2d 119 (S.D. 1993).

The notice doesn't inform the tribe of their right to intervene, and was not sent by registered mail with return receipt request, notice is not proper. *In re B.J.E.*, 422 N.W.2d 597 (S.D. 1988).

Notice is insufficient where no document or phone call informed any potentially interested tribe of its right of intervention, or complied with ICWA's mailing requirements. *In re IEM*, 233 Mich. App. 240, 592 N.W.2d 751 (1999).

### 9<sup>th</sup> Circuit

Failure to comply with notice requirements under the ICWA does not render the trial court's action void but makes it subject to collateral attack by the Indian child, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe. *Carson v. Carson*, 170 Or.App. 263, 13 P.3d 523 (2000).

State violated notice requirement of the ICWA by making no attempt to send notice of parental rights termination hearing to mother by registered mail or by attempting to send registered notice to parents in care of tribal office. *In re L.A.M.*, 727 P.2d 1057 (Alaska 1986).

### 10<sup>th</sup> Circuit

No notice of hearing in proposed adoption proceeding is moot where the cause was to be remanded for further determinations by trial court. *In re R.R.R.*, 1988 OK 109, 763 P.2d 94 (1988).

Trial court's appointment, without notice, of non-Indian successor guardians for three parentless Indian children was improper; the children's paternal grandparents were entitled, under the ICWA, to notice of the pending successor guardian appointment. *Duncan v. Wiley*, 657 P.2d 1212 (Okla. App. Ct. 1982).

A termination order is invalid due to a court's failure to direct proper notice to the appropriate tribe or to the Secretary of the Interior. *In re H.D.*, 11 Kan. App. 2d 531, 729 P.2d 1234 (1986).

### 11<sup>th</sup> Circuit

Under the ICWA, notice is not sufficient where department sent tribe notice of dependency petition, but failed to provide notice of termination of parental rights proceeding. *S.H. v. Calhoun County Dept. of Human Resources*, No. 2000042, 2001 WL 498979 (Ala. Civ. App. May 11, 2001).

## **Notice – Actual Notice**

Participation in a proceeding waives the notice requirement.

### 6<sup>th</sup> Circuit

Evidence that actual notice was received by the Bad River Indian Tribe alone is sufficient to satisfy the notice requirement of the ICWA. *In re S.S.S. & S.K.S.*, Nos. 236587, 236644, 2002 WL 1923867 (Mich. Ct. App. Aug. 20, 2002)(unpublished opinion).

### 7<sup>th</sup> Circuit

In situations where the tribe has participated in the proceedings or expressly indicated they have no interest in the proceedings, the error of not giving the tribe a ten day notice, is harmless. *In re Kyle S.*, 192 Wis. 2d 767 (Wis. Ct. App. 1995).

### 8<sup>th</sup> Circuit

When tribes have actual notice of an amendment in a petition, the notice requirement is fulfilled. *In re B.J.E.*, 422 N.W.2d 597 (S.D. 1988).

Even though Indian custodian of children, should have received notice of proceeding in which parental rights of children's father were terminated, that issue was rendered moot by fact that extensive hearing was held of custodian's petition for custody and adoptive preferences. *In re J.J.*, 454 N.W.2d 317 (S.D. 1990).

### 9<sup>th</sup> Circuit

Indian child's maternal aunt, whose foster care of child was terminated without giving aunt notice of the hearing, was not entitled to relief on theory that federal standards in ICWA. That requires Indian custodian be given notice of proceeding to terminate foster care placement, preempted state law defining legal custody, in light of fact that congress expressly left determination of "legal custody" up to state law. *State ex rel. Juvenile Dept., Multnomah County v. England*, 292 Or. 545, 640 P.2d 608 (1982).

### 10<sup>th</sup> Circuit

Notice of the tribe by first class mail and not registered mail constitutes sufficient notice where the tribe has acknowledged notice through an attempt to intervene. *In re D.M.J.*, 1985 Okla. 93, 741 P.2d 1386 (1985).

## **Appointment of Counsel**

In involuntary proceedings, parents and Indian custodians are entitled to court appointed counsel. Some courts hold court appointed counsel is waived if it is not requested; other courts hold that court appointed counsel is mandatory even if not requested. Counsel for children is discretionary.

### 8<sup>th</sup> Circuit

§1912(b) does not apply to voluntary proceedings. The parent or Indian custodian has a right to court-appointed counsel only in involuntary proceedings. The party seeking court-appointed counsel must request it. *B.R.T. v. The Executive Director of the Social Service of North Dakota*, 391 N.W.2d 594 (N.D. 1986).

### 9<sup>th</sup> Circuit

The appointment of counsel in the case of an indigent parent is mandatory. Only the appointment of counsel for children is discretionary. *In re M. E. M.*, 195 Mont. 329, 635 P.2d 1313 (1986).

The court did not fail to provide competent counsel for the mother and child. The standards of performance are not different from those for counsel appointed pursuant to state statute. *State ex rel. Juvenile Dept. of Clackamas County v. Charles*, 106 Or. App. 637, 810 P.2d 393 (1991).

There was no violation of the ICWA where parents are provided with separate counsel on day that their affidavit of indigency was filed in juvenile court, counsel was appointed for parents as soon as court had determined their indigency status, as the act requires. *State ex rel. Juvenile Dept. of Multnomah County v. Charles*, 70 Or. App. 10, 688 P.2d 1354 (1984).

By advising mother of her right to counsel and mailing her an application form, trial court satisfied the appointment of counsel requirement imposed by the ICWA. Courts need to recognize the crucial difference an early counsel appointment can make and remain sensitive to the potentially drastic consequences of unnecessary delay. *V.D. v. State, Dept. of Health and Social Services*, 991 P.2d 214 (Alaska 1999).

### 10<sup>th</sup> Circuit

Right to counsel in custody proceeding involving the ICWA is element of procedural due process as well as mandate of that statute; right does not depend on specific request, and counsel must be appointed unless right is knowingly and intelligently waived. *In re J.W.*, 742 P.2d 1171 (Okla. Ct. App. 1987).

## **Examination of reports or other documents**

### **Active Efforts (remedial services and rehabilitative programs; preventive measures; and burden of proof necessary) - Adequate.**

Under the ICWA, the party who brings the proceeding for involuntary foster care placement or termination of parental rights must prove to the court that active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family. It must also be proven that those efforts were not successful.

### 7<sup>th</sup> Circuit

Actions of the adoptive parents to adopt and raise the child can be seen as an active effort to reunite the pre-existing Indian family unit thus fulfilling the spirit and requirements of §1912(d). *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

If the majority of services were offered or provided prior to the removal of the child from the home, that does not diminish the fact that they were aimed at actively preventing the breakup of the family. If services are offered to remedy the “chaos” in a home and mother does not comply and refuses supervised visitation with the minor after removal, the futility of active efforts is demonstrated. *In re S.L.*, 55 N.W.2d 678 (Wis. Ct. App. 1990, an unpublished opinion).

### 8<sup>th</sup> Circuit

Evidence beyond a reasonable doubt supported finding that DSS consistently attempted to provide broad range of remedial services to parents, but that such efforts were futile so that termination of parental rights was least restrictive alternative in the best interests of the child. *In re A.R.P.*, 519 N.W.2d 56 (S.D. 1994).

It is found beyond a reasonable doubt, DSS made the requisite efforts to prevent the breakup of the family and those efforts proved unsuccessful. The Act was not designed to protect the grandmother at the expense of the children. *In re J.J.*, 454 N.W.2d 317 (S.D. 1990).

The state, through exhaustive effort, made a reasonable effort to rehabilitate the family. Evidence showed the family members received services from DSS including: food, shelter, medical treatment, transportation, clothing, and various counseling services. *In re S.D.*, 402 N.W.2d 346 (S.D. 1987).

Where the Department attempted to educate the mother in childbearing before birth, its efforts were continued after birth, but mother refused such efforts, and Department had no success in subsequent efforts to assist mother in developing her maternal skills and overcoming her alcohol and chemical addictions; the state has proven it's burden beyond a reasonable doubt that active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of an Indian family. *In re P.B.*, 371 N.W.2d 366 (S.D. 1985).

Evidence that mother made no effort to exercise consistent visitation indicated mother's pain-huffing addiction was cause of her inability to function as parent was sufficient to support finding that active efforts were made to prevent breakup of Indian family before termination of mother's parental rights was sought. *In re S.R.*, 323 N.W.2d 885 (S.D. 1982).

Active efforts were demonstrated by providing psychological and family services, case management, child protection, parental skills services, foster care, money management services, and transportation over a period of fifteen years. *In re V.R.*, No. C2-90-1765, 1991 WL 42614 (Minn. Ct. App. Apr. 2, 1991).

Lack of parental interest in children over a six year period and the counties encouragement to contact the children qualified as “efforts to avoid a family break-up” under ICWA. *In re T.J.J.*, 366 N.W.2d 651 (Minn. Ct. App. 1985).

When child was placed with grandparents and a great distance from father this was consistent with the ICWA § 1912(b) and did not disrupt the “active efforts” required by the county. *In re M.E.B.*, Nos. C6-90-2370, C3-90-2388 1991 WL 34689 (Minn. Ct. App. Mar. 19, 1991).

The BIA has established guidelines on the form that these remedial and rehabilitative services must take: These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child’s tribe. They shall also involve and use the available resources of the extended family, the Tribe, and Indian social service agencies, and individual Indian care givers. *In re M.S.S.*, 465 N.W.2d 412 (Minn. 1991).

### 9<sup>th</sup> Circuit

Father was provided a sexual deviancy evaluation and later received treatment for a three month period (until he was terminated for noncompliance), the father was referred to 12 other treatment providers (and was offered funding options if one worked out) who were not willing or able to treat the father. These efforts were enough to show that DSHS made sufficient efforts under the statute to rehabilitate the father. It was up to the father to make an effort also. *In re E.C.*, No. 50618-8-I, 50619-6-I, 2003 WL 289430 (Wash. Ct. App. Feb. 10, 2003)(unpublished opinion).

It was not clearly erroneous for the court to decide that the state had provided active efforts to the father and they were unsuccessful where the father stated to his caseworker that he would not undergo the required treatment for “boundary issues” with regard to his daughter. It would have been a waste of time for the state to set up an appointment with a therapist for which the father would never have shown up. Therefore, the state had provided reasonable active efforts to rehabilitate the father and the father had not remedied the conditions that placed the children at risk within a reasonable time. Termination of the father’s rights was justified. *R.P. v. State of Alaska*, No. S-110179, 2002 WL 1943665 (Alaska Aug. 21, 2002)(unpublished opinion).

Even where the state failed to provide active efforts for a seven-month period, the state did not fail to provide active efforts overall where it provided extensive remedial services throughout the time it was involved with the case. Also, 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 the ICWA. There is no reason to think that an additional psychological evaluation or an additional seven months of intervention would have prevented this result. *E.A. v. State of Alaska*, 46 P.3d 986 (Alaska 2002).

Given the father's history of failed treatment and his failure to acknowledge having a problem with violence and the fact that there are no more classes available to him, there is no error in the determination that active efforts have been provided, but failed. *T.D.W. v. State of Alaska*, No. S-10177, 2002 WL 863289 (Alaska May 1, 2002).

Although the mother participated in the required programs and continues to take her medication, the trial court did not err in determining that active efforts to provide remedial services have been unsuccessful where there has been some improvement in overcoming a mental disorder, but not sufficient improvement to demonstrate adequate parenting skills. Completion of recommended treatment does not guarantee the return of her children. *V.S.B. v. State of Alaska*, 45 P.3d 1198 (Alaska 2002).

The court determined that the evidentiary standard for active efforts under 1912(d), is that the record must show by clear and convincing evidence that active efforts were employed by DPHHS to provide remedial and rehabilitative services to prevent the breakup of the Indian family. In this case, DPHHS began implementing services for both mother and father prior to the show cause hearing. It was not necessary for remedial and rehabilitative programs to be offered before the children were removed, given the complex nature of the issues involved with abuse and neglect. *In re G.S., Jr.*, 312 Mont. 108, 59 P.3d 1063 (Mont. 2002).

The district court did not err in determining that remedial and rehabilitative programs designed to prevent the breakup of the Indian family had proven unsuccessful and that continued custody of the children by the mother are likely to result in emotional or physical damage to the children where Mother failed to complete the approved treatment plan; and is unlikely to make significant progress within a reasonable time to meet the children's needs, and where the children are severely disturbed and have special needs as a result of the Mother's severe neglect. *In re A.L.R.*, 311 Mont. 76, 2002 MT 183 (Mont. 2002).

The department of corrections rather than the state may fulfill the active efforts obligation. Therefore, the parenting and treatment classes offered to the father by the Department of Corrections were sufficient to meet the active efforts requirement. *T.F. v. State of Alaska*, 26 P.3d 1089 (Alaska 2001).

The Superior court did not err in concluding that the state provided active efforts to reunite an Indian family. Mother was placed in the Fairbanks Rescue Mission program, which had experience working with dual-diagnosed patients and had sufficient resources to accommodate mother at her own pace, but mother decided to leave the program before completion. Also, the mother was reluctant to leave Fairbanks to go to Anchorage for treatment. Mother knew that the state had previously attempted to terminate her rights and would likely do so again if she failed to complete a rehabilitation program. There is no reason to think that trying another residential dual treatment program would have had a successful outcome. *N.A. v. State of Alaska*, 19 P.3d 597 (Alaska 2001).

The father concedes that the superior court correctly determined that DFYS made sufficient active efforts to provide rehabilitative services to prevent the permanent breakup of Jam's family as required by ICWA, therefore DFYS has made sufficient active efforts to provide rehabilitation for the father because beyond the ICWA there are no heightened requirements. *J.A. v. State of Alaska*, 50 P.3d 395 (Alaska 2002).

Drug and alcohol treatment program services, anger management and sex offender treatment services provided to Indian father were appropriate and there was thus no violation by administrative agency of ICWA requiring offering of remedial services and rehabilitation. *State ex rel. Juvenile Dept. of Multnomah County v. Woodruff*, 108 Or. App. 352, 816 P.2d 623 (1991).

Evidence established the state's active efforts to provide services to parents of children adjudicated children were unsuccessful. Despite efforts to provide services, father continued to have difficulty in his independent living skills, maintaining sobriety, refraining from domestic violence, and achieving mental stability. *A.H. v. State, Dept. of Health & Social Services*, 10 P.3d 1156 (Alaska 2000).

Superior Court properly considered father's demonstrated lack of willingness to participate in sexual offender and substance abuse treatment programs as factor in deciding State owed no further duty to make active remedial efforts pursuant to the ICWA to prevent breakup of Indian family by termination of father's parental rights. *A.M. v. State*, 945 P.2d 296 (Alaska 1997).

The state's attempts to assist D.H. in enrolling and completing drug rehabilitation programs qualify as "active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." *D.H. v. State, Dept. of Health & Social Services*, 929 P.2d 650 (Alaska 1996).

A finding the state made active effort to provide remedial services and rehabilitative programs to preserve family was supported by evidence where state initially made active effort to provide treatment for father's substance abuse and later, less active efforts were justifiable in light of father's continuing unwillingness to participate in treatment in any meaningful or ongoing way. *In re J.W.*, 921 P.2d 604 (Alaska 1996).

Evidence supported finding reasonable efforts were made to reunite family and those efforts had proven unsuccessful; father refused to follow examining psychiatrist's recommendations as outlined in treatment plan or cooperate in setting up alternative plan and father repeatedly denied having mental problems and resisted intervention of Department of Family and Youth Services. *K.N. v. State*, 856 P.2d 468 (Alaska 1993).

When proving "active efforts" the standard of proof is "clear and convincing". *In re Dependency of A.M.*, 106 Wash. App. 123, 22 P.3d 828 (Wash. Ct. App. 2001).

### 10<sup>th</sup> Circuit

Evidence supported determination Indian father had been offered adequate remedial services and efforts proved futile; tribe filed paternity claim on father's behalf, adoptive parents' attorneys notified father of his rights, mother asked father to attend counseling with church social worker before child's birth, state of Utah attempted to encourage father to support his children by initiating wage withholding for child support, and attorney was appointed to represent father, but father failed to cooperate in any way with his attorney or participate in the proceedings at issue, refused to pay child support, and did not try to contact child. *In re Baby Boy Doe*, 127 Idaho 452, 902 P.2d 477 (1995).

Foster care placement of half-Indian children was not subject to invalidation for failure to comply with provision of ICWA requiring state provide rehabilitative programs or remedial services to prevent breakup of Indian family where, after non-Indian mother's parental rights in children were terminated, two different home studies were conducted, neither of which recommended children be placed with Indian father, state suggested service plan in which father was required to pay minimal amount of child support and to visit children to become acquainted with them, and father visited children only once during pendency proceedings. *In re S.C.*, 1992 Okla. 98, 833 P.2d 1249 (1992).

### 11<sup>th</sup> Circuit

Department of Human Resources satisfied requirement it actively provided remedial services and rehabilitative programs to prevent family's breakup prior to court action to place children elsewhere, where agency's provision of numerous services over several years were either rejected or never completed by parents. *Long v. State*, 527 So.2d 133 (Ala. Civ. App. 1988).

## **Insufficient "Active Efforts"**

### 5<sup>th</sup> Circuit

The evidence shows DCCPS provided remedial services; the appellant substantially complied with the recommendations. There is no evidence that these programs had been unsuccessful. *Joyce Doty-Jabbaar v. Dallas County Child Protective Services*, 19 S.W.3d 870 (Tex. Ct. App. 2000).

