INDIAN CHILD WELFARE ACT
CASELAW UPDATE

B.J. Jones
Director-Northern Plains Tribal Judicial Institute-University of North Dakota Law School
jones@law.und.edu

I.INTRODUCTION

The Indian Child Welfare Act, 25 U.S.C. §1901 et seq. has a serious impact upon both private and public "child custody proceedings" involving Indian children. The failure to comply with the ICWA can result in adoptions and placements being set aside and potential liability of the attorney involved. This outline reviews some of the issues attorneys have to be cognizant of in cases involving the placement of Indian children.

II. APPLICATION OF THE INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act applies to "child custody proceedings" involving "Indian children." Child custody proceedings include both pre-adoptive and adoptive placements. The ICWA applies equally to private and public adoptions. ICWA also applies to stepparent adoptions. See Matter of Adoption of Baade, 462 N.W.2d 485 (S.D. 1990). One of the more difficult issues that arises for attorneys is determining whether an Indian child is an Indian under the ICWA. The ICWA defines an Indian child as a member of a federally-recognized Indian tribe or a child who is eligible for membership in a federally-recognized Tribe and the biological child of a member. Attorneys have an affirmative obligation to notify a Court if a proceeding involves a child that may be Indian. The failure to notify the Court of the potential status of the child as Indian may result in vitiating an adoption and potential criminal liability should a pending act of Congress be enacted. Some state courts have adopted a judicially-created exception to the Indian Child Welfare Act, frequently referred to as the "existing Indian family exception" that holds that the ICWA does not apply to a child custody proceeding unless the child has lived in an intact Indian family. A majority of state courts to rule on this have rejected this exception as contrary to the language of the ICWA.

A. Status of Tribe

1. In Interest of C.H., 510 N.W.2d 119 (S.D. 1993) (on remand Court holds that Mowa Band of Choctaw Indians is a federally recognized Tribe for ICWA purposes).

2. In re M.C.P., 153 Vt. 275, 571 A.2d 627 (Vt. 1989) (member of Micmac Tribe of Indians not Indian); see also In re A.J., 733 A.2d 36 (Vt. 1999).

3. In re John V. , 5 Cal. App. 4th 1201, 7 Cal. Rptr. 2d 629 (Cal. App. 6 Dist. 1992) (Creoles not Indians).

4. In re Interest of J.L.M., 451 N.W.2d 377 (Neb.1990) (In decision prior to restoration of Nebraska Poncas, Court holds that Ponca child not Indian).

5. In re Wanomi P. , 264 Cal. Rptr. 623 (Ct. App. 2 Dist.1989); In the Matter of T.I.S., 586 N.E.2d 690 (Ill. App. 1 Dist. 1991); In re Stairwalt, 190 Ill.App. 3d 547, 546 N.E.2d 44 (Ill. App. 2 Dist. 1989) (Canadian Tribes not Indians for ICWA); but see Matter of Adoption of Linda J., 682 N.Y.S. 2d 565 (NY Family Court 1999)(Court holds that Canadian Indian entitled to have her adoption records released to Canadian band under ICWA).

6. Matter of Adoption of Christopher, 662 N.Y.S. 2d 366 (N.Y. 1997)(native village in Alaska that is not federally recognized not entitled to treatment as Indian tribe under ICWA.)

7. People ex rel. P.A.M., 961 P.2d 588 (Col. App. 1998)(Blood Tribe of Canada not an Indian Tribe for purposes of ICWA.).

8. Matter of A.D.L., 612 S.E.2d 639 (NC App 2005)(Lumbee Tribe of North Carolina not federally-recognized Tribe for ICWA purposes).

9. Matter of C.H., 79 P.3d 822 (Mont. 2003)(Little Shell Band of Pembina Indians not federally-recognized).

B.Status of Child

1. In re Desiree F.,83 Cal. App. 4th 460, 99 Cal. Rptr 2d 688 (Ca. App. 5 Dist. 2000)(Failure to apply ICWA to child that was not enrolled member of Indian tribe was erroneous in light of child's eligibility for membership. Court invalidates all proceedings under 25 USC §1914 for failure to permit Tribe to intervene).

2. In re Adam N., 84 Cal. App. 4th 846, 101 Cal 2d 181 (Cal. App. 3 Dist. 2000)(father's assertion that he was a Blackfoot (sic) Indian without any other proof did not support notice to the Blackfeet Tribe of Montana); see also In re Brittany Kirk v. Klamath Tribe, 11 P.3d 701 (Or. App. 2000); In re A.S., 614 N.W.2d 393 (SD 2000).

3. Matter of Adoption of Riffle, 922 P.2d 510 (Mont. 1996)(Tribal determination on membership is conclusive.)

4 .Matter of Dependency and Neglect of A.L., 442 N.W.2d 233 (S.D. 1989) (Tribe's enrollment of Caucasian child invokes ICWA).

