



Indian Child Welfare Act: Key Concepts and Recent Clarifications

September 2, 2015

Purpose:

- to protect the best interests of Indian children and
- to promote the stability and security of Indian tribes and families.

Background and Conceptual Framework: ICWA was Congress' response to the "alarmingly high percentage of Indian families [that were] broken up by the removal, often unwarranted, of their children . . . by nontribal public and private agencies" and to the "alarmingly high percentage of such children . . . placed in non-Indian foster and adoptive homes and institutions." Congress also recognized that states "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." Finally, Congress recognized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901.

To counter these problems, ICWA created many mechanisms designed to: (1) eliminate or reduce the cultural mistakes (and bias) that resulted in Indian children being placed out of their homes and out of their Indian communities in such great numbers, and (2) continue an Indian child's connections with their tribe even when in state custody. For example, ICWA's:

- Placement preferences prioritize placement with extended family or other tribal families whenever surrogate care is necessary,
- Jurisdiction requirements prioritize decision-making by judges who are familiar with tribal values (that is, judges in tribal courts),
- Active efforts requirements demand that caseworkers extend extra efforts on behalf of the parents of Indian children,
- Evidentiary requirements (requiring a higher burden of proof at TPR, requiring a qualified expert witness) ensure that the court is informed about tribal families, childrearing, and customs, and
- Notice and intervention provisions allow tribes to participate in and inform state court proceedings.

Select Major Provisions with Recent Clarifications

Applicability. ICWA applies when an Indian child is involved in a child custody proceeding (foster care placement, TPR, pre-adoptive and adoptive placement) in state court. 25 USC § 1903(1).

- **Indian Child:** Any unmarried person who is under 18 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. ICWA § 1903(4).
- No exception to ICWA for the so-called “existing Indian family doctrine.” Courts should not consider the extent of the child’s or parent’s connections to the tribe or whether the Indian parent ever had custody of the child when determining whether ICWA applies in a given case.
- The court must ask in *every* child custody proceeding whether the child is or could be an Indian child. BIA Guidelines for State Courts and Agencies A.3, 80 Fed. Reg. 10150 (Feb. 25, 2015).
- When taking a child into custody, CYFD shall make reasonable efforts to determine whether child is an Indian child. § 32A-4-6(C). CYFD shall investigate whether the child is eligible for enrollment as a member of an Indian tribe, and if so, shall pursue the enrollment on the child’s behalf. § 32A-4-22(I); *State ex rel. CYFD v. Marsalee P.*, 2013-NMCA-062.

Jurisdiction. Tribal court has *exclusive jurisdiction* over any child custody proceeding involving an Indian child residing or domiciled within the reservation, and over an Indian child who is ward of tribal court notwithstanding the child’s residence/domicile. ICWA § 1911(a). When Indian child resides or is domiciled *off* the reservation, tribe and state have *concurrent—but presumptively tribal—jurisdiction*. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

- **Court-to-court communication regarding child’s status as a ward of the tribal court:** Under the new Guidelines, if an Indian child has been domiciled or previously resided on an Indian reservation, the state court must contact the tribal court to determine whether the child is a ward of the tribal court. If so, the state court must dismiss (and the agency must transmit all information about the Indian child custody proceeding to the tribal court). BIA Guidelines for State Courts and Agencies B.5, 80 Fed. Reg. 10150 (Feb. 25, 2015).
- **Dismissal:** As soon as the state court determines that it does not have jurisdiction, it must dismiss. BIA Guidelines for State Courts and Agencies B.5, 80 Fed. Reg. 10150 (Feb. 25, 2015).

Transfer. In cases of concurrent jurisdiction, State Court shall transfer proceedings to tribe’s jurisdiction upon petition of Indian child’s parent, Indian custodian or tribe, unless: (1) parent or Indian custodian objects; or (2) the tribe declines transfer; or (3) good cause exists to deny transfer. Children’s Code § 32A-1-9(D). ICWA § 1911(b); BIA Guidelines for State Courts and Agencies C.3, 80 Fed. Reg. 10150 (Feb. 25, 2015). It is presumptively in the best interest of the Indian child to transfer the case to the jurisdiction of the Indian tribe. BIA Guidelines for State Courts and Agencies C.3, 80 Fed. Reg. 10150 (Feb. 25, 2015).