### 6<sup>th</sup> Circuit

It was error to terminate parental rights where there was no attempt by the petitioner to show that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful. *In re Morgan*, 140 Mich. App. 594, 634 N.W.2d 754 (1985).

### 9<sup>th</sup> Circuit

The Superior court erred in concluding that the state provided active efforts for keeping the family together. The states efforts to work with the father toward reunification in this case are minimal. It appears that the state was satisfied with allowing FL officials to investigate the case and the evidence suggests that the state of FL was not aware that the higher standards of the ICWA apply. *C.J. v. State of Alaska*, 18 P.3d 1214 (Alaska 2001).

The department did not contact the father, therefore the requirement of remedial services and rehabilitation programs to prevent the breakup of the family could not have been fulfilled. *In re M.P.M.*, 294 Mont. 87, 976 P.2d 988 (1999).

In proceeding to determine child custody, testimony state pointed to peppered throughout hearing indicating some remedial efforts were made to prevent breakup of Indian family which were arguably unsuccessful served to diffuse evidence showing that active efforts had been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and those efforts had been unsuccessful as required by ICWA. *State ex rel. Juvenile Dept. of Multnomah County v. Charles*, 70 Or. App. 10, 688 P.2d 1354 (1984).

Evidence in termination of parental rights proceedings was insufficient to show state engaged in active efforts to prevent the breakup of the family. State's efforts to work with father toward reunification were minimal. *C.J. v. State, Dept. of Health and Social Services*, 18 P.3d 1214 (Alaska 2001).

### **Burden of Proof**

Although the ICWA doesn't expressly state the standard for proving active efforts have been made, generally courts have held that proof "beyond a reasonable doubt" is necessary.

### 6<sup>th</sup> Circuit

Applicable Indian tribes determined that the child was not an Indian child; therefore, the family court was not required to apply the heightened evidentiary standards applicable to the ICWA. *In re McQueen*, Nos. 223814, 223940, 2001 WL 651351 (Mich. Ct. App. May 25, 2001)(unpublished opinion).

The trial court's order clearly sets forth the standards under the ICWA and the state statute, and the factual findings detailed in the referee's report and recommendation, as adopted by the trial court, support the trial court's conclusions that a statutory basis existed for termination of parental rights and that such was in the best interest of the children, and that there was evidence beyond a reasonable doubt that continued custody of the children by the parent would likely result in serious emotional or physical damage to the children. Therefore, the dual burdens under the ICWA and the state statutes were applied and supported by the evidence. *In re Hidalgo*, No. 214139, 1999 WL 33437997 (Mich. Ct. App. June 1, 1999)(unpublished opinion).

In an Indian child custody proceeding, a dual burden of proof must be met: the probate court must find beyond a reasonable doubt that “ continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child,” and the court must also find clear and convincing evidence supports termination under the applicable state statutory ground.” *In Re Elliott*, 218 Mich. App. 196, 554 N.W.2d 32 (1996).

### 7<sup>th</sup> Circuit

At minimum, evidence of active efforts made to provide services with a view toward avoiding the breakup of the Indian family should include evidence of sensitivity of court appointed experts toward Indian culture and traditions that would affect behaviors of the parents being evaluated. *In re J.J.*, 462 N.W.2d 555 (Wis. Ct. App. 1990).

### 8<sup>th</sup> Circuit

Subsection 1912(d) contains no express language requiring evidence beyond a reasonable doubt to show that active efforts have been made to prevent the breakup of the Indian family were unsuccessful; Clear and convincing efforts are enough. *In re M.S.*, 2001 N.D. 68, 624 N.W.2d 678 (2001).

The ICWA requirement of “active efforts” is separate and distinct from the “reasonable efforts” provision and therefore requires the state to plead active efforts by the state to prevent the breakup of the family. *In re Sabrienia B. v. Roseann, H.* 621 N.W.2d 836 (Neb. Ct. App. 2001).

It must be shown beyond a reasonable doubt, the State made a number of efforts at providing mother with remedial services and rehabilitative programs designed to prevent the breakup of the family. The services must be provided to the family as a whole. *In re L.N.W.*, 457 N.W.2d 17 (Iowa Ct. App. 1990).

Counsel not arguing the applicability of ICWA is not reversible error where notice was sent to and duly received by the BIA, the court was presented with extensive evidence of remedial services that were offered but not successful, and where the court applied the “beyond a reasonable doubt” standard. *V.F. v. State*, 666 P.2d 42 (Alaska 1983).

The party asserting applicability of the ICWA has the burden of proving that the child meets the criteria under ICWA. *In re A.S.*, 614 N.W.2d 383 (S.D. 2000).

The “beyond a reasonable doubt” standard is the necessary proof for determining whether active efforts to provide remedial services and rehabilitative programs to prevent the breakup of an Indian family had been made. *In re M.S.S.*, 465 N.W.2d 412 (Minn. Ct. App. 1991).

Logically, this seems to be compelled: FI termination of parental rights of Indian parents to their children can be ordered only upon a factual basis shown beyond a reasonable doubt (§1912(f)), and if termination cannot be effected without a showing of active efforts to prevent the breakup of the Indian family and a failure

thereof (§1912(d)), then the adequacy of efforts and futility of them, as predicts to termination, must likewise be established beyond a reasonable doubt.

Therefore, we recognize the reasonable doubt standard as appropriate in determining whether the petitioning party has complied with section 1912(d).*Id.*

Great caution must be used in reviewing termination proceedings, finds that termination is proper only where the evidence clearly mandates it. *In re B.M.J., L.M.J., and R.L.J.*, No. C7-97-120, 1997 WL 370372 (Minn. App. July 8, 1997) quoting *In re Welfare of L.J.B.*, 356 N.W.2d 394, 397 (Minn.App. 1984).

Under the ICWA, termination of parental rights requires proof beyond a reasonable doubt. *In re B.M.J., L.M.J., and R.L.J.*, No. C7-97-120, 1997 WL 370372 (Minn. App. July 8, 1997).

### 9<sup>th</sup> Circuit

The superior court did not clearly err in finding that the state failed to provide active efforts to prevent the breakup of an Indian family. Where the father testified that he completed all elements of his plan, no evidence that the state had another plan after paternity was established, and the state transferred the baby to a rural village where father could not effectively visit the baby. Although the evidence also shows that the father failed to visit his son when his son was in Anchorage, failed to ask for help in visiting his son once he was placed with his grandmother, and evidence that the father had been informed of the goals that DFYS had set for him and his failure to keep DFYS informed about the attainment of those goals. *State of Alaska v. V.S.*, No. S-10350, 2002 WL 1004097 (Alaska May, 15 2002)(unpublished opinion)

### 10<sup>th</sup> Circuit

DSS was required to prove beyond a reasonable doubt active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and these efforts were unsuccessful before trial court could terminate parental rights. *In re R.L.*, 961 P.2d 606 (Colo. Ct. App. 1998).

In a Kansas court an action for termination of parental rights of a child subject to the ICWA, the court should evaluate the evidence by first applying the “clear and convincing evidence” test established under Kansas law, and then apply the “beyond a reasonable doubt” standard of the ICWA. *In re H.A.M.*, 25 Kan. App. 2d 289, 961 P.2d 716 (Kan. Ct. App. 1998).

## **“Active Efforts” Generally**

### 1<sup>st</sup> Circuit

DHS is not required to engage in futile, nonproductive efforts to reunify Indian family. Determination that Indian parents failed to make good-faith effort to cooperate with DHS in development and pursuit of rehabilitation and family

reunification plan was supported by sufficient evidence showing mother's sole effort at reunification was visits with her children and father completely refused to even discuss prospects for reunification. *In re Annette P.*, 589 A.2d 924 (Me. 1991).

#### 6<sup>th</sup> Circuit

There was no disruption in the "Indian family" since family had already broken up by the time termination proceedings were initiated, due to parents' separation and father's imprisonment for crimes against his children, and children lived with and were cared for by their Indian mother. The "active efforts" language of 1912(d) is not incorporated into 1912(f) and, therefore, the provisions can exist independently. *In re SD*, 236 Mich. App. 240, 599 N.W.2d 772 (1999).

#### 7<sup>th</sup> Circuit

The active efforts requirement applies to an incarcerated parent; however, the fact of incarceration can diminish the level of active efforts required. When a parent is incarcerated, the relevant question is whether the State's efforts to provide remedial services are appropriate under the circumstances. *In re Cari B.*, 327 Ill.App.3d 743, 763 N.E.2d 917 (Ill. App. Ct. 2002).

The state is required to establish compliance with the active efforts requirement by a preponderance of the evidence. *In re Cari B.*, 327 Ill.App.3d 743, 763 N.E.2d 917 (Ill. App. Ct. 2002).

#### 8<sup>th</sup> Circuit

The court properly waived the requirement of reasonable efforts because over a period of time the parent's had been provided with almost every service available and had been unable to make changes in their lifestyle or their ability to be committed parents to the children. *In re N.T.B.*, No. 02-1604, 2002 WL 31528667 (Iowa Ct. App. Nov. 15, 2002) (unpublished opinion).

§1912(d) does not apply to voluntary proceedings to the termination of parental rights. *In the interest of L.D.R.T.*, 391 N.W.2d 594 (N.D. 1986).

A challenge as to the adequacy of the active efforts, of the state, to provide reunification services as required by §1912(d) must be raised prior to the termination proceedings if it is to be considered. *In re M.M.*, No. 98-1944, 1999 WL 1157441 (Iowa Ct. App. Dec. 13, 1999).

Sufficient evidence of active efforts exists where mentally ill mother received services and incarcerated father has made no effort, emotionally or physically, to have a relationship with his daughter throughout her life. The court record clearly indicated the State made every effort to contact the father and attempted to provide him with access to therapy and counseling services. *In re R.L.F.*, 437 N.W.2d 599 (Iowa Ct. App. 1989).

### 9<sup>th</sup> Circuit

The incarceration of the father doesn't eliminate the active efforts requirement of §1912(d); the court required no active efforts be shown therefore it did not meet the requirements of §1912(d) of the ICWA. *D.J. v. P.C.*, 36 P.3d 663 (Alaska 2001).

Because the father did not acknowledge paternity before the blood test, ICWA did not obligate the state to provide active efforts until his paternity had been established. Once paternity was established, the states active efforts duty was triggered; however, due to the father's incarceration the scope of the state's duties were reduced. *T.F. v. State of Alaska*, 26 P.3d 1089 (Alaska 2001).

The 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 superior court could find the state's active efforts duty was discharged when Jack was convicted of sexually abusing his children, the superior court did not err in terminating his parental rights. *J.S. v. State of Alaska*, 50 P.3d 388 (Alaska 2002).

The state was not required to make active efforts to prevent the breakup of the Indian family until the father's paternity had been established. *A.A. v. State, Dept. of Family & Youth Services*, 982 P.2d 256 (Alaska 1999).

### **Qualified Expert Witness: Determination of Damage to a Child**

Foster care placement may not be ordered without clear and convincing evidence that continued custody by the parent or Indian custodian will result in serious emotional or physical damage to the child. Clear and convincing evidence must be supported by the testimony of a qualified expert witness.

### 4<sup>th</sup> Circuit

There was no cultural bias involved, so as to disqualify agency's non-Indian witness from testifying as an expert in satisfaction of the Act, where expert witness had experience in testing ethnic groups and teaching Indian children, and dependent children neither practiced Indian lifestyle nor lived on reservation. *Long v. State, Dept. of Human Resources*, 527 So.2d 133 (Alaska Ct. App 1988).

BIA guidelines, although not binding, are useful as a guide in determining what is meant by a "qualified expert witness." *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992).

### 6<sup>th</sup> Circuit

To the extent the probate court in this case held that no expert testimony was necessary, we find this to constitute clear legal error. *Elliot v. Boyd*, 218 Mich. App. 196, 554 N.W.2d 32 (Mich. Ct. App. 1996).

### 8<sup>th</sup> Circuit

The witness was qualified as an expert witness because she has extensive education and experience, she testified that she is aware of the issues concerning the rearing of an Indian child outside of the Indian heritage and that she gave a great deal of consideration to the child's Native American ancestry before reaching her conclusions. *In re C.E.H. v. L.M.W. and R.H.*, 837 S.W.2d 947 (Mo. Ct. App. 1992).

Discretion exists to determine if the expert qualifies as an expert, but there is no discretion regarding whether a qualified expert witness is needed before a child is placed in foster care or parental rights are terminated. *In re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996).

The ICWA has been interpreted to mean only one qualified expert witness need testify. *In the Matter of Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986).

There is no definition in the ICWA of qualified expert witness, but the House Report states the phrase "is meant to apply to expertise beyond the normal social worker qualifications." *Id.*

There is no abuse of discretion in finding that a social worker, who has worked for DHS for two years, has taken a seminar on ICWA, has been associated with Native Americans throughout her life, has affiliated herself with the Indian Youths of America group, and has a caseload of 45-50 cases of which 1/3 involve Native American households, qualifies as an expert witness. *In re L.N.W.*, 457 N.W.2d 17 (Iowa Ct. App. 1990).

There is no abuse of discretion in finding two psychologists were qualified expert witnesses where both psychologists had taken course work in Native American culture and one of the psychologists was experienced in working with Native American youth. *In re T.J.J.*, 366 N.W.2d 651 (Minn. Ct. App. 1985).

This section applies to temporary emergency custody continuation but not termination of parental rights. *In re D.M., E.M., and A.M.*, NO. C1-00-495, 2000 WL 1182826 (Minn.App. Aug 22, 2000).

When the ICWA applies, termination of parental rights cannot be ordered in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witness, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm. *Id.*

### 9<sup>th</sup> Circuit

The court hold that expert witnesses need not have special knowledge of Indian life and the experts in this case were qualified because they shad specialized training for the medical, psychological, and special needs of the children, even though such experts lack special knowledge of and sensitivity to Indian culture. *In re Mahaney*, 146 Wash.2d 878, 51P.3d 776 (Wash. 2002).

Experienced social workers who testified for the state did not possess specialized knowledge of social or cultural aspects of Indian life as required by ICWA, were not qualified as experts even though both possessed expertise beyond social worker qualifications. Therefore, the burden of clear and convincing evidence that continued custody would result in serious emotional or physical damage was not met. *State ex rel. Juvenile Dept. of Mutnomah County v. Charles*, 70 Or. App. 10, 688 P.2d 1354 (1984).

Any error in rejecting testimony of husband's expert witnesses was harmless in child custody proceeding under ICWA, where experts had no knowledge of Native wife's parental fitness or of services available to child in public schools of wife's community. *Jordan v. Jordan*, 983 P.2d 1258 (Alaska 1999).

Acceptance of witnesses as qualified experts termination of parental rights did not constitute an abuse of discretion, where four witnesses were qualified in social work, two were counselors and one was a neurologist; one of the social workers was a member of the relative native community and had native children, and another counselor had 20 years experience in teaching and counseling native Alaskans. *In re Termination of Parental Rights of T.O.*, 759 P.2d 1308 (Alaska 1988).

Use of plural form "expert witnesses" in the ICWA does not mean that testimony of more than one qualified expert witness is required in child custody-foster care placement proceedings under the Act, since federal rules of construction provide that plural and singular are interchangeable. *D.A.W. v. State*, 699 P.2d 340 (Alaska 1985).

"Qualified expert witness" within meaning of ICWA, is meant to apply to expertise beyond normal social worker qualifications, and by the use of the plural form, "expert witnesses" in the Act, it is not meant that the testimony of more than one qualified expert is required in order to terminate parental rights. *In re Dependency of Roberts*, 46 Wash. App. 748, 732 P.2d 528 (1987).

### 10<sup>th</sup> Circuit

The purpose of the qualified expert testimony is to provide the court with knowledge of the social and cultural aspects of Indian life to diminish the risk of cultural bias. *In re L.N.W.*, 457 N.W.2d 17 (Iowa Ct. App. 1990).

### **Evidence of Damage to child**

An Indian child may not be involuntarily placed in foster care without clear and convincing evidence that continued custody of the child by the parent or the Indian custodian is likely to result in serious emotional or physical harm.

### 7<sup>th</sup> Circuit

The credibility of the evidence demonstrating the return of custody with the parent would likely result in serious emotional or physical damage to the child is for the fact finder to determine. *In re S.L.*, 55 N.W.2d 678 (Wis. Ct. App. 1990).

### 9<sup>th</sup> Circuit

The state did not fail to prove beyond a reasonable doubt that the father's continued custody over E.C. and B.C. was likely to result in serious emotional or physical damage to the children. With regard to the daughter, E.C. the state proved that continued custody posed a risk to E.C., both of future abuse and the lack of stability in her life. With regard to B.C., although his father did not sexually abuse him, Moores testified that the father has a risk of crossover offending; from this the court concludes that B.C. was at risk of future victimization. Also, B.C.'s therapist said that separating B.C. from his sister would have horrible consequences for him; the court had a tenable basis for concluding that returning B.C. to Cameron's custody would result in severe psychological damage. *In re E.C.*, No. 50618-8-I, 50619-6-I, 2003 WL 289430 (Wash. Ct. App. Feb. 10, 2003)(unpublished opinion).

The court order granting temporary legal custody of the two Indian children was supported by clear and convincing evidence where the father had extensive criminal history including several assaults on the mother, the parents had historically failed to take advantage of child protective services in other states, preferring to flee the area instead, and mother downplayed the violence of father against her. There is clear and convincing evidence where the mother fails to take active steps to protect the children from violence and where mother doesn't realize the degree of psychological and emotional damage to the children. *In re G.S., Jr.*, 312 Mont. 108, 59 P.3d 1063 (Mont. 2002).

The district court did not err in determining that remedial and rehabilitative programs designed to prevent the breakup of the Indian family had proven unsuccessful and that continued custody of the children by the mother are likely to result in emotional or physical damage to the children where Mother failed to complete the approved treatment plan; and is unlikely to make significant progress within a reasonable time to meet the children's needs, and where the children are severely disturbed and have special needs as a result of the Mother's severe neglect. *In re A.L.R.*, 311 Mont. 76, 2002 MT 183 (Mont. 2002).

When putting a child into foster care there is a lesser standard of proof than when revoking parental rights. The test is: "serious emotional or physical damage" proven by clear and convincing evidence. *In re L.F.*, 266 Mont. 461, 880 P.2d 1365 (1994).

Given the superior court made no specific findings that focused explicitly on the issue of likelihood of future harm, as well as the importance of such a determination, the question should be remanded. *D.H. v. State*, Dept. of Health & Social Services, 929 P.2d 650 (Alaska 1996).

Where Indian child is removed from his family, burden is on state to prove beyond a reasonable doubt continued custody by parent is likely to result in serious emotional or physical damage to child. *In re Dependency of Roberts*, 46 Wash. App. 748, 732 P.2d 528 (1987).

Under the ICWA, the trial court could not order a non-parental placement of the Indian children without determining by clear and convincing evidence, including testimony of qualified expert witnesses, that custody of the children with appellant was likely to result in serious emotional or physical damage to the children. *In re Mahaney*, 105 Wash. App. 391, 20 P.3d 437 (2001).

#### 10<sup>th</sup> Circuit

Although physician did not have expertise regarding Native American children, where issues as to whether child had been victim of shaken-baby syndrome and whether serious emotional or physical damage to child would result if he were returned to custody of parents did not implicate cultural bias, and physician, who had extensive experience with shaken-baby syndrome, testified that child had very high risk of mortality was sufficient under ICWA to establish that child was dependent. *Rachelle S. v. Arizona Dept. of Economic Sec.*, 191 Ariz. 518, 958 P.2d 459 (Ariz. Ct. App. 1998).

### **Parental rights termination orders; evidence; determination of damage to child: Qualified as an Expert**

Before parental rights can be terminated, evidence beyond a reasonable doubt that continued custody by parent would result in serious emotional or physical damage to the child must be proven.

#### 4<sup>th</sup> Circuit

A witness who testified that continued custody of Indian child with her mother would likely result in serious emotional or physical damage to the child was a "qualified expert," as required under ICWA for termination of mother's parental rights, even if witness did not have any special knowledge of Indian life. The witness' opinion was based upon culturally neutral considerations, and she had substantial education and experience in her specialty. *People ex rel. A.N.W.*, 976 P.2d 365 (Colo. Ct. App. 1999).

If termination of parental rights of an Indian child is based on parental unfitness unrelated to Indian culture or society, an expert witness qualified to testify pursuant to ICWA need not possess special knowledge of Indian life. *In re R.L.*, 961 P.2d 606 (Colo. Ct. App. 1998).

#### 5<sup>th</sup> Circuit

There is no evidence of the caseworker's education and no evidence she was familiar with Indian culture and childrearing practices. Also, the state failed to

inquire of the “expert” whether the mother’s continued custody of the child would likely result in serious emotional or physical damage to the child. *Joyce Doty-Jabbaar v. Dallas County Child Protective services*, 19 S.W.3d 870 (Tex. Ct. App. 2000).

### 6<sup>th</sup> Circuit

Where the petitioner elicited the qualifications of the expert, which were: she works for the Michigan ICWA agency, has a bachelor’s degree in psychology, and is of Mexican and Native American descent and the other expert testified that she works with the Grand Traverse Band of Ottawa Chippewa Indians as the director of the Indian Child Welfare Committee, is American Indian and worked for the tribe for over 14 years, the trial court did not err in terminating parental rights without the testimony of qualified expert witness. *In re Hidalgo*, No. 214139, 1999 WL 33437997 (Mich. Ct. App. June 1, 1999)(unpublished opinion).

A witness is qualified as an expert where they have a B.S. in business, about 15 hours of graduate study in psychology or sociology, and 11 years of experience in the field. *In re J.L.H.*, 316 N.W.2d 650 (S.D. 1982).

Failure of experts presented by Cabinet for Human Resources to have special knowledge of Indian life was not fatal to admission of their testimony in action to involuntarily terminate parental rights under the ICWA. *D.W.H. v. Cabinet for Human Resources*, 706 S.W.2d 840 (Ky. Ct. App. 1986).

When the lower court held that no expert testimony was necessary, this constituted clear legal error. *In re Elliott v. Boyd*, 218 Mich. App. 196, 554 N.W.2d 32 (1996).

### 7<sup>th</sup> Circuit

The testimony presented was that of qualified experts where one person was an occupational therapist, has a degree in occupational therapy, and is knowledgeable and experienced in the area of psychology, has been working with children since 1994, has previously worked as a residential counselor for emotionally disturbed children, has worked with children who have witnessed domestic violence or have been victims of domestic violence. Also, where the other witness is the director of the Domestic Violence Intervention Program. *In re Burks*, 76 Ark. App. 71, 61 S.W.3d 184 (Ark. Ct. App. 2001).

It is error for a trial court not to ask a purported expert witness if he had specific qualifications related to the placement of Native American children, as Congress made the qualified expert witness requirement in order to correct the failure of welfare workers to understand Indian culture and practices concerning the rearing of Indian children. *In re D.S.*, 577 N.E.2d 572 (Ind. 1991).

BIA guidelines, although not binding, are useful as a guide in determining what is meant by “qualified expert witness.” *In re S.M.*, 508 N.W.2d 732 (Iowa. Ct. App. 1993).

Indian social workers constituted “qualified expert witnesses” as required by section 1912(f) for termination proceedings despite the fact that Wisconsin law requires a licensed physician specializing in psychiatry or a licensed psychologist testify as to emotional damage in CHIPS proceedings. *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992).

### 8<sup>th</sup> Circuit

The state failed to present testimony of a qualified expert witness where the only DHS worker has no expertise beyond that of the normal social worker and where no determination by the court was made that continued custody of the child by the parent or Indian custodian would likely result in serious emotional or physical damage to the child. *In re D.W.*, No. 00-1677, 2001 WL 710205 (Iowa Ct. App. June 13, 2001)(unpublished opinion).

Although the doctor lacked special knowledge of the Native American culture, her lack of experience with that way of life in no way compromised or undermined the value of her testimony. *In Re Alan L.*, No. A-95-048, 1995 W.L. 663542 (Neb. Ct. App. Nov. 7, 1995).

Where there is testimony from a professional with substantial education and experience in psychology, he/she is deemed to be qualified under the ICWA. The fact that the expert used lacked experience with the Indian way of life in no way compromised or undermined the value of his testimony. *In re C.W.*, 479 N.W.2d 105 (Neb. 1992).

Where a tracker aide for DHS testified concerning Indian spiritual ceremonies and customs, expert witness testimony has been provided in compliance with §1912(f). *In re J.D.B.*, 584 N.W.2d 577 (Iowa Ct. App. 1998).

In parental rights termination hearing governed by ICWA, requirement of “qualified expert witness testimony” was met by testimony of two state Department of Human Services social workers who had been employed as social workers for 5 and 7 1/2 years, and who had taken continuing education and cultural training pertaining to Indians had been qualified under ICWA 16 times in past and 50 to 75 percent of her case work involved delivery of service to Indians, and a witness who had no specific experience with mother or children in the case, had received basic training relative to ICWA. *In re S.M.*, 508 N.W.2d 732 (Iowa Ct. App. 1993).

A social worker employed by the Department of Human Services for over two and one-half years, who has taken a seminar on ICWA, who has been associated with Indians throughout her life, and has affiliated herself with the Indian Youths of America group is qualified as an expert witness within the meaning of ICWA. *In re L.N.W.*, 457 N.W.2d 17 (Iowa Ct. App. 1990).

A social worker with a B.A. in social work who had regular contact with Native Americans as director of a youth shelter which had approximately 30% Native Americans as residents was found to be a qualified expert witness. *In re K.A.B.E.*, 325 N.W.2d 840 (S.D. 1982).

The decision to terminate parental rights was properly based on consideration of expert testimony. The trial court used its discretion in determining a social work who had supervised over 300 American Indian family cases during her ten years of work experience, as well as the testimony of others experienced in working with Indian families was qualified as an expert witness. *In re S.D.*, 402 N.W.2d 346 (S.D. 1987).

Minnesota follows the guidelines issued by the Bureau of Indian Affairs (BIA) and the Minnesota Department of Human Services (DHS). *In re B.M.J., L.M.J., R.L.J.*, No. C7-97-120, 1997 WL 370372 (Minn.App. July 8, 1997); *quoting In re Welfare of M.S.S.*, 465 N.W.2d 412, 417 (Minn.App. 1991).

If a person has significant ties with the Indian community and meets the qualifications of ICWA; only they will they be qualified as an expert witness and their testimony be submitted as evidence in a case involving termination of parental rights. *In re D.M.*, No. CX-01-635, 2001 WL 1182826 (Minn. Ct. App. Oct. 9, 2000).

The court must apply the standards laid out in the Department of Human Services manual for determining whether the witnesses qualify as experts. *In re M.S.S.*, 465 N.W.2d 412. (Minn. Ct. App. 1991).

Neither Indian heritage nor dealing with Indian families is sufficient to qualify as an expert witness. The court should include explanations in the record if it uses discretion to qualify an expert who does not have knowledge of tribal customs. *In re B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990).

A guardian ad litem is not automatically qualified as an expert. *Id.*

Merely because a caseworker deals with Indian families, it does to necessarily follow that he qualifies as an Indian child welfare expert. *Id.*

Termination of parental rights to an Indian child requires proof beyond a reasonable doubt that the continued custody by the parent would likely result in serious emotional or physical damage to the child. This stringent standard is applied because there is a presumption in favor of maintaining parental rights. *In re M.E.B.*, No. C6-90-2370, 1991 WL 34689 (Minn.App. Mar 19, 1991).

### 9<sup>th</sup> Circuit

Each gave testimony that supported the trial court's determination that mother would likely continue to cause her children serious harm if she were to regain custody. Also, the expert had substantial experience in the delivery of child and family services to Indians and whom the tribe acknowledges has extensive knowledge of prevailing social and cultural standards and childrearing practices within the tribe. Therefore, the record includes qualified expert testimony as required by the ICWA. *In re Lucas*, 177 Or. App. 318, 33 P.3d 1001 (Or. Ct. App. 2001).

The testimony was given by a qualified expert witness because the evidence established that the witness was a member of the tribe that she had been an

ICWA worker for the Choctaw nation for two years and was a designated representative of the tribe for testifying in termination proceedings; she had been raised in the tribe's culture and was familiar with its child rearing values; and she was familiar with the facts and circumstances of the mother's case. *In re Amador*, 176 Or.App. 237, 30 P.3d 1223 (Or. Ct. App. 2001).

A witness lacking knowledge of tribal culture may not qualify as an expert. *In re Matter of Appeal in Pima County Juvenile Action No. 3-903*, 130 Ariz. 202, 635 P.2d 187 (Ariz. Ct. App. 1981), cert. denied *sub nom*, *Catholic Social Services of Tusan v. P.C.*, 102 S.Ct. 1644 (1982) (*reasoning and conclusions affirmed Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)).

To qualify as expert social workers (and teachers) require "expertise beyond the normal social worker (or teacher) qualifications." *In re Adoption of H.M.O.*, 289 Mont. 509, 962 P.2d 1191 (1998).

Expert witness testimony was qualified under ICWA where expert is a counseling psychologist, himself an Indian who specialized in Indian culture and who had approximately 20 years of experience in treating Indian families and adolescents, reviewed children's files and testified. *State ex rel. Juvenile Dept. of Multnomah County v. Woodruff*, 108 Or. App. 352, 816 P.2d 623 (1991).

Trial court did not abuse its discretion by qualifying the witness as a qualified expert in Yupik culture; social worker and children were all Yupik, social worker learned about Yupik child-rearing practices through knowledge passed on by village elders and was able to describe important role played in child-rearing by Yupik extended family and sought input from appropriate village. *L.G. v. State, Dept. of Health and Social Services*, 14 P.3d 946 (Alaska 2000).

Prospective adoptive parents met their burden, under ICWA, to produce testimony of qualified expert that father's continued custody of Native American child was likely to result in serious emotional damage by producing testimony of Chief Appellate Judge of Ute Indian Tribe, who held masters' degree in social work and was pursuing doctorate, that child had bonded with the adoptive parents and that permanent removal of child from the adoptive home would likely result in serious emotional harm. *In re Baby Boy Doe*, 127 Idaho 452, 902 P.2d 477 (1995).

In proceeding for permanent deprivation of legal father's parental rights, trial court did not abuse its discretion in determining that witnesses, one of whom had been employed as caseworker supervisor of foster care program in Indian center and other who had been a mental health counselor and foster care caseworker for tribe and Indian center, are qualified expert witnesses for purposes of the ICWA. *In re Fisher*, 31 Wash. App. 550, 643 P.2d 887 (1982).

Testimony by tribal social worker, who was specially educated to work with and had experience working with Indian child's Pueblo, and testimony by Department of Economic security caseworker who had training and experience in ICWA cases was qualified as an expert under ICWA. *Matter of Maricopa County Juvenile Action No. JS-8287*, 171 Ariz. 104, 828 P.2d 1245 (Ariz. Ct. App. 1991).

### 10<sup>th</sup> Circuit

The testimony by the expert witness was qualified under the ICWA where her opinion was based on only on her review of the file, but also on case staffing done with the family's ongoing case manager for the Navajo Nation who had prepared an extensive file; her opinion was also formed by talking with the family's DCFS social worker. *In re F.M.*, 458 Utah Adv. Rep. 26, 57 P.3d 1130 (Utah Ct. App. 2002).

### **Parental rights termination orders; evidence; determination of damage to child: When Expert Testimony is Required**

Although the ICWA mandates the testimony of a qualified expert witness in a proceeding for termination of parental rights, some courts have held that if no cultural bias is implicated then expert witnesses do not require special knowledge of Indian life.

### 6<sup>th</sup> Circuit

It was clear legal error for the probate court to hold that no expert testimony was necessary. ICWA expressly mandates that "qualified expert witnesses" testify before a child is placed in foster care or parental rights are terminated. *In re Elliott*, 218 Mich. App. 461, 554 N.W.2d 32 (1996).

Where cultural bias is not implicated, a qualified expert witness need not have special knowledge of Indian life, but must have expertise beyond the normal social worker qualifications. *In Re Elliott*, 218 Mich. App. 461, 554 N.W.2d 32 (1996).

### 8<sup>th</sup> Circuit

When cultural bias is not implicated in parental termination proceedings, the requirement of qualified expert witness testimony under §1912(f) can be met by testimony of an expert witness who does not possess special knowledge of Indian life. Racial traditions are not implicated in allegations that a parent has failed to provide adequate food, basic daily hygiene, and supervision. *In re M.S.*, 2001 N.D. 68, 624 N.W.2d 678 (2001).

Indian father's failure to object in parental termination proceedings to qualifications of caseworker as "qualified expert" within meaning of ICWA operated as waiver of any improprieties in caseworker's testimony. *In re R.L.F.*, 437 N.W.2d 599 (Iowa Ct. App. 1989).

When a parent stipulates to the use of experts at trial, the stipulation is sufficient to meet the qualified expert requirement and the issue is no longer appealable. *In re A.V.S.*, Nos. 1999-427, 9-680, 99-0376, 2000 WL 18858 (Iowa Ct. App. Jan. 12, 2000).

### 9<sup>th</sup> Circuit

Use of expert witnesses who had no specific knowledge of Indian culture in proceeding to terminate parental rights of Indian mother was not error, where no cultural bias was implicated in termination. In this case, termination was due to mother's mental illness, and state presented evidence beyond a reasonable doubt that mother's emotional illness, mental deficiency, neurological disorders, and failure to adjust to such conditions, combined to leave her incapable of parenting for extended periods of time. *State ex rel. Children's Services Div. v. Campell*, 122 Or. App. 371, 857 P.2d 888 (1993).

When cultural bias is clearly not implicated, the proof required by the ICWA for termination of parental rights may be provided by the statutorily required "expert witnesses" who do not possess special knowledge of Indian life. *State ex rel. Juvenile Dept. of Lane County v. Tucker*, 76 Or. App. 673, 710 P.2d 793 (1985).

Even if trial court refused to hear testimony from expert in native culture, it would not justify reversal in a case where there is clear and convincing evidence that children are at risk of future physical harm if returned to mother's custody. *L.G. v. State, Dept. of Health and Social Services*, 14 P.3d 946 (Alaska 2000).

### **Qualified Expert Testimony – Generally**

#### 2<sup>nd</sup> Circuit

Petitioner has not presented the testimony of an expert qualified under the meaning of ICWA; for that reason petitioner has not proven, beyond a reasonable doubt that the mother's failure to rehabilitate in terms of a likelihood of serious emotional or physical damage to the child. *In re Jessica T.*, 1993 WL 566662 (Conn. Super. Ct. Dec. 20, 1993).