- **Good Cause Not to Transfer:** Burden is on party opposing transfer to show that good cause exists *not* to transfer. BIA Guidelines for State Courts and Agencies C.2, 80 Fed. Reg. 10150 (Feb. 25, 2015). State courts may *not* consider the following as reasons not to transfer: proceedings at an advanced stage, transfer results in change of placement, the child’s contacts (or lack thereof) with the tribe or reservation, socio-economic conditions or perceived inadequacy of tribal social services or judicial

systems, or tribal court's prospective placement for the child. BIA Guidelines for State Courts and Agencies C.3, 80 Fed. Reg. 10150 (Feb. 25, 2015).

- State Court Jurisdiction in cases involving **Emergency Removal or Placement**: Temporary emergency custody should be allowed only to prevent imminent physical damage or harm to the Indian child and should not last more than 30 days. BIA Guidelines for State Courts and Agencies B.8, 80 Fed. Reg. 10150 (Feb. 25, 2015).

Notice. When the agency *or court* knows or has reason to know that a child custody proceeding involves an Indian child, the agency *or court* must send notice of each proceeding to each tribe where the child may be a member, the child's parents, and the Indian custodian if any. Notice should be in accord with the requirements in BIA Guidelines for State Courts and Agencies B.6, 80 Fed. Reg. 10150 (Feb. 25, 2015).

Placement Preferences. ICWA's placement preferences should be followed unless the child's tribe has established a different order of preference by resolution. In that case, CYFD or the court shall follow that different order so long as it is the least restrictive setting appropriate for the child. When appropriate, the child's or parent's preference shall be considered. ICWA § 1915(c). Placement within child's own tribe is preferred. BIA Guidelines for State Courts and Agencies F.1, 80 Fed. Reg. 10150 (Feb. 25, 2015).

- **Preferences for foster care or pre-adoptive placements**, child must be placed in the least restrictive setting that most approximates family, meets child's special needs, and is within reasonable proximity of his/her home. Absent good cause, preference shall be given to:
 - Member of child's extended family, as defined by law/custom of child's tribe or, absent law or custom, a person age 18 or older who is child's grandparent, aunt/uncle, brother/sister, brother/sister-in-law, niece/nephew, first/second cousin, or stepparent; ICWA § 1903(2);
 - Foster home licensed, approved or specified by the child's tribe;
 - Indian foster home licensed or approved by authorized non-Indian licensing authority; or
 - Institution for children approved by an Indian tribe or operated by Indian organization which has a program suitable to meet child's needs. ICWA § 1915(b).
- **Preferences for adoptive placements**, absent good cause, preference shall be given to:
 - Member of child's extended family, as defined by law/custom of child's tribe or, absent law or custom, shall be person age 18 or older who is child's grandparent, aunt/uncle, brother/sister, brother/sister-in-law, niece/nephew, first/second cousin, or stepparent; ICWA § 1903(2);
 - Other members of the Indian child's tribe; or
 - Other Indian families. ICWA § 1915(a).
- **Good Cause to Deviate from Placement Preferences.** According to BIA Guidelines F.4, 80 Fed. Reg. 10158 (February 25, 2015), any party seeking to deviate must prove good cause by clear and convincing evidence. Good cause must be based on the:
 - request of the parents;
 - request of the child;
 - extraordinary physical or emotional needs of the child. However, these extraordinary physical and emotional needs **cannot include** ordinary bonding or attachment that might have occurred

in the current placement or the fact that the child has been in the current placement for an extended period. The good cause determination does not include an independent consideration by the court of the best interests of the Indian child because Congress determined that the placement preferences are in the best interests of the Indian child; or

- unavailability of a placement. Unavailability requires a court determination that the agency has made **active efforts** to find a placement according to the preferences and none has been located. *But see State ex rel. CYFD v. Casey J.*, 2015-NMCA- ____ (No. 33,409, filed June 22, 2015). A placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the child's parent or extended family resides or with which they maintain social and cultural ties.