#### 6<sup>th</sup> Circuit

There is no description of requirements necessary for qualification as an expert witness within the ICWA. Only one expert witness need testify under the requirements of the ICWA. *In Re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996).

#### 8<sup>th</sup> Circuit

Although the father did not object to the testimony at trial, he may question whether or not the testimony was that of a qualified expert witness, because the state never expressly offered witness's testimony as expert under ICWA, the father did not have a chance to object. *In re D.W.*, No. 00-1677, 2001 WL 710205 (Iowa Ct. App. June 13, 2001)(unpublished opinion).

A witness must be qualified under the ICWA standards to be considered an expert witness; furthermore, when considering termination of parental rights, their testimony must address current ability to parent. *In re B.M.J.*, No. C7-97-120, 1997 WL 370372 (Minn. Ct. App. July, 8 1997).

Parental rights may be terminated with expert testimony showing that beyond a reasonable doubt continued custody by parent would result in serious or emotional or physical harm to the child. *In re R.T.*, No. C0-95-973, 1995 WL 731400 (Minn. Ct. App. Dec. 12, 1995).

Expert testimony is not optional, but required under the ICWA. *Long v. Geldert*, No. C8-921502, 1993 WL 27747 (Minn. Ct. App. Feb. 9, 1993).

### 9<sup>th</sup> Circuit

The superior court did not err in terminating Jack's parental rights without hearing testimony from an expert on Native life because cultural issues were not implicated in the proceedings and there was sufficient expert testimony that the boys could suffer severe emotional harm if Jack's parental rights were not terminated. *J.S. v. State of Alaska*, 50 P.3d 388 (Alaska 2002).

The trial court erred by relying upon the testimony of the state's expert in determining that continued custody with the mother would likely result in serious emotional or physical damage to the child because the expert did not meet nor speak with children or their parents. The expert gained all his information regarding the case by reading the case file. The expert was not aware of updated information about the case and the mother's substantial period of sobriety before trial casts doubt on the earlier conduct. *J.J. v. State of Alaska*, 38 P.3d 7 (Alaska 2001).

The district court did not err by telling the ICWA expert witness what testimony was needed to support the Department's petition for termination of parental rights; although Montana state law states that questioning by the court must be cautiously guarded and exercised with great care so as not to constitute express or implied comment, bias or prejudice, there is also a rule that requires an objection to interrogation by the court. No such objection was made, so the issue is not preserved for appeal. *In re K.M.G.*, 309 Mont. 529, 43 P.3d 983, 2002 WL 49825, No. 01-592 (Mont. Jan. 3, 2002)(unpublished opinion).

The evidence from the expert was insufficient; the expert received all her information about the case from reading a file given to her by DFYS and never met or spoke with the father or the children. The testimony is based on generalizations and not the particular facts of the case. The expert testimony should be based on the particular facts of the case. The state of AS relied on the FL social workers to investigate the appropriateness of the father's home for the children; however, the state failed to produce any direct evidence from FL officials about what they had done. *C.J. v. State of Alaska*, 18 P.3d 1214 (Alaska 2001).

The experts were sufficiently familiar with the facts of the case by review of selected DFYS records and DFYS's summary of relevant facts and of the testimony of other witnesses. These summaries served to keep the experts testimony sufficiently grounded in the facts and issues of the case. *J.A. v. State of Alaska*, 50 P.3d 395 (Alaska 2002).

The expert testimony is sufficiently tailored to the specific circumstances of the case to meet the requirements of the ICWA where the Dr. certifiable by the court under ICWA as an expert based upon five years as a psychologist working for the Alaska Area Native Health Service, as well as continuing work with Native families during the last five years and the Dr. testified about the dangers of returning children to violent situations and specifically testified that returning a child to a home in which a perpetrator of violence remains untreated would likely result in harm to the child. *T.D.W. v. State of Alaska*, No. S-10177, 2002 WL 863289 (Alaska May 1, 2002).

If the Department fails to sustain its burden of proof, “evidence beyond a reasonable doubt, including testimony of qualified expert witness”, the holding will be invalidated. *In re K.H.*, 294 Mont. 466, 981 P.2d 1190 (1999).

### 10<sup>th</sup> Circuit

The purpose of an expert witness is to provide the state court with evidence of tribal child rearing customs. *In the Matter of N.L.*, 1988 Okla. 39, 754 P.2d 863 (1988).

## **Termination**

Parental rights may only be terminated upon a showing beyond a reasonable doubt that continued custody by the parent will result in serious emotional or physical damage to the child.

### 1<sup>st</sup> Circuit

In action for termination of Indian mother’s parental rights, evidence supported finding beyond a reasonable doubt that mother’s continued custody of two minor children would likely result in their serious emotional or physical damage, thus satisfying requirements of ICWA; where expert testified such damage would result, other witnesses testified to mother’s past and future inability to care for children, there was evidence of unsatisfactory conditions in mother’s home, of medical neglect, of mother’s lack of supervision of the children, and of mother’s inability to protect children from sexual abuse, and long term assistance from service providers did not enhance mother’s parenting abilities. *In re Denice F.*, 658 A.2d 1070 (Me. 1995).

### 2<sup>nd</sup> Circuit

Evidence was sufficient to terminate father’s parental rights under the ICWA, on ground the children would suffer serious physical or emotional damage if returned to father’s care; all three children suffered severe neglect and physical and sexual abuse, prior efforts to unify the family were futile, and children’s psychiatrist’s opinioned that they would suffer if they were to have any further care from father. *In re Adoption of Arnold*, 50 Mass. App. Ct. 743, 741 N.E.2d 456 (2001).

#### 4<sup>th</sup> Circuit

Evidence established beyond a reasonable doubt that custody of child with parent was likely to result in serious emotional or physical damage to child, as required for termination of parental rights under the ICWA; licensed psychologist testified as to child's success during his two years and eight months in foster parents' home, that foster parents had enrolled child in local Indian day-care center, and that child was happy and secure in home. *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992).

Evidence supported termination of mother's parental rights to Indian child under both State law and ICWA, despite mother's claim that she had substantially complied with the major portions of the treatment plan; while mother attended parenting classes, complied with the terms of her probation, and engaged in mental health counseling, she was unable to hold a job, was sporadic in her visitation, was unaware of the problems that prevented her from successfully parenting her child, and did not interact emotionally with the child, and thus, the plan was not successful. *People ex rel. A.N.W.*, 976 P.2d 365 (Colo. Ct. App. 1999).

#### 5<sup>th</sup> Circuit

Under ICWA, father's parental rights could not be involuntarily terminated in the absence of a finding continued custody of the child was likely to result in serious or emotional physical damage to the child. *In re W.D.H.*, 43 S.W.3d 30 (Tex. Ct. App. 2001).

#### 6<sup>th</sup> Circuit

Respondent admits testimony by a qualified expert witness was presented. Evidence that the father had sexually abused his children and a continuing relationship with him would result in serious emotional harm to the children meets the standard of beyond a reasonable doubt as required by ICWA. *In re SD*, 236 Mich. App. 240, 599 N.W.2d 772 (1999).

The termination of parental rights was just because the father was given enough time to demonstrate the possible success of the efforts at rehabilitation. The evidence indicated that respondent did not finish parenting classes, did not have suitable housing, his attendance at therapy was sporadic, he continued to use alcohol, he did not attend AA regularly, and his only drug screen was positive for cocaine. *In re Hidalgo*, No. 214139, 1999 WL 33437997 (Mich. Ct. App. June 1, 1999)(unpublished opinion).

In an Indian child custody proceeding, a dual burden of proof must be met: the probate court must find beyond a reasonable doubt that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," and the court must also find that clear and

convincing evidence supports termination under the applicable state statutory ground” *In Re Elliott*, 218 Mich. App. 196, 554 N.W.2d 32 (1996).

A higher standard of proof and greater evidentiary standard for the termination of parental rights to Native American children does not deny equal protection to non-Indian parents. *In re Miller*, 182 Mich. App. 70, 451 N.W.2d 576 (1990).

The federal standards were not followed at the dispositional stage of the state proceedings. The probate court erred by explicitly applying the clear and convincing evidence standard for termination of parental rights proceedings, contrary to the higher “beyond a reasonable doubt” standard. *In re Morgan*, 140 Mich. App. 594, 364 N.W.2d 754 (1985).

Evidence of medical neglect of child, parents’ alcohol abuse, suicide attempts, and unstable home environment, when considered together, was sufficient to support determination that continued custody of child by parents was likely to result in serious emotional or physical damage to her beyond reasonable doubt. *D.W.H. v. Cabinet for Human Resources*, 706 S.W.2d 840 (Ky. Ct. App. 1986).

### 7<sup>th</sup> Circuit

Evidence at the trial permitted the jury to find that mother’s care for her children had been so inconsistent that it essentially deprived the children of a home and a functioning parent. *In re Maryah Monika M.*, 248 Wis.2d 529, 635 N.W.2d 906 (Wis. Ct. App. 2001) (unpublished opinion).

The petitioners proved beyond a reasonable doubt that continued custody with parents would likely result in serious emotional or physical damage to the children where father was ordered to undergo anger management and domestic violence counseling, but only attended one session and failed to exercise visitation with the children from June 1998 to January 1999, where allegations were made that the father whipped the two children with a belt which resulted in bruises and where one child was taken by DHS due to a broken leg which was allegedly the result of abuse. Also, where the mother maintained daily contact with the father after being ordered not to. *In re Burks*, 76 Ark. App. 71, 61 S.W.3d 184 (Ark. Ct. App. 2001).

It is error for a trial court to apply the state law burden of a clear and convincing evidence for a termination of parental rights determination instead of the ICWA beyond a reasonable doubt standard in a case concerning an Indian child. *In re D.S.*, 577 N.E.2d 572 (Ind. 1991).

Dual burdens of proof given in jury instructions to comply with the ICWA and the Wisconsin law was proper, as both burdens of proof can be used. *In Re D.S.P.*, 166 Wis.2d 464, 480 N.W.2d 234 (Wis. 1992).

A qualified expert’s testimony that the Indian parent’s past conduct would likely continue, that her child-rearing capabilities would be affected and that her parenting would likely result in serious emotional or physical harm to the child were sufficient evidence for termination. *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

### 8<sup>th</sup> Circuit

The trial did not err when it failed to apply the beyond a reasonable doubt standard to all issues presented in this case. Proof beyond a reasonable doubt was required only with respect to the issue of determination of whether or not continued custody by parent is likely to result in serious emotional or physical damage presented in 1912(f). *In re J.A.*, No. 02-1146, 2002 WL 31424883 (Iowa Ct. App. Oct. 30, 2002) (unpublished opinion).

Termination of parental rights were proven beyond a reasonable doubt to be in the best interests of the child where two expert witnesses testified that there is a likelihood of emotional or physical harm to the child because of mother's substance abuse and instability and where the department has offered services and mother failed to improve. *In re K.T.*, No. 02-0952, 2002 WL 1758435 (Iowa Ct. App. July 31, 2002) (unpublished opinion).

The trial court did not err in finding beyond a reasonable doubt that serious emotional or physical damage would likely result if the children were returned to Mother, where the mother failed to complete family service agreement, children were in need of a stable environment, the children were diagnosed with chronic psychological problems, had been in several foster homes due to behavior, and had anger issues. *In re S.G.V.E.*, 2001 SD 105, 634 N.W.2d 88 (S.D. 2001).

Proof of the mother's drug and alcohol addictions and the fact the mother served over 900 days in jail for offenses related to her alcohol and inhalant addictions, along with testimony from a qualified expert witness that the children would likely suffer from serious emotional harm if returned to their mother now or in the near future are sufficient to prove the petitioner's case beyond a reasonable doubt. *In re C.W.*, 479 N.W.2d 105 (Neb. 1992).

The two phrases "best interests" and "likelihood of serious emotional or physical harm" do not connote synonymous situations, and the pleading of "best interests" does not sufficiently place in issue the requirement of the ICWA that continued custody by the parent is likely to result in serious emotional or physical harm. *In re Sabriena B.*, 9 Neb. App. 888, 621 N.W.2d 836 (2001).

Evidence was sufficient to support trial court's finding that continued legal custody by father would result in serious emotional damage to child, where, removing the child from where the parents who are petitioning to adopt him would result in serious emotional damage. *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990).

Sufficient evidence, beyond a reasonable doubt, supported termination of grandmother's custodial rights in two minor Indian children; one child was raped while in grandmother's custody while grandmother was intoxicated, and qualified experts testified that continued custody of children by grandmother was likely to result in serious emotional or physical damage to children. *In re J.J.*, 454 N.W.2d 317 (S.D. 1990).

The grounds for termination were supported with respect to a father who has never seen the child and has failed to provide financial support despite his expressed, generalized interest in the child. Also evidence that the father could not be an effective custodial parent of child supported termination of his rights on grounds that child would be imminently likely to suffer harmful emotional or physical effects were he allowed to assume parenting role. *In re R.L.F.*, 437 N.W.2d 599 (Iowa Ct. App. 1989).

In some instances, a long-term permanency order, and not the termination of parental rights, may be appropriate to ensure the minors' best interests and to ensure that the minors' ties with the tribes are continued. *In re B.M.*, No. 98-2175, 1999 WL 823851 (Iowa Ct. App. Oct. 15, 1999).

The invalidation of a parental rights termination may not be accomplished by showing a violation of the placement preferences in a proceeding brought pursuant to §1914. *In the interest of L.D.R.T.*, 391 N.W.2d 594 (N.D. 1986).

Testimony of ICWA expert that, in her opinion, child would suffer serious emotional or physical injury if returned to his parents' custody supported determination that termination of father's parental rights was least restrictive alternative. The expert's opinion was partially based on risk factors such as father's failure to establish and maintain relationship with mother, violence in home, father's chemical dependency issues, and his deficient judgment and impulse control. *In re B.S.*, 566 N.W. 2d 446 (S.D. 1997).

Before a trial court applies the higher standard of beyond a reasonable doubt, some evidence must show that the child is an Indian and that the Act applies. *In re A.S.*, No. 21349, 2000 WL 1006613 (S.D. July 13, 2000).

Although the mother was Caucasian the ICWA applied to termination of her parental rights, despite the proposition that the purpose of the Act is maintenance of an Indian family. Therefore, the burden of prove should have been beyond a reasonable doubt. *In re N.S.*, 474 N.W.2d 96 (S.D. 1991).

Evidence supported finding that natural parents' further custody of children would result in serious emotional or physical damage to children, thus justifying termination of parental rights; parents exhibited violent and intoxicated behavior over a period of years, resulting in problems for all children due to lack of stability in the home. *In re S.D.*, 402 N.W.2d 346 (S.D. 1987).

Before trial court is required to apply standard for termination of parental rights set out in Indian Child Welfare Act, some evidence must show that child is Indian and that Act applies. *In re B.R.B.*, 381 N.W.2d 283 (S.D. 1986).

The court was justified in terminating the Indian mother's rights with evidence showing the mother was found intoxicated lying with child, mother's chronic use of alcohol and inhalants, and mother's severe borderline personality disorder. *In re P.B.*, 371 N.W.2d 366 (S.D. 1985).

The standard of proof necessary for adjudication of dependency and termination of parental rights with respect to Indian children under ICWA is clear and convincing evidence. Findings at adjudicatory state of dependency and

termination of parental rights proceeding under ICWA were supported by clear and convincing evidence of natural mother's child abuse, inadequate supervision of children, and alcoholism. *In re K.A.B.E.*, 325 N.W.2d 840 (S.D. 1982).

Proof that mother's continued custody of child was likely to result in serious emotional or physical damage to child was beyond a reasonable doubt, where mother had rarely seen child, where child had special needs, and where mother showed no sense of responsibility or degree of interest in child. Termination was the least restrictive alternative. Where Indian mother was unresponsive to efforts to assist her and where child would be irreparably damaged by further contact with mother in parental relationship, trial court, which gave child's father, also an Indian, sole custody, care and control of child based on finding that father was providing child with appropriate environment, had no reasonable alternative other than termination of mother's parental rights. *In re S.R.*, 323 N.W.2d 885 (S.D. 1982).

The evidence was sufficient to show that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. Evidence of conduct of mother and other persons in and about the children's residence supported trial court's finding that children were neglected and dependent. Burden was proved beyond a reasonable doubt where it was proven that continued custody by the mother was likely to result in severe emotional and physical damage to children. *In re J.L.H.*, 316 N.W.2d 650 (S.D. 1982).

Termination is the least restrictive alternative. In a situation where the mother was granted the opportunity to improve the situation, did not prohibit the court from imposing more restrictive alternatives when course of conduct continued and thwarted effectiveness of lesser alternatives. *Id.*

Clear and convincing evidence standard of proof for termination of parental rights of American Indian mother was inadequate as the ICWA of 1978 required determination, supported by "evidence beyond a reasonable doubt," continued custody of child was likely to result in serious emotional or physical damage to the child. *In re J.L.H.*, 299 N.W.2d 812 (S.D. 1980).

Chronic alcohol or chemical abuse provides sufficient basis to support termination of parental rights *In re M.E.B.*, Nos. C6-90-2370, C3-90-2388, 1991 WL 34689 (Minn. Ct. App. March 19, 1991).

There is not a custody requirement within § 1912(f). *In re W.R.*, 379 N.W.2d 544 (Minn. Ct. App. 1985).

Mothers 2 ½ year history of erratic behavior combined with testimony of two expert witnesses is adequate to meet the requirement of termination of parental rights of the ICWA. *In re R.M.M.*, 316 N.W.2d 538 (Minn. 1982).

There should only be a termination of parental rights when all options have been explored. The beyond a reasonable doubt determination must include the likelihood supported by evidence that present conditions are likely to continue for an indeterminate period of time. *Id.*

A “stringent” standard of review is applied to a district court’s decision to terminate parental rights and this court will closely scrutinize the sufficiency of the evidence. *In re D.M., E.M., and A.M.* NO. C1-00-495, 2000WL 1182826(Minn. App. Aug 22, 2000).

Great caution must be used in reviewing termination proceedings, finds that termination is proper only where the evidence clearly mandates it. *In re B.M.J., L.M.J., and R.L.J.*, No. C7-97-120, 1997 WL 370372 (Minn. App. July 8, 1997) quoting *In re Welfare of L.J.B.*, 356 N.W.2d 394, 397 (Minn.App. 1984).

Under the ICWA, termination of parental rights requires proof beyond a reasonable doubt. *In re B.M.J., L.M.J., and R.L.J.*, No. C7-97-120, 1997 WL 370372 (Minn. App. July 8, 1997).

Although an evidentiary issue is not raised at the trial court, the appellate court is not estopped from reviewing that issue for the first time on appeal “where to decline review would work an injustice or infringe upon a constitutional right”. *Id.*

The guidelines state guidelines shall be looked at in addition to the requirements in the BIA, required by the ICWA. The Guidelines for State courts, 44 Fed.Reg. 67,593 (1979). The DHA manual adds to paragraph (iii) the requirement that the professional have “substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community.” DHS Manual, XIII-3586 (Jan. 30, 1987). *In re B.W., a/k/a B.G.*, 454 N.W.2d 437 (Minn. 1990).

If a trial court does not apply standards in the DHS manual, that court should make explicit findings as to why it chose not to require that expert testimony of a professional be qualified by showing “substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community.” *Id.*

### 9<sup>th</sup> Circuit

The superior court did not err in finding that beyond a reasonable doubt continued custody by the father would result in serious emotional or physical damage to the children where there was substantial testimony by experts with personal knowledge of the facts of this case and an expert with substantial expertise in sex offender treatment. *J.S. v. State of Alaska*, 50 P.3d 388 (Alaska 2002).

The trial court did not err in determining that the child would likely be harmed if returned to the custody of Mother where the record gives every indication that mother’s poor parenting skills are highly related to her substance abuse problems, and that mother is unlikely to achieve lasting sobriety and the unequivocal opinions of the two experts and the child’s documented fear of returning to his mother provide the requisite proof both that the mother’s conduct would likely harm the child and that the mother is unlikely to permanently change that conduct. *E.A. v. State of Alaska*, 46 P.3d 986 (Alaska 2002).

The trial court satisfied the ICWA with regard to the termination of parental rights by relying on expert testimony to support its decision. The combination of the developmental difficulties experienced by the children with the negative feelings they have for their parents would overwhelm the ability of either parent to meet the needs of the children and cause the children to feel insecure and unsafe. *V.S.B. v. State of Alaska*, 45 P.3d 1198 (Alaska 2002).

The grandmother and the father are not coequals as parent and Indian custodian in the case, because the grandmother is the one petitioning for termination of the father's parental rights. The ICWA applies to termination proceedings when a party other than the state seeks the termination, even when that party is an Indian Custodian under the ICWA. Therefore, the trial court's decision not to apply the heightened standard of the ICWA was an error. *D.J. v. P.C.*, 36 P.3d 663 (Alaska 2001).

There is no indication that the lower court's grant of summary judgment considered the effect of legal custody and whether continued legal custody by the father would likely result in serious emotional or physical damage to the child. *D.J. v. P.C.*, 36 P.3d 663 (Alaska 2001).

Because of improvements in mother's ability to care for her children and the doubts raised by the expert, the superior court was not clearly erroneous in finding that the state failed to prove beyond a reasonable doubt that granting Lewis custody of the children would likely result in serious emotional or physical damage. *State of Alaska v. M.L.L.*, 61 P.3d 438 (Alaska 2002).

The trial court was in compliance with the ICWA when it determined that the father's failure to successfully complete his treatment plans, when coupled with his continuous criminal activity was reason enough to terminate his parental rights. *In re M.D.M.*, 313 Mont. 51, 59 P.3d 1142 (Mont. 2002).

Evidence established beyond a reasonable doubt that Indian father was unfit as parent and that reintegration of children into home was not likely to occur in the foreseeable future and, thus, termination of parental rights was warranted; father was currently in prison, he had sexually abused his daughter, and he had a long history of addictive use of alcohol and controlled substances. *State ex rel. Juvenile Dept. of Multnomah County v. Woodruff*, 108 Or. App. 352, 816 P.2d 623 (1991).

If parental rights are terminated prior to the establishment of a child's "Indian" heritage under the act, termination is valid. *In re Adoption of Crews*, 118 Wash. 2d 561, 825 P.2d 305 (1992).

Evidence established that father had not remedied his inability to meet children's needs and children would continue to suffer emotional and physical damage unless father's parental rights were terminated. Father is paranoid schizophrenic, has made no progress with his living skills, charged with stalking the mother and assaulting her boyfriend. *A.H. v. State, Dept. of Health & Social Services*, 10 P.3d 1156 (Alaska 2000).

State's evidence, including expert witness testimony, was insufficient to show beyond reasonable doubt that placement with father was likely to result in serious physical or emotional damage to children. There was un rebutted evidence in record father was successfully parenting his older child, as well as evidence that he wished to parent children in question and had taken steps to put himself in a position to do so. *C.J. v. State, Dept. of Health and Social Services*, 18 P.3d 1214 (Alaska 2001).

Mother's repeated alcohol and drug abuse led to repeated separations of children from their mother. Removing children from their current placement would hinder their ability to attach to a caregiver in the future. *L.G. v. State, Dept. of Health and Social Services*, 14 P.3d 946 (Alaska 2000).

Trial court did not clearly err in finding that continued custody of children by father would likely cause children serious emotional harm, as required for termination of parental rights under ICWA and state regulation; evidence was presented children had close ties with foster mother and father's prolonged separation from children would likely have effects on their mental health if children eventually were returned. *A.M. v. State*, 891 P.2d 815 (Alaska 1995).

Evidence supported finding that custody by father was likely to result in serious emotional or physical harm to children; examining psychiatrist and children's therapist considered father's paranoia and related conduct emotionally harmful to children and there were numerous reports of excessive and inappropriate discipline. *K.N. v. State*, 856 P.2d 468, (Alaska 1993).

Trial court in a parental rights termination proceeding conducted pursuant to the ICWA must apply a reasonable doubt standard of proof in determining whether continued custody of child by parent or Indian custodian is likely to result in serious emotional or physical damage to child, but as to additional findings mandated by state law, trial court must apply a clear and convincing standard of proof to determine whether child is in need of aid as a result of parental conduct and whether parental conduct is likely to continue. *In re J.R.B.*, 715 P.2d 1170 (Alaska 1986).

Discretionary use of hearsay evidence during dispositive phase of a state parental rights termination proceeding conducted pursuant to the ICWA is consistent with fundamental fairness and is not violative of parents' constitutional rights to due process. *In re J.R.B.*, 715 P.2d 1170 (Alaska 1986).

Evidence, that total amount of time Indian mother spent visiting her Indian child over 8 months was a little over two hours, with mother missing visits on occasions, that mother was unable to provide court with explanation of why she failed to visit her son, that expert witnesses concluded lack of contact had destroyed parent-child bond, and that experts agreed there was little likelihood mother's behavior would change and serious physical or emotional damage would occur to child if he were returned to mother's custody, supported decision to terminate mother's parental rights on basis of her abandonment of child. *D.E.D. v. State*, 704 P.2d 774 (Alaska 1985).

Decision to terminate father's parental rights was supported by evidence, including required expert testimony, proving beyond reasonable doubt that father's continued custody of child was likely to result in serious emotional damage based on evidence that father neither offered nor assisted mother with pregnancy or with medical costs associated with the pregnancy and birth, father had never provided any support for the child or offered to do so, father had at least six children by four women, two of whom testified as to father's failure to maintain any regular contact with their children, that father had committed acts of domestic violence against former wife in presence of their children, and that father lacked honesty and integrity. *In re Baby Boy Doe*, 127 Idaho 452, 902 P.2d 477 (1995).

Evidence sustained trial court's decision to terminate biological mother's parental rights to Indian child based on finding beyond a reasonable doubt that mother was unable to discharge parental responsibilities due to mental illness and chronic alcohol abuse, and reasonable grounds to believe that her condition would continue for prolonged indeterminate period of time; child had been in out-of-home placement for more than two years and had been living with foster family who planned to adopt her. *In re Matter of Maricopa County Juvenile Action No. JS-8287*, 171 Ariz. 104, 828 P.2d 1245 (Ariz. Ct. App. 1991).

The requisite burden of proof for termination of parental rights was not met. Where there was no evidence as to mother's fitness as a parent or any attempt to preserve parent-child relationship, Indian mother was entitled to return of her child when she revoked her relinquishment of parental rights. *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (Ariz. Ct. App. 1981).

Even if the preferred placement preferences of the ICWA are ignored, it is immaterial to the question of termination, which focuses on why the children are dependent rather than on where the children were living. *In re Appeal in Maricopa County Juvenile Action No., JS-7359*, 766 P.2d 105 (Ariz. Ct. App. 1988).

### 10<sup>th</sup> Circuit

Termination of mother's parental rights in Indian child was sufficiently supported by evidence that child was neglected where child remained for extended period of time in care of third persons and never had strong bond with mother. *In re Laurie R.*, 107 N.M. 529, 760 P.2d 1295 (N.M. Ct. App. 1988).

The court did not err due to insufficient findings. Regarding the findings, the expert's testimony and the extensive files of the Navajo Children and Family Service program, along with the testimony from the children's social workers regarding the children's severe behavior disorders and their need for a competent custodian who can offer a very structured environment, the juvenile court correctly concluded that returning the children to her would likely result in serious emotional and physical damage to the children. *In re F.M.*, 458 Utah Adv. Rep. 26, 57 P.3d 1130 (Utah Ct. App. 2002).

The case must be remanded and the additional federal requirements for parental right termination proceedings involving Indian children must be applied. It must be proven beyond a reasonable doubt and with expert witness testimony that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. *K.E. v. State*, 912 P.2d 1002 (Utah Ct. App. 1996).

Mother's parental rights could not be terminated on basis of findings that termination was in children's best interests and that children had not bonded to their mother; bonding could not be expected as children had been separated from their mother for two years, and no expert other than Department of Human Services caseworker offered any testimony as to children's best interests. *In re J.W.*, 742 P.2d 1171 (Okla. Ct. App. 1987).

There was no evidentiary basis under federal or state law to support termination of Indian mother's parental rights based on noncompliance with court-ordered service plan, including demand that she continue education and/or employment; though mother did not have a job she was still going to school and was in process of seeking employment, and mother had otherwise met plan's commands. *In re J.W.*, 742 P.2d 1171 (Okla. Ct. App. 1987).

Expert testimony that child was special needs child who would not develop properly, unless provided special education, placement in developmental preschool, and constant attention at home, and evidence that father had failed to obtain suitable residence, and had been unable and unwilling to comply with court-approved treatment plans, was sufficient to sustain People's burden of proving that father's continued custody of child was likely to result in serious emotional or physical damage to child in proceeding to terminate father's parental relationship with child pursuant to ICWA. *In re C.A.J.*, 709 P.2d 604 (Colo. Ct. App. 1985).

Testimony of psychologists, psychotherapist, behavioral pediatrician, and all three caseworkers involved with family that, in their opinion, parents would not change their child-rearing practices in foreseeable future, was sufficient to support finding that conditions and causes of negligence and abuse were unlikely to change, and thus, sufficient to support grounds for termination of parental rights beyond reasonable doubt as required by ICWA. *In re R.N.*, 107 N.M. 341, 757 P.2d 1333 (Ct. App. 1998).

### **§1913 Parental rights; Voluntary Termination**

1. Consent; record; certification matters; invalid consents. Where any parent or Indian custodian voluntarily consents to a foster care placement or termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that

either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, the birth of the Indian child shall not be valid.

2. Foster care placement; withdrawal of consent. Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.
3. Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody. In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.
4. Collateral attack: vacation of decree and return of custody; limitations. After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption that has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

## **FEDERAL REGISTER**

### 1. Consent

#### Section E.2(c).

The consent document shall contain the name and birth date of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, the name and address of the consenting parent or Indian custodian, the name and address of the person or entity by or through whom the placement was arranged, and the name and address of the prospective foster parents, if known at the time.

A consent to termination of parental rights or adoption shall contain in addition to the above mentioned information, the name and address of the person or entity by or through whom any pre-adoptive or adoptive placement has been or is to be arranged.

### 2. Withdrawal of consent to foster care

### Section E.3.

Where a parent or Indian custodian has consented to a foster care placement under state, such consent may be withdrawn at any time by filing, in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable to returned to the parent or Indian custodian.

## 3. Voluntary termination of parental rights

### Section B.1.

Under the Act confidentiality is given a much higher priority in voluntary proceeding than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements, but not in involuntary ones.

### Section E.4. and Commentary

(a) Consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable. This provision recommends that the clerk of the court be responsible for notifying the family with whom the child has been placed that consent has been withdrawn. The court's involvement frequently may be necessary since the biological parents are often not told who the adoptive parents are.

## 4. Collateral Attack

### Section G.1. (a) and (b)

(a) The person who executed the consent may petition the court in which the final adoption decree was entered to vacate the decree

and revoke the consent on the grounds that such consent was obtained by fraud or duress. (b) Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

#### Section G.1. Commentary

This section recommends that the petition be brought in the same court in which the decree was entered, since that court clearly has jurisdiction, and witnesses on the issue of fraud or duress are most likely to be within its jurisdiction.

### RELEVANT CASES

The absence of case law testifies to the relative clarity of §1913. The high standard for consent to foster placement or termination of parental rights requires both written consent and a hearing before a judge in court and on the record. The only litigated issue deals with withdrawal of consent to a termination of parental rights. Courts appear to be unanimous in holding that an effective consent to a termination of parental rights becomes irrevocable upon a final order by the court. This holding is, of course, subject to §1913(d) and evidence of fraud or duress should be enough to render consent invalid.

#### Consent

##### Federal Court

"1913(a), requires that a consent for adoption be recorded before 'a judge of a court of competent jurisdiction.' In the case of reservation domiciled children that could be only the tribal court. The children therefore could not be made non-domiciliary of the reservation through any such state-court consent." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

##### 2<sup>nd</sup> Circuit

An Indian father's consent to the adoption of a child born out of wedlock is not needed where the father never established paternity. *In re Adoption of Christopher*, 662 N.Y.S.2d 366 (N.Y. Fam. Ct. 1997).

##### 3<sup>rd</sup> Circuit

The trial court's refusal to reopen judgment of adoption as requested by alleged biological father, on basis of ICWA, did not constitute abuse of discretion which would require reversal; neither adoptive parents nor court knew that child was

Indian during initial proceeding, alleged biological father had actual notice of pendency of proceedings but elected not to respond, significant time had passed, and psychological bonding occurred between infant and adoptive parents who gained custody when child was eight days old. *In re Child of Indian Heritage*, 219 N.J. Super. 28, 529 A.2d 1009 (N.J. Super. App. Div. 1987).

### 9<sup>th</sup> Circuit

If the child met definition of “Indian child” at time of hearing on mother’s motion to dismiss adoption petition, mother was entitled, under ICWA, to revoke her consent to the adoption even though that consent had become irrevocable under state law. ICWA doesn’t require tribal affiliation be established before parental consent to adoption is signed or becomes irrevocable under state law. *Quinn v. Walters*, 320 Or. 233, 881 P.2d 795 (1994).

The requirement that a father be advised of his rights under §1913 (a) only applies when a person voluntarily consents to termination. Although the father’s initial request for CSD assistance in caring for his children was voluntary, the termination proceedings were involuntary and were initiated by CSD after he had been convicted of sexually abusing his daughter. *State ex rel. Juvenile Dept. of Multnomah County v. Woodruff*, 108 Or. App. 352, 816 P.2d 623 (1991).

ICWA maintains that consent to adoption is invalid if given before, or within ten days after, the birth of the child. Consent to adoption must be given before a judge who certifies that the parent understands the consequences of the consent. *In re Tracy Angus*, 60 Or. App. 546, 655 P.2d 208 (1982).

The issue of whether superior court committed reversible error in not declining jurisdiction will not be considered, where mother never requested superior court to rule on jurisdictional issues she specified as error on appeal. *D.E.D. v. State*, 704 P.2d 774 (Alaska 1985).

Consents to adopt are invalid if it does not contain required judicial certification. *In re Baby Boy Doe*, 127 Idaho 452, 902 P.2d 477 (Idaho 1995).

## **Withdrawal of consent to foster care**

### 3<sup>rd</sup> Circuit

Placement of Indian child with foster parents was temporary and, thus, adoptive Indian parent had the right and ability under the ICWA to withdraw her consent to placement and to effect immediate return of child. *In re Adoption of K.L.R.R.*, 356 Pa. Super. 555, 515 A.2d 33 (1986).