Active Efforts. Active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family are **required** in every ICWA case. § 1912(d).

- Active efforts constitute more than reasonable efforts and include identifying culturally appropriate services (including community-based services); actively assisting parents to overcome barriers to obtaining services; inviting representatives of the child's tribe to participate in services and proceedings; accounting for the tribe's social and cultural conditions and way of life; offering/employing all available and culturally appropriate family preservation strategies; notifying and consulting with the child's extended family members to provide family structure and support for the child, to assure cultural connections, and to serve as placement resources for the child. This is not an exhaustive list. BIA Guidelines A.2, 80 Fed. Reg. 10150 (February 25, 2015).
- In order to prevent removal, **active efforts must begin** "from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian." BIA Guidelines B.1, 80 Fed. Reg. 10150 (February 25, 2015).
- ASFA does **not** alter ICWA's active efforts requirement: even where ASFA may relieve the State from proving reasonable efforts, active efforts are required. BIA Guidelines A.2, 80 Fed. Reg. 10150 (February 25, 2015).
- **Do active efforts apply to placement preferences?** According to the NM Court of Appeals, the active efforts requirement does not apply to placement preferences. *State ex rel. CYFD v. Casey J.*, 2015-NMCA- ____ (No. 33,409, filed June 22, 2015). But, the new Guidelines indicate that good cause to deviate from the placement preferences because of unavailability of a placement requires a court finding that active efforts to find a placement according to the preferences were made and no placement was found. BIA Guidelines F.4, 80 Fed. Reg. 10158 (February 25, 2015).

Standards of Evidence. BIA Guidelines for State Courts and Agencies D.3, 80 Fed. Reg. 10150 (Feb. 25, 2015).

- **Foster care placement.** The court may not issue an order effecting a foster care placement of an Indian child **unless clear and convincing evidence** is presented, including the testimony of one or more Qualified Expert Witnesses (QEWs), demonstrating that the child's continued custody with the parents or Indian custodian is likely to result in serious harm to the child.

- Clear and convincing evidence requires proof of a *causal relationship* between conditions in the home and serious emotional or physical damage to the particular child who is subject of the proceedings.
- The determination cannot be based only on evidence of community or family poverty, single parenthood, the custodian's age, crowded/inadequate housing, substance abuse, or nonconforming social behavior.
- **TPR.** The court may not terminate parental rights unless the order is supported by evidence **beyond a reasonable doubt**, including the testimony of one or more QEWs, demonstrating that the child's continued custody with the parents or Indian custodian is likely to result in serious harm to the child.

Qualified Expert Witness. ICWA § 1912(e)-(f); BIA Guidelines for State Courts and Agencies D.3 and D.4, 80 Fed. Reg. 10150 (Feb. 25, 2015).

- **When required.** The testimony of *one or more* qualified expert witnesses (QEW) is required before the court may issue an order effecting a foster care placement or terminating the parental rights of the parent of an Indian child.
- The court or any party may request assistance of child's tribe or BIA to locate a QEW.
- **Person(s) presumed to meet QEW requirements** (in descending order):
 - members of child's tribe recognized by tribal community as knowledgeable in tribal customs pertaining to family organization/childrearing;
 - members of another tribe recognized to be a qualified expert witness by the child's tribe based on their knowledge of delivery of child and family services to Indians and to the child's tribe;
 - laypersons recognized by the tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards/childrearing practices in the Indian child's tribe;
 - professionals having substantial education and experience who can demonstrate knowledge of the prevailing social and cultural standards/childrearing practices of the tribe.

For more details about ICWA and its application in New Mexico, see the New Mexico Child Welfare Handbook, Chapter 39 (2014 edition and updates): <http://childlaw.unm.edu/resources/index.php>.