## **Voluntary termination of parental rights**

### 3<sup>rd</sup> Circuit

Placement of Indian child with foster parents was temporary and, thus, Indian parent had right and ability under the ICWA to withdraw her consent to placement and to effect immediate return of child, notwithstanding fact that adoption may have been, at one time, “ultimate objective” of parties, where placement was purely consensual. *In re Adoption of K.L.R.R.*, 356 Pa. Super. 555, 515 A.2d 33 (Pa. Super. Ct. 1986).

### 6<sup>th</sup> Circuit

An Indian mother’s right to withdraw consent to the termination of her parental rights expires with an entry of a final order terminating her rights, rather than lasting until the subsequent order of adoption under the ICWA. Consent to termination of parental rights may be withdrawn at any time before a final decree of termination is entered, but consent to adoption may only be withdrawn before a final decree of adoption. *Kiogma v. Walker*, 472 N.W.2d 13 (Mich. Ct. App. 1991).

### 8<sup>th</sup> Circuit

Under §1913(c), the mother would only have the right to withdraw her consent in a voluntary adoption proceeding. The court found this was an involuntary proceeding and the consent form originally signed and the subsequent withdrawal was not the issue before the trial court. *In re C.E.H. v. L.M.W. and R.H.*, 837 S.W.2d 947 (Mo. Ct. App. 1992).

Under §1913(c), the mother’s right to withdraw her consent to the termination expired when the order terminating parental rights became final. The consent to either voluntary termination of parental rights or consent to adoption may only be withdrawn prior to the final order of either termination of parental rights or a final adoption decree, whichever happens first. *In re L.D.R.T.* 391 N.W.2d 594 (N.D. 1986).

### 9<sup>th</sup> Circuit

Under the ICWA, the mother’s consent to terminate her parental rights voluntarily, was not an adoption placement proceeding and can only be characterized as a voluntary termination proceeding, therefore, under §1913(c), her right to revoke consent expired upon the entry of the final order terminating her parental rights. *In re M.D.*, 110 Wash.App. 524, 42 P.3d 424 (Wash. Ct. App. 2002).

Former wife's right under ICWA to withdraw relinquishment of parental rights did not entitle her to custody of child who lived with former husband after rights were relinquished; rather, trial court should have conducted further proceedings to modify custody. *Harvick v. Harvick*, 828 P.2d 769 (Alaska 1992).

Statute governing consent to voluntary termination of parental rights and consent to voluntary proceedings for the adoptive placement of Indian children does not allow a natural parent to withdraw an executed voluntary relinquishment of parental rights after a final order terminating those rights has been entered. If Congress had intended consents to termination to be revocable at any time before entry of a final decree of adoption, the words "as the case may be" would not appear in the statute. *In re J.R.S.* 690 P.2d 10 (Alaska 1984).

When information about Indian ancestry is sparse and does not suggest child is eligible in tribal enrollment and statements fail to suggest any relationship with an identifiable tribe then neither the court nor the private adoption agency have a duty to investigate further. *In re Adoption of Crews*, 118 Wash. 2d 561, 825 P.2d 305 (Wash 1992).

Although Indian child was living in Arizona with prospective adoptive parents pursuant to temporary custody order, Arizona court should have deferred to tribal jurisdiction in parental rights termination proceeding where evidence concerning mother's fitness as a parent would be more readily accessible in Montana, in which reservation of mother's tribe was located, and qualified expert witnesses. *In re Matter of Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (Ariz. Ct. App. 1981).

The parent of an Indian child may revoke consent at any time before entry of a final decree of adoption and have the child returned. *In re Tracy Angus*, 60 Or. App. 546, 655 P.2d 208 (1982).

### **Collateral Attack**

#### **9<sup>th</sup> Circuit**

ICWA incorporates state statutes of limitations except in challenges based on fraud or duress, which are governed, by Act's two-year statute of limitations. Alaska's one-year limitations period, rather than California's three-year period, applied to mother's action to set aside adoption of Indian child under ICWA; although child was born in California, adoption decree was issued by Alaska court, adoptive child and her family lived in Alaska, child was conceived in Alaska, and mother consented to adoption in Alaska court. *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989).

The ICWA applies even where the child was not born into an Indian family. Therefore, the Indian parents have all of the rights afforded them under the ICWA. *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989).

### **§1914 Petition to Court of Competent Jurisdiction to Invalidate Action Upon Showing of Certain Violations.**

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian

from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, 1913.

## FEDERAL REGISTER

## RELEVANT CASES

Any violation of Sections 1911, 1912, or 1913 can constitute reversible error, however courts are split as to the remedy to be given if an ICWA violation is found. Some courts conclude the holding is susceptible to collateral attacks by the tribal court, other courts conclude it constitutes reversible error and still other courts will remand part of the case.

### Violations of the ICWA

#### Federal Court

§1914 provides minimum federal standards in state Indian child custody proceedings; however, it does not oust states of traditional jurisdiction over Indian children. *Morrow v. Winslow*, 94 F.3d 1386, 1391 (10<sup>th</sup> Cir. 1996)(Okla.).

District Court had subject matter jurisdiction insofar as mother alleged that state proceeding violated the Indian Child Welfare Act. *Roman-Nose v. New Mexico Dept. of Human Services*, 967 F.2d 435 (10<sup>th</sup> Cir. 1992)(Okla.).

The ICWA allows federal courts to invalidate state court proceedings involving the termination of parental rights in an Indian child. *Umtuch v. Hoyt*, 163 F.3d 609 (9<sup>th</sup> Cir. 1998)(Or.).

First impression issues, if substantial, should not support an attorney's fee award against a losing plaintiff. *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10<sup>th</sup> Cir. 1985)(Kan.).

#### 6<sup>th</sup> Circuit

Evidence that actual notice was received by the Bad River Indian Tribe alone is sufficient to satisfy the notice requirement of the ICWA. Since the tribe declined to intervene, the burden shifted to the respondent mother to show that the ICWA still applied. Because the mother and the children are not enrolled in the tribe, the court will not disturb the trial courts finding that the ICWA applied. The mother should not be granted more time to apply for membership with the tribe. *In re S.S.S. & S.K.S.*, Nos. 236587, 236644, 2002 WL 1923867 (Mich. Ct. App. Aug. 20, 2002)(unpublished opinion).

Where appellate made no mention that child was enrolled or enrollable in a tribe in earlier proceedings and where in this proceeding, appellant does not contend that the child is enrolled or enrollable the circuit court's decision will not be reversed on the grounds of failure to inquire whether the child is an Indian child. In this case it appears that the appellate simply attacks on a technical failure, but doesn't show that the ICWA would otherwise apply making it a harmless error. *In re K.S.*, No. 234282, 2002 WL 743180 (Mich. Ct. App. Apr. 23, 2002)(unpublished opinion).

The children were not found to be Indian children under the ICWA, therefore the fact that notice to the tribes was late was harmless error, and therefore does not invalidate the decision made below. *In re M.M.*, No. 231800, 231805, 2002 WL 1360392 (Mich. Ct. App. June 21, 2002)(unpublished opinion).

When the tribe of a child is unknown, ICWA doesn't require that petitioner demonstrate receipt of notice by all tribes notified by the BIA. Because actual notice to the Cherokee tribes and the BIA was demonstrated in this case, petitioner's substantial compliance with the notice requirements was sufficient to satisfy the ICWA. Therefore there is no violation under §1914. *In re TM*, 245 Mich. App. 181 (Mich. Ct. App. 2001).

Applicable Indian tribes determined that the child was not an Indian child; therefore, the family court was not required to apply the heightened evidentiary standards applicable to the ICWA. *In re McQueen*, Nos. 223814, 223940, 2001 WL 651351 (Mich. Ct. App. May 25, 2001)(unpublished opinion).

If the petitioner failed to comply with the order to ascertain a determination of tribal relationship of respondent with tribe, the case must be remanded to the trial court with instructions for it to determine whether respondent's children are Indian. *In re Yeary*, No. 224475, 2001 WL 753900 (Mich. Ct. App. Feb. 9, 2001)(unpublished opinion).

If lower court's fails to provide adequate notice under §1912 (a), but correctly applies Michigan law the lower court's ruling is not necessarily invalid, but rather conditionally affirmed. The case is remanded so that the court and the BIA may provide proper notice to the interested tribe. If the tribe does not seek to intervene, or after intervention the trial court still concludes that the ICWA doesn't apply, the original orders will stand. If the trial court concludes that the ICWA does apply, further proceedings consistent with the Act will be necessary. *In re IEM*, 233 Mich. App. 438 (Mich. Ct. App. 1999).

The courts failure to adhere to the inquiry and notice requirements at the subsequent preliminary hearing alone may have constituted reason to invalidate the proceedings. *In re Elliott*, 218 Mich. App. 196, 554 N.W.2d 32 (Mich. Ct. App. 1996).

### 7<sup>th</sup> Circuit

While a termination hearing may not be held until ten days after tribal receipt of notice pursuant to 1912(a), failure to comply with this provision does not

constitute automatic reversal. *In re Kyle S.*, 192 Wis.2d 767 (Wis. Ct. App. 1995) an unpublished opinion.

### 8<sup>th</sup> Circuit

The invalidation of a parental rights termination may not be accomplished by showing a violation of the placement preferences in a proceeding brought pursuant to §1914. *In the interest of L.D.R.T.*, 391 N.W.2d 594 (N.D. 1986).

Assuming the alleged violations under the ICWA did occur, the plaintiff would be entitled to invalidation of the initial temporary custody proceedings. Section 1914, however, “does not provide for invalidation of a valid separate action because of an invalid prior one.” ICWA violations in temporary custody proceedings do not invalidate a subsequent permanent custody proceeding. *In Interest of J.W.*, 528 N.W.2d 657 (Iowa Ct. App. 1995, an unpublished opinion).

Under the provisions of ICWA, the parent of an Indian child has the right to petition a court of competent jurisdiction to invalidate any action for termination of parental rights upon a showing that such act violated §§ 1911, 1912, or 1913. *B.R.T. v. Exec. Dir. of Social Services*, 391 N.W.2d 594 (N.D. 1986).

The trial courts holding could not have been based on the testimony of he qualified expert witnesses and holding is therefore clearly erroneous. *In re S.E.G.*, 521 N.W.2d 357 (Minn. 1994).

The trial court found violations of §1912, because the prior proceedings did not meet the stated requirements, the trial court did not err in reopening the proceeding. *Gilbert v. Long*, No. C8-92-1502, 1993 WL 27747 (Minn. App. Feb. 09, 1993).

### 9th Circuit

Although the father didn’t raise ICWA issues with the lower court, the trial court was apprized of the child’s status as an Indian Child under the ICWA and was thus aware that the termination of the father’s parental rights was a child custody proceeding within the meaning of the ICWA. Also, the grandmother used the ICWA to support her petition for adoption under the ICWA as Indian Custodian, therefore the question of whether ICWA’s termination provisions applied was before the court. The father may raise ICWA issues on appeal. *D.J. v. P.C.*, 36 P.3d 663 (Alaska 2001).

Failure to comply with notice requirements under ICWA does not render the trial court’s action void but makes it subject to collateral attack by the Indian child, any parent or Indian custodian from whose custody such child was removed, and the Indian child’s tribe. *Carson v. Carson*, 170 Or. App. 263, 13 P.3d 523 (2000).

The court did not err in denying mother’s petition to set aside the court’s order for foster care, because the child was not eligible for enrollment under the ICWA, at the time of the placement. *State ex rel. Juvenile Dept. of Lane County v. Tucker*, 76 Or. App. 673, 710 P.2d 793 (1985).

### 10<sup>th</sup> Circuit

The case should be remanded to examine whether the best interests of the children were considered in the denial of jurisdiction. This court found that timely request for transfer was present and that clear and convincing evidence can't be said to support denial of transfer of jurisdiction. *In re S.W.*, 2002 OK CIV APP 26, 41 P.3d 1003 (Okla. Ct. App. 2002).

Under the first proceeding the court is bound by horizontal stare decisis because the father failed to petition for rehearing. For the second proceeding, the trial court specifically found that the active efforts prong of the ICWA was satisfied. The father did not challenge this finding or argue that the evidence supporting the conclusion is insufficient. *In re S.D.C.*, 435 Utah Adv. Rep. 22, 36 P.3d 540 (Utah Ct. App. 2001).

Section of ICWA granting court of competent jurisdiction specific authority to invalidate placement or termination of parental rights decree that violated certain other provisions of ICWA did not authorize Cherokee tribal court to dismiss pending abuse and neglect proceeding in children's court. The Tribal Court's order of dismissal thus did not divest the State Children's Court of jurisdiction. *Spear v. McDermott*, 121 N.M. 609, 916 P.2d 228 (N.M. Ct. App. 1996).

Statute permitting Indian child, Indian parent, and Indian tribe to petition court to invalidate termination of parental rights under state law did not require participation of child, parent, or guardian, and tribe. *In re Begay*, 107 N.M. 810, 765 P.2d 1178 (N.M. Ct. App. 1988).

Violations of the ICWA provisions may be cause for invalidation of the proceedings. *In re H.D.*, 729 P.2d 1234 (Kan. Ct. App. 1986).

### **Standards; Which parties must join in appeal; and Substantial Compliance**

#### 6<sup>th</sup> Circuit

Section 1914 is ambiguous, so language must be construed to give effect to the legislative intent, which is to ensure compliance with minimum federal standards. Minimum federal standards would be harder to achieve if all parties had to join in an appeal. *In re Krefft*, 384 N.W.2d 843 (Mich. Ct. App. 1986).

#### 8<sup>th</sup> Circuit

The provisions of ICWA are to be strictly construed and applied; therefore, the argument the state is in "substantial compliance" with the ICWA is not sufficient. *In re J.W.*, 498 N.W.2d 417 (Iowa Ct. App. 1993).

## Standing

### 3<sup>rd</sup> Circuit

Standing under §1914 is conferred on “any parent.” As “parent” is defined by the ICWA, however, an unwed father is not a parent unless his paternity has been acknowledge or established under state or tribal law. Because the petitioner was not a “parent” within the meaning of the ICWA he lacked standing to challenge the adoption under §1914. *In re Adoption of a Child of Indian Heritage*, 111 N.J. 155, 543 A.2d 925 (N.J. 1988).

### 6<sup>th</sup> Circuit

Any one of the listed parties may appeal on its own, therefore, an Indian mother has standing to challenge the alleged violations of ICWA even if her tribe does not join her in the appeal. *In re Krefft*, 384 N.W.2d 843 (Mich. Ct. App. 1986).

## Other Remedies

### Federal Courts

Tribe's federal suit challenging adoption under Indian Child Welfare Act was barred under Oklahoma doctrine of res judicata. *Kickapoo Tribe of Oklahoma v. Rader*, 822 F.2d 1493 (10<sup>th</sup> Cir. 1987)(Okla.).

The ICWA applies to child adoption proceedings and the suits are not to be barred by res judicata. *Id.*

Doctrine of res judicata precluded Indian tribe from relitigating attack on Kansas state court judgment, and (2) award of attorney fees against losing Indian tribe was not warranted. *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10<sup>th</sup> Cir. 1985)(Kan.).

The ICWA does not provide for a cause of action for money damage. The only relief that can be provided is declaratory relief under the act. *Fletcher v. State*, 858 F. Supp. 169 (D. Fla. 1994).

### 10<sup>th</sup> Circuit

If the provisions of the ICWA are not initially followed, subsequent remedial acts may bring a Kansas termination of parental rights action into compliance with the requirements of the act. *In re H.A.M.*, 25 Kan. App. 2d 289, 961 P.2d 716 (1998).

## **§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 Indian 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-

a member of the Indian child's extended family;

- i. foster home licensed, approved, or specified by the Indian child's tribe;
- ii. an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- iii. 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 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.

**1. Adoptive Placements; Preferences.**

F.1 commentary.

The Act clearly recognized the role of the child's extended family in helping to raise children. The extended family should be looked to first when it becomes necessary to remove the child from the custody of his or her parents. Because of differences in cultures among tribes, placement within the same tribe is preferable.

This section also provides that single parent families shall be considered for placements. The legislative history of the Act makes it clear that Congress intended custody decisions to be made based on a consideration of the present or potential custodian's ability to provide the necessary care, supervision and support for the child rather than on preconceived notions of proper family composition.

The third subsection recognizes, however, that the consenting parents' request for anonymity takes precedence over efforts to find a home consistent with the Act's priority.

**2. Foster Care or Preadoptive Placements; Criteria; Preferences.**

F.3 commentary.

A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social services program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

**3. Tribal Resolution for Different order of Preference; personal Preference Considered; Anonymity in Application of Preferences.**

**4. Social and Cultural Standards Applicable.**

**5. Record of placement; availability.**

Section G.4. Commentary

This section has been modified. The records no longer have to be all in one location, however, they must be retrievable by a single

office that would make them available to the requester within seven days of a request.

6. Good Cause to Modify Preferences.

Section F.3. Good Cause to Modify Preferences

- (a) For purposes of foster care, preadoptive or adoptive placements, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:
- (i) The request of the biological parents or the child when the child is of sufficient age.
  - (ii) The extraordinary physical or emotional needs of the child as established by testimony of qualified expert witness.
  - (iii) The unavailability of suitable families for placement after diligent search has been completed for families meeting the preference criteria.
- (b) The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (a) shall be on the party urging that the preferences not be followed.

Section F.3. Commentary

The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph (I) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons. The wishes of an older child are important in making an effective placement.

In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Paragraph (ii) recommends that such consideration be considered as good cause to the contrary.

Since Congress has established a clear preference for placements within the tribal culture, it is recommended in subsection (b) that the party urging an exception be made be required to bear the burden of proving and exception is necessary.

<b>RELEVANT CASES</b>
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The central issue for §1915 centers on the standard for determining what constitutes “good cause” to deviate from the explicit placement preferences set out in the provision. The ICWA does not set out a “good cause” standard to

deviate from the placement preferences. The BIA guidelines, while not binding on state courts, do set out a good cause standard; allow for only three exceptions; state courts should not find exceptions. Also, the “best interest” analysis imputes white; middle-class biases, which the ICWA was passed to counteract.

Although a “best interest” analysis seems to violate the purpose of ICWA, some courts do allow for deviation from the ICWA’s placement preferences based upon a “best interests” analysis in addition to the considerations outlined in the BIA guidelines. Practitioners in such states should challenge this approach in the trial court and argue for application of the analysis that adheres to the BIA guidelines and the purpose and intent of the ICWA.

### **Adoptive Placements; Preferences.**

#### **Supreme Court**

Congressional intent of the ICWA is that Indian children should remain in the Indian community. Indian child welfare determinations should not be based on a white middle-class standard. Protections exist to counter state bias and, therefore, it cannot be that easy to go against the placement preferences. A finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child’s best interests. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

“It is clear that Congress concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture. Congress determined to subject such placements to the ICWA’s jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

“Without ‘good cause’ to deviate from the ICWA placement preference children shall be placed with (1) members of the child’s extended family, (2) other members of the same tribe, or (3) other Indian families.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

#### **8<sup>th</sup> Circuit**

The juvenile court did not err in determining good cause existed to depart from the placement preferences of the ICWA considering the requests of the biological parents, the extraordinary needs of the child, the certainty of emotional trauma if custody were to be transferred, the significant bonding and attachment that has developed between the child and the respondents, the recommendations of the GAL and D.F.S. and the overall best interests of the child. *In re C.G.L.*, 63 S.W.3d 693 (Mo. Ct. App. 2002).

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; (3) other Indian families. *Ex rel. C.G.L., Darrell Glen Lowe, Anna Bell Lowe, and the Cherokee Nation of Oklahoma v. Jack Bilyeu and Kelly Bilyeu, McDonald County Juvenile Office, and Missouri Dept. of Social Services*, 28 S.W.3d 502 (Mo. Ct. App. 2000).

Where failure to give statutorily specified preference to persons or agencies designated by §1915(b) is not shown to be warranted by good cause, the case must be remanded for further proceedings on that issue. *In re Madonna Bird Head v. Bird Head Rattling Chase*, 331 N.W.2d 785 (Neb. 1983).

A couple who are members of a tribe not recognized by the Secretary of Interior are not entitled to preference in adoptive placement under ICWA. *In re H.N.B.*, 619 N.W.2d 340 (Iowa 2000).

A tribal determination that a child is a member or eligible for membership in that tribe is conclusive evidence that a child is an Indian child under the Indian Child Welfare Act. *In re Welfare of S.N.R.*, 617 N.W.2d 77 (Minn. 2000).

Good cause may include a child's need for stability, but this is not equivalent to a need to be adopted. *Id.*

A court may consider the best interests of the child when determining "good cause" to deviate from §1915 placement preferences, but such deviation cannot be based solely upon the consideration of the child's best interests. *In re S.E.G.*, 521 N.W.2d 357 (Minn. 1994).

Indian children should remain in the Indian community and Indian child welfare determinations should not be based on a white middle-class standard. Protections exist to counter state bias and, therefore, it cannot be that easy to go against the placement preferences. *Id.*

The need for permanence is not an extra ordinary emotional need that alone can be the deciding factor in determine placement. *Id.*

Perspective adoptive parent failed to provide expert testimony that is necessary to demonstrate good cause to deviate from the placement preferences of the ICWA. *In the Matter of the Welfare of S.N.R.*, 617 N.W.2d 77 (Minn. 2000).

The best interest of the child must be construed with the act. *In re T.T. and T.T.*, No. C0-95-780, 1995 WL 579255 (Minn. App. Oct. 03, 1995).

The ICWA expresses the presumption that in an adoptive placement of an Indian child, the child's interests are best served by placement with an extended family member. To overcome this preference, a party must establish the existence of "good cause to the contrary." Agency guidelines provide "good cause to the contrary" shall be based on one or more of the following considerations: (i) the request of the biological parents or the child when the child is of sufficient age. (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness. (iii) The unavailability of suitable families

for placement after a diligent search has been completed for families meeting the preference criteria. *In re M.T.S.*, 489 N.W.2d 285 (Minn. 1992).

Merely to give his relatives priority in considering preadoptive placement, as required by section 1915(b) of the ICWA is not sufficient. Should the court find the proposed relatives to be qualified foster parents for M.S.S., the need for terminating Smith's parental rights might be obviated. *In re M.S.S.*, 465 N.W.2d 412 (Minn. 1991).

### 9<sup>th</sup> Circuit

Neither the need to protect an Indian child from family member who had abused child, nor possible future psychological disorder, were "extraordinary physical or emotional need" that constituted good cause to deviate from ICWA placement preference. *In re C.H.*, 299 Mont. 62, 997 P.2d 776 (2000).

Indian child's aunt had statutory right to intervene in adoption proceeding of non-Indian foster parents because she had "interest" in seeing child adopted by Indian family. *In re M.E.M.*, 223 Mont. 234, 725 P.2d 212 (Mont. 1986).

Whether there is good cause to deviate from the adoptive placement preferences of the ICWA in a particular case depends on many factors including, but not limited to, the BIA guidelines. *C.L. v. P.C.S.*, 17 P.3d 769 (Alaska 2001).

ICWA does not set out an order for adoption preference among extended family members. *Id.*

In deviating from statutory preferences of the ICWA, superior court did not clearly err in its determination as to child's preference for adoption, where child expressed preference of living with deceased mother's friend to judge in chambers. Fact that child wrote conflicting letters as to his preference did not render court's determination clearly erroneous. *Adoption of N.P.S.*, 868 P.2d 934 (Alaska 1994).

Good cause existed to deviate from the ICWA placement preference, and to support adoption by non-Indian parents where mother consented to the open adoption which would allow the natural mother visitation rights. *In re Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993).

A trial court committed error in denying Tribe's intervention and denial of ICWA placement preferences. *In re J.R.S.* 690 P.2d 10 (Alaska 1984).

Good cause existed to avoid placement preferences of ICWA following termination of father's parental rights, where mother preferred to place child with prospective adoptive parents. *In re Baby Boy Doe*, 127 Idaho 452, 902 P.2d 477 (1995).

Where trial court in adoption proceeding involving Indian child failed to make ruling whether "good cause" existed the ICWA not to make preferential placement, based on erroneous finding the ICWA did not apply, it was appropriate to remand case for purpose of hearing, as trial court was proper

court to make ruling in the first instance. *In re Adoption of M.*, 66 Wash. App. 475, 832 P.2d 518 (1992).

The ICWA gives state courts the power to allow a child to remain in the home of the biological parent's choosing. *Id.*

Custody dispute between father and stepfather resulting in award of primary physical custody of child to stepfather was a "foster care placement" to which ICWA applied; if stepfather proved that he was child's "Indian custodian" within meaning of ICWA; that status would make parties coequals under ICWA and remove the protections otherwise applicable to father under that statute. *J.W. v. R.J.*, 951 P.2d 1206 (Alaska 1998).

### 10<sup>th</sup> Circuit

Certainty of emotional or psychological damage to the Indian child if removed from the primary caretaker may be considered by the court in determining whether good cause exists to deviate from the placement preferences of the ICWA. *People ex rel. A.N.W.*, 976 P.2d 365 (Colo. Ct. App. 1999).

## **Foster Care or Preadoptive Placements; Criteria; Preferences.**

### Supreme Court

Congressional intent of the ICWA is Indian children should remain in the Indian community. Indian child welfare determinations should not be based on a white middle-class standard. Protections exist to counter state bias and, therefore, it cannot be that easy to go against the placement preferences. A finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child's best interests. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

"It is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture. Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

### 7<sup>th</sup> Circuit

The court should consider the deprivation of the rich Indian heritage that would occur if the children were placed in a white foster home. Cultural and socioeconomic considerations to justify placement in a white foster home are inappropriate under ICWA as justifications. *In re J.R.H.*, 358 N.W.2d 311 (Iowa 1984).

### 8<sup>th</sup> Circuit

Good cause existed to deviate from ICWA's preferred placement for foster care, where three social workers testified that it was in the children's best interest to remain temporarily. The discretion that the court is able to use in determining good cause is: 1) the best interests of the children, 2) the wishes of the biological parents, 3) the child's ties to the tribe, and 4) the child's ability to make any cultural adjustments necessitated by a particular placement. *In re A.E.*, 572 N.W.2d 579 (Iowa 1997).

Where the parents initially request that the children be placed in non-Indian home in order to keep the children in Lincoln, and where the children have never lived on a reservation nor had extended contact with Indian relatives, and where the children have bonded for three years with non-Indian foster parents, there is good cause not to follow the placement preference guidelines of the ICWA. *In Re of Alan L., Jr., and Nickalus L., v. Denise L. and Alan L., Sr.* No. A-95-048, 1995 W.L. 663542 (Neb. Ct. App. Nov. 07, 1995).

A position statement requesting the children be placed with a specific foster family, if not placed with the tribe, is not the equivalent of Tribe approval as required by §1915(b)(ii). *In re H.N.B.*, 619 N.W.2d 340 (Iowa 2000).

A half sibling's mother, who was not married to Indian children's father, was not "stepparent" within meaning of ICWA; consequently not a "preferred placement" within the ICWA. *In re A.E.*, 572 N.W.2d 579 (Iowa 1997).

Best interests are not included in the BIA guidelines and its use in the placement of children is contrary to the plain language of ICWA. Best interests standard would be too subjective and the good cause determination should be limited to those outlined in the BIA guidelines so as to avoid the imposition of a white middle-class standard. *In re S.E.G.*, 521 N.W.2d 357 (Minn. 1994).

Just because a Native American foster home is not ready to adopt, does not mean that permanence is not met. *Id.*

Expert witnesses must provide the testimony regarding the child's emotional and physical needs. *Id.*

If good cause can be shown, the tribe may waive the statutory preference for placement. *In re Welfare of T.T. and T.T.*, No. C0-95-780, 1995 WL 579255 (Minn. Ct. App. Oct. 03, 1995).

Extended family member includes Indian child's grandparents. *Long v. Geldert*, No. C8-92-1502, 1993 WL 27747 (Minn. Ct. App. Feb. 09, 1993).

"The Band (Mille Lacs) is not a relative under either Minnesota Statutes or the Indian Child Welfare Act (ICWA). See Minn. Stat. § 260.015, subd. 13 (1994) (defining "relative"); 25 U.S.C.A. § 1903(2) (West 1983) (defining "extended family members")" The Court concluded that legal custody could not be transferred to the Band with physical custody to a relative. *In re J.B.* No. CX-95-4771995, 1995 WL 450515 (Minn. Ct. App. Aug. 1, 1995). Unpublished decision. The court concluded, "[I]t was an abuse of discretion for the trial court

to declare it was without power to provide a disposition other than return of the children to the mother here merely because the parties offered it a limited array of disposition options, and the 18-month time period in the statute had run.”

### 9<sup>th</sup> Circuit

The court did not err in placing the child with out of state distant relatives; where the tribe was concerned that placing the child with the in state relative would give bio mom unfettered access to the child, and the in state relative was a young woman caring for her own infant and that she herself had been the subject of dependency intervention as a child and where there were questions raised as to if she had any tribal affiliation and where the Alaska relatives fell squarely within the foster care and pre-adoptive preferences of 1915(b)(i)(iii) and had strong backing from the tribe. *In re Z.F.S.*, 113 Wash.App. 632, 51 P.3d 170 (Wash. Ct. App. 2002).

The tribe signed a stipulation stating that the state worked in conjunction with the tribe to find placement with the boys’ family pursuant to the ICWA and placement with family or other natives was not available. The state, therefore, complied with the preferences of the ICWA. *J.S. v. State of Alaska*, 50 P.3d 388 (Alaska 2002).

There was ‘good cause’ to not follow the ICWA placement preferences when terminating father’s parental rights; therefore, there is no basis for invalidating the courts termination order upon appeal. *State ex rel. Juvenile Dept. of Multnomah County v. Woodruff*, 108 Or. App. 352, 816 P.2d 623 (1991).

The court did not err in allowing an emergency removal of an Indian child and placing the child with paternal aunt. *State ex rel. Juvenile Dept. of Clackamas County v. Charles*, 106 Or. App. 637, 810 P.2d 393 (1991).

Trial court had good cause to deviate from placement preferences of ICWA when experts agreed that removing child from placement with foster mother was certain to cause her serious emotional or psychological damage. *L.G. v. State, Dept.*, 14 P.3d 946 (Alaska 2000).

Once it is determined that dependency proceeding involves Indian child, judge must, in the absence of good cause to the contrary, follow the provisions of the ICWA. *In re Appeal in Coconino County Juvenile Action No. J-10175*, 153 Ariz. 346, 736 P.2d 829 (Ariz. Ct. App. 1987).

### 10<sup>th</sup> Circuit

When foster care and pre-adoptive placement preference under the ICWA has not been considered remanding the case is the appropriate remedy. *In re N.L.*, 754 P.2d 863 (Okla. 1988).

## **Tribal Resolution for Different Order of Preference; Personal Preference Considered; Anonymity in Application of Preferences.**

### 8<sup>th</sup> Circuit

There was no violation of the ICWA even though child was not placed within the Act's preferences because the mother specifically requested the child be placed in that particular home and now eight years later protests ICWA non-compliance upon appeal. *Ex rel. Interest of C.W., M.W., K.W., and J.W. v. D.W.*, 479 N.W.2d 105 (Neb. 1992).

### 9<sup>th</sup> Circuit

The tribe's right to enforce statutory preferences for adoptive placement of Indian children prevailed over parent statutorily recognized interest in anonymity. *In re Baby Girl Doe*, 262 Mont. 380, 865 P.2d 1090 (1993).

### 10<sup>th</sup> Circuit

If Indian tribe fails to appeal denial of its right to intervene in custody dispute, parent of child may raise the issue on appeal. *In re Guardianship of Q.G.M.*, 808 P.2d 684 (Okla. 1991).

## **Social and Cultural Standards Applicable.**

### 8<sup>th</sup> Circuit

It was discovered through testimony regarding the Sac and Fox tribes of Oklahoma that leaving a child in the care of extended family for a lengthy period of time is common, under the tribe's extended kinship system. *In re B.M.*, No. 98-2175, 1999 WL 823851 (Iowa Ct. App. Oct. 15, 1999).

The standards that shall be applied are those of the prevailing social and cultural standards of the Indian Community in which the parent or extended family members maintain social and cultural ties. *In re Custody of S.E.G., A.L.W., V.M.G.*, 521 N.W.2d 357 (Minn. 1994).

The ICWA does not exclude intra family custody disputes, when the Grandmother qualifies as a "Foster Care" provider within the definition of ICWA. *In re the Custody of A.K.H.*, 502 N.W.2d 790 (Minn. 1993).

## **Record of placement; availability.**

## **§1916. Return of Custody**

- A. Petition; best interest of child. Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this Act that such return of custody is not in the best interests of the child.
- B. Removal from foster care home; placement procedures. Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

### **FEDERAL REGISTER**

#### 1. Notice of Change in Child's Status

##### Section G.3. (a)

Notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.

##### Section G.3. (b)

A parent or Indian custodian may waive his right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at anytime by filing with the court a written notice of revocation, but such revocation would not affect any proceeding that occurred before the filing of the notice of revocation.

### **RELEVANT CASES**

#### **Return of Custody**

##### *9<sup>th</sup> Circuit*

Indian child's maternal aunt, whose foster care of child was terminated without giving aunt notice of the hearing, was not entitled to relief on theory that federal standards in ICWA requiring Indian custodian be given notice of proceeding to

terminate foster care placement, preempted state law defining legal custody, in light of fact that congress expressly left determination of “legal custody” up to state law. *State ex rel. Juvenile Dept. Multnomah County v. England*, 292 Or. 545, 640 P.2d 608 (1982).

If parents of Indian child petition for return of child when adoption decree is vacated, the child is required to be returned to parents unless such arrangement is proven to be contrary to child’s best interests under standards established by the ICWA. *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982).

**§ 1917 Tribal Affiliation Information and Other Information for Protection of Rights from Tribal Relationship; Application of Subject of Adoptive Placement; Disclosure by Court.**

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual’s biological parents and provide such other information as may be necessary to protect any rights flowing from the individual’s tribal relationship.

**FEDERAL REGISTER**

Section G.2. (b)

This section applies regardless of whether or not the original adoption was subject to the provisions of the act.

Section G.2. (c)

Where state law prohibits revelation of the identity of the biological parent, assistance of the BIA shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

G.2 commentary.

The Act was not intended to supersede the decision of state legislatures on whether adult adoptees may be told the names of their biological parents. The intent is simply to assure the protection of rights deriving from tribal membership. If the adoptee meets the requirements for tribal enrollment, the BIA can certify that fact to the appropriate tribe.

**RELEVANT CASES**

Upon reaching the age of majority an Indian child, upon application and a proper showing, may open records that verify tribal affiliation. If the biological parent

does not give consent to disclosing their identity the tribal affiliation is the only information that may be released.

### 2<sup>nd</sup> Circuit

Under provision of the ICWA dealing with tribal affiliation information and disclosure of information by court, adoptive child, as a matter of law, established “good cause” for opening her adoptive records to disclose identity of her biological mother and maternal grandparents for the purpose of verifying that child was member of particular tribe. *In re Adoption of Rebecca*, 158 Misc.2d 644, 601 N.Y.S.2d 682 (N.Y. 1993).

### 3<sup>rd</sup> Circuit

Adopted person of Indian descent made proper showing of need for disclosure of names of her natural parents, based on finding by court that identifying information was necessary to determine natural mother’s tribal affiliation and thus entitled to court ordered review of certain adoption records to establish tribal membership. *In re Adoption of Mellinger*, 288 N.J. Super. 191, 672 A.2d 197 (N.J. Super. Ct. App. Div. 1996).

### 6<sup>th</sup> Circuit

An adult adoptee can get access to adoption records: 1) with the consent or death of parents, or 2) when good cause is shown. An adult adoptee that wants to establish Indian heritage in order to qualify for benefits under Michigan’s tuition waiver program has demonstrated good cause through section 1902 for the release of such information. *Hanson v. Doe*, 470 N.W.2d 669 (Mich. Ct. App. 1991).

Section 1917 allows an Indian individual, upon application, to gain access to information from the court regarding tribal affiliation, if any, and any other information that may be necessary. Where the biological parent gives no consent, privacy of the biological parent shall be protected while providing information about the adoptee’s tribal membership or affiliation. *Id.*

## **§1918. Reassumption of Jurisdiction over Child Custody Proceedings**

- (a) **Petition; suitable plan; approved by Secretary. Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953, as amended by title IV of the Act of April 11, 1968, or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a**

**petition to reassume such jurisdiction, which includes a suitable plan to exercise such jurisdiction.**

**(b) Criteria applicable to consideration by Secretary; partial retrocession.**

**(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:**

- (i) Whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;**
- (ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;**
- (iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and**
- (iv) the feasibility of the plan in cases of multi-tribal occupation of a single reservation of geographic area.**

**(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this Act are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) over limited community or geographic areas without regard for the reservation status of the area affected.**

**(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval. If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be**

necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

- (d) Pending actions or proceedings unaffected. Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this Act.

## FEDERAL REGISTER

### Introduction

The secretary is directed to determine whether a plan for reassumption of jurisdiction is feasible as that term is used in the statute.

## RELEVANT CASES

### 9<sup>th</sup> Circuit

The language of §1911(b) reflects congressional intent that all tribes be able to accept transfer of jurisdiction of ICWA cases from state courts. §1911(b) authorizes transfer to tribal court regardless of whether or how P.L. 280 otherwise affects the tribes' jurisdiction. The lower court erroneously concluded that under §1911(b) the tribe could not claim jurisdiction and therefore, did not make a decision on denial for good cause. On remand, the trial court should inquire whether good cause exists to transfer jurisdiction to the tribe. *In re C.R.H.*, 29 P.3d 849 (Alaska 2001)(rev'd *Native Village of Nenana v. State, Dep't of Health & Soc. Servs.*, 722 P.2d 219, *In re K.E.*, 744 P.2d 1173).

As the language in section in §1911 makes clear, congress intended P.L 280 to affect tribes' exclusive jurisdiction under subsection 1911(a), but did not intent P.L 280 to affect transfer jurisdiction under subsection 1911(b). *Native Village of Nenana v. State, Dep't of Health & Soc. Servs.*, 722 P.2d 219 (Alaska 1986)(overruled by *In re C.R.H.*, 29 P.3d 849 (Alaska 2001)).

Subsection 1911(b) authorizes transfer to tribal courts regardless of whether or how P.L. 280 otherwise affects the tribes' jurisdiction. *Id.*

The state of Alaska has exclusive jurisdiction pursuant to 1918(a) until a particular tribe petitions to reassume jurisdiction over such matters and the Secretary of the Interior approves the tribe's petition. *Native Village of Nenana v. State of Alaska*, 722 P.2d 219 (Alaska 1986)(overruled by *In re C.R.H.*, 29 P.3d 849 (Alaska 2001)).

Indian tribe was not entitled to transfer of child custody matter from Superior Court to tribe where the particular tribe had not been approved by the Secretary

of United States Department of the Interior to reassume jurisdiction of custody matters. *Id.*

Indian tribe was not entitled to transfer of child custody matter from Superior Court to tribe where the particular tribe had not been approved by the Secretary of United States Department of the Interior to reassume jurisdiction of custody matters. *Id.*

Superior court can not transfer termination of parental rights proceeding to tribal court on Alaska native village's petition without first determining that tribe is authorized by Secretary of Interior to reassume jurisdiction over child custody matters. *In re K.E.*, 744 P.2d 1173 (Alaska 1987)( *overruled by In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

### **§1919. Agreements between States and Indian Tribes**

- (a) **Subject coverage. States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.**
- (b) **Revocation; notice; actions or proceedings unaffected. Such agreements may be revoked by either party upon one hundred and eighty days; written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.**

### **RELEVANT CASES**

#### 8<sup>th</sup> Circuit

The tribe and the county were authorized to enter into agreements whereby the County would provide supervisory care for a child placed by the Tribal Court in a foster home on the reservation. *Sayers v. Beltrami County*, 481 N.W.2d 547. (Minn. 1992).

#### 9<sup>th</sup> Circuit

Allowing an agreement between a tribe and a state regarding children, who do not qualify as "Indian children" under ICWA, exceeds the states applicable statutory authority. Therefore, the trial court did not err in ordering the state to plan for the children as it would for any child who is not an Indian child as defined in ICWA. *State ex rel. State Office for Services to Children and Families v. Klamath Tribe*, 170 Or. App. 106, 11 P.3d 701 (2000).

**§1920. Improper Removal of Child from Custody; Declination of Jurisdiction; Forthwith Return of Child; Danger Exception.**

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody after a visit or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

**FEDERAL REGISTER**

1. Improper Removal from custody

Section B.8. (A)

If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

Section B.8. (b)

If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

Section B.8. Commentary

A finding of improper removal goes to the jurisdiction of the court to hear the case at all; this section provides that the court will decide the issue as soon as it arises before proceeding further on the merits.

**RELEVANT CASES**

If an Indian Child is removed from the custody of their parents or Indian Custodian, in violation of the ICWA, the child must be immediately returned to the

parent or Indian custodian and the court shall decline jurisdiction of a relinquishment petition without a showing that the child is subject to a substantial and immediate danger or threat of such danger.

6<sup>th</sup> Circuit

Return home is not warranted when proper notice is the only issue on appeal. *In re Maynard*, 592 N.W.2d 751 (Mich. Ct. App. 1999).

8<sup>th</sup> Circuit

Removal of the children under §1920 was not improper. The findings of the trial court as to the physical and emotional injuries sustained by both children demonstrate that a return of custody to V.J. would subject them to substantial and immediate danger. *In re J.J.*, 454 N.W.2d 317 (S.D. 1990).

A state court must decline jurisdiction over a petitioner who has improperly retained custody of an Indian child, after a temporary relinquishment of custody, and must have the child returned to his or her parents or Indian custodian. *In re C.T.T.L.*, No.C3-88-253, 1988 WL 53115 (Minn. Ct. App. 1988).

**§1921 Higher State or Federal Standard Applicable to Protect Rights of Parent or Indian Custodian of Indian Child.**

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title, the State or Federal court shall apply the State or Federal standard.

**FEDERAL REGISTER**

A. Policy

Subsection A, Commentary

Congress did not intend for this section to eliminate the rights of a child to learn of tribal affiliation upon becoming 18 years old. Congress intended for this section to apply primarily in those instances where a state provides greater protection for a right accorded to parents under the act.

## RELEVANT CASES

If a state court has provisions which are in conflict with the ICWA those standards may be applied only if it gives greater protection to the parent or Indian custodian than the ICWA. See also, § 1902, Supporting Cases, Section C – Federal Standards of ICWA Versus. State Laws – Pre-emption.

### Supreme Court

Congress intended nationwide uniformity of terms when enacting the ICWA. Courts should not look to state law for definition of terms. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

### Federal Cases

Commanche tribal custom provides that a child's paternal aunt assumes immediate role of mother when child's mother is not available. *In re K.A.W.*, 2 Okla. Trib. 338, 1992 WL 752134, (Comanche Child. Ct. Feb. 05, 1992)(Tribal Court Case).

### 2<sup>nd</sup> Circuit

ICWA doesn't preempt those provisions of the New York State Family Court Act which are not in conflict with it, and therefore, that the New York statutes can be read so as to harmonize them with ICWA. The application of NY preponderance of the evidence standard to the findings of fact was not in conflict with § 1912(e) of the ICWA. *New York City Dept. of Social Services on Behalf of Oscar C., Jr. v. Oscar C.*, 192 A.D.2d 280, 600 N.Y.S.2d 957 (N.Y. App. Div. 1993).

### 5<sup>th</sup> Circuit

It was error for the trial court to make findings under the Family Code because the provisions providing for the involuntary termination of parental rights are in conflict with the ICWA. *In the Interest of W.D.H.*, 43 S.W.3d 30 (Tex. Ct. App. 2001).

### 6<sup>th</sup> Circuit

Child custody proceedings involving foster care or termination of parental rights to an Indian child are subject to specific federal standards. Where a state or some other federal law provides a higher standard of protection for the rights of the parent or Indian custodian of an Indian child than the ICWA, the court should apply the higher standard *In Re Tyler James Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996).

### 7<sup>th</sup> Circuit

Congress intended ICWA to provide greater protection to the Indian family than generally afforded under state statutes. *In Interest of J.J.*, 462 N.W.2d 555 (Wis. Ct. App. 1990, an unpublished opinion).

### 8<sup>th</sup> Circuit

Before trial court is required to apply standard for termination of parental rights set out in Indian Child Welfare Act, some evidence must show that child is Indian and that Act applies. *In re B.R.B.*, 381 N.W.2d 283 (S.D. 1986).

Where a state or some other federal law provides a higher standard of protection for the rights of the parent or Indian custodian of an Indian child than the ICWA, the court should apply the higher standard. *In re the Adoption of M.T.S.*, 489 N.W.2d 285 (Minn. 1982).

The ICWA establishes minimum federal standards for placement of Indian children; only state or federal laws which give higher standard of protection to rights of parent or Indian custodian of Indian children are applicable to child custody proceedings under ICWA. Accordingly, our state legislature has expressly acknowledged that the ICWA controls in several areas concerning the welfare of Indian children. *In re the Adoption of M.T.S.*, 489 N.W.2d 285 (Minn. 1982).

### 9<sup>th</sup> Circuit

In a Kansas court an action for termination of parental rights of a child subject to the ICWA, the court should evaluate the evidence by first applying the “clear and convincing evidence” test established under Kansas law, and then apply the “beyond a reasonable doubt” standard of the ICWA. *In re H.A.M.*, 25 Kan. App. 2d 289, 961 P.2d 716 (1998).

### 10<sup>th</sup> Circuit

Federal law providing Indian courts with exclusive jurisdiction over custody proceedings involving children on reservation preempts state laws. *In re Halloway*, 732 P.2d 962 (Utah 1986), *cited with approval in Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). *See also, for similar reasoning and conclusions In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981), cert. denied *sub nom. Catholic Social Services v. P.C.*, 455 U.S. 1007 (1982); *In re Adoption of Baby Child*, 102 N.M. 735, 700 P.2d 198 (App. 1985)).

## **§1922. Emergency Removal or Placement of Child; Termination; Appropriate Action.**

Nothing in this title shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this title, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

### **FEDERAL REGISTER**

#### Emergency Removal of an Indian Child

##### 1. Jurisdiction

###### Section B.7. (c)

If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises jurisdiction over the case—whichever is earlier.

###### Section B.7. Commentary.

Since jurisdiction under the Act is based on domicile and residence rather than simple physical presence, there may be instances in which action must be taken with respect to a child who is physically located off the reservation but is subject to exclusive tribal jurisdiction.

###### Section B.7. Commentary.

The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end. State action shall also end as soon as the tribe is ready to take over the case.

## 2. Procedure for removal

### Section B.7. (a)

Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.

### Section B.7. (b) (I – VII)

When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:

- i. The name, age, and last known address of the Indian child
- ii. The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.
- iii. Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is believed to be on an Indian reservation, the name of the reservation, the name of the reservation shall be stated.
- iv. The tribal affiliation of the child and of the parents and/or Indian custodians
- v. A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.
- vi. If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribes jurisdiction.
- vii. A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

### Section B.7. (d)

Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

## RELEVANT CASES

### 9<sup>th</sup> Circuit

ICWA does not prevent the emergency removal of an Indian child under state law and does not require notice in that situation to the parents and the tribe until a custody proceeding is initiated. The ICWA requires notice at least ten days before a hearing. The ICWA does not require a hearing within ten days. *State ex rel. Juvenile Dept. of Clackamas County v. Charles*, 106 Or. App. 637, 810 P.2d 393 (1991).

## **§1923. Effective Date**

None of the provisions of this title, except 1911(a), 1918, and 1919, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after the enactment of this Act, but shall apply to any subsequent proceeding in the same matter or subsequent proceeding affecting the custody or placement of the same child.

## RELEVANT CASES

### 2<sup>nd</sup> Circuit

Confidential release of information concerning biological mother of Indian person who had been adopted 35 years earlier was “subsequent proceeding” within meaning of ICWA. §1923 extends provisions of ICWA to adoptions completed subsequent to effective date of ICWA. *In re Adoption of Linda J.W.*, 179 Misc. 2d 96, 682 N.Y.S.2d 565 (N.Y. Fam. Ct. 1998).

Proceeding in which adoptive child sought release of information identifying her biological mother and maternal grandparents in order to verify that she was member of particular tribe was “subsequent proceeding within meaning of ICWA”. *In re Adoption of Rebecca*, 158 Misc. 2d 644, 601 N.Y.S.2d 682 (N.Y. Sup. Ct. 1993).

### 6<sup>th</sup> Circuit

An adult adoptee’s petition to examine adoption records to establish Indian heritage is both a “subsequent proceeding” and a “proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement.” *Hanson v. Doe*, 470 N.W.2d 669 (Mich. Ct. App. 1991).

8<sup>th</sup> Circuit

ICWA should not be applied to a hearing, which is a continuation of a hearing held on December 22, 1977. *In re Quentin Bird Head v. Frederick Tail*, 308 N.W.2d 837 (Neb. 1981).

Termination proceeding which was initiated prior to enactment of the ICWA, but which, because of order holding petition for termination, was not concluded until after Act became effective was a proceeding for “continuance,” rather than a “subsequent proceeding,” and was a proceeding as to which the Act did not apply. *In re R.N.*, 303 N.W.2d 102 (S.D. 1981).

9<sup>th</sup> Circuit

A hearing is required to be held in superior court prior to entering final decree of adoption and would be a “subsequent proceeding in the same matter,” under the act. *E.A. v. State*, 623 P.2d 1210 (Alaska 1981).

**§1931 Grants for on or near reservation programs and child welfare codes**

**(a) Statement of purpose; scope of programs**

**The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—**

- (1) a system for licensing or otherwise regulating Indian foster and adoptive homes;**
- (2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;**
- (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;**

- (4) home improvement programs;
- (5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;
- (6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;
- (7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and
- (8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

- (b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under Titles IV-B and XX of the Social Security Act [[42 U.S.C.A. §§ 620](#) et seq., [1397](#) et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under Titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

## RELEVANT CASES

### Federal Courts

Regulations governing distribution of ICWA funds were valid. *Navajo Nation v. Hodel*, 645 F.Supp. 825 (D. Ariz. 1986).

## **§ 1932. Grants for off-reservation programs for additional services**

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

- (1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;
- (2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;
- (3) family assistance, including homemaker and home counselors, day care, after school care, and employment, recreational activities, and respite care; and
- (4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

### **RELEVANT CASES**

#### *Federal Courts*

Regulations governing distribution of ICWA funds were valid. *Navajo Nation v. Hodel*, 645 F.Supp. 825 (D. Ariz. 1986).

If funding for an ICWA grant is denied there must be an appeal process. *Id.*

## **§ 1933. Funds for on and off reservation programs**

- (a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: Provided, That authority to make payments pursuant to such

agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

### **§ 1934. "Indian" defined for certain purposes**

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

### **§ 1951. Information availability to and disclosure by Secretary**

(a) **Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act**

**Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show--**

- (1) the name and tribal affiliation of the child;**
- (2) the names and addresses of the biological parents;**
- (3) the names and addresses of the adoptive parents; and**
- (4) the identity of any agency having files or information relating to such adoptive placement.**

**Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act ([5 U.S.C. 552](#)), as amended.**

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to

enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

## **§1952. RULES AND REGULATIONS**

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

### **FEDERAL REGISTER**

Purpose of this section:

Introduction

Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the act.

Nothing in this section compels the conclusion that Congress intended to vest the Department of the Interior with supervisory power to control state or tribal courts or to legislate them with respect to Indian Child custody matters.

## **§ 1961. Locally convenient day schools**

(a) **Sense of Congress**

**It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.**

**(b) Report to Congress; contents, etc.**

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

**§ 1963. Severability**

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.