5 .Matter of Baby Boy Doe. 849 P.2d 925, 930-931 (Idaho 1993) (Court holds that a state Court must make independent determination of whether child is Indian even if Tribe and BIA are unable to make determination).

6 .Matter of Adoption of Baby Boy W., 831 P.2d 643 (Okla. 1993) (father's claim that school records show he is Indian not sufficient); Matter of Shawboose, 438 N.W.2d 272 (Mich. App. 1989) (failure of mother to prove enrollment and Tribe to intervene doomed application of ICWA); People In Interest of A.E., 749 P.2d 450 (Col. App. 1987).

7. Quinn v. Walters, 320 Or. 233, 881 P.2d 795 (1994) (Court rejects application of ICWA on ground that only proof of membership was inadmissible hearsay).

8. Matter of Welfare of S.N.R., 617 N.W.2d 77 (C.A. Minn. 2000)(Court holds that tribal determination of membership is conclusive and cannot be collaterally challenged.)

9. In re Carlos G., 74 Cal. App. 4th 1138, 88 Cal. Rptr. 2d 623 (Cal. App. 3d Dist. 1999)(Tribe's notice that child was not eligible for membership in Tribe conclusive on question of whether ICWA applies.); In re J.O., 743 A.2d 341 (N.J. App. 2000)(reference at status hearing to children as Indian did not trigger ICWA requirements).

10. Interest of A.L. and J.L., 2001 ND 59; 623 N.W.2d 418; 2001(mere allegation by attorney that children are Indian not sufficient to invoke ICWA.)

11. In re C.N., 196 Ill. 2d 181; 752 N.E.2d 1030; 2001 Ill. LEXIS 484; 256 Ill. Dec. 788 (Father's eleventh hour claim he was Indian not sufficient to invoke ICWA.)

12. In re Joseph P.,140 Cal.App 4th 1524(Cal. App. 5th 2006)(After Court determined that ICWA did not apply during foster care proceedings based upon information provided by father, father's new assertion that he was Mohican from New York during termination proceedings did not trigger new notice requirement. Court states that determination by Bureau of Indian Affairs is conclusive notwithstanding tribal records that seem to conflict with BIA decision).

13. BH v. People of Colorado, 138 P.3d 299 (Col. 2006)(Court remands order of termination of parental rights of mother over children to require notice to Cherokee tribe based upon mother's assertion that the grandmother had reported that her great-great grandmother had walked the Trail of Tears; that she was trying to register with the Cherokee tribe at that very time; and that she had officially adopted her Indian name. Court indicates that termination would be affirmed if the Court determined that ICWA did not apply.)

14. In Interest of Dakota L., 712 N.W.2d 583 (Neb. App. 2006)(Court upholds the exercise of state court jurisdiction over Omaha children who were wards of Tribal Court because Tribe indicated that it could not provide services to the family in Omaha, Nebraska. Court reverses adjudicatory order because of defective petition and notice).

15. In re Aaron R., 130 Cal. App. 4th 697 (Cal. App. 1st Dist. 2005)(grandmother's claim to belong to an "historical association" not sufficient to invoke ICWA).

16. In re the Matter of A.G., 109 P.3d 756 (Mont. 2005)(Trial Court had affirmative obligation to determine whether children were Indian despite fact that Tribe did not conclusively demonstrate eligibility); but see In Interest of D.H., 688 NW2d 491 (Iowa App. 2004)(Court not under an affirmative obligation to determine Indian ancestry of child); In re H.D., 797 N.E.2d 1112 (Ill. App. 2003)(Court need not apply ICWA unless affirmative finding of Indian child status).

17. In Interest of T.D., 890 So. 2d 473 (Fla. App. 2004)(mother's assertion of Indian ancestry at time of termination hearing not sufficient to invoke ICWA but court cautions state to do a better job of determining ICWA applicability early in proceedings).

18.

C.Status of Proceedings

1. Custody Dispute - Application of Defender, 435 N.W.2d 717 (S.D. 1989); In re Custody of Sengstock, 165 Wis. 2d 86, 477 N.W.2d 310 (Wis. App. 1991) (ICWA does not apply to custody disputes between parents).

2.Intrafamily Dispute - Matter of Ashley Elizabeth R. 863 P.2d 45 (N.M. App. 1993); Custody of A.K.H., 502 N.W.2d 79 (Minn. App. 1993)applies to custody dispute between parent and non-parent).See also, In re Guardianship of Q.G.M., 808 P.2d 684 (Okla. 1991); In re Custody of S.B.R., 719 P.2d154 (Wash. App. 1986); J.W. v. R.J., 951 P.2 1206 (AK 1998)(rejects in context of custody dispute between father and stepfather); D.J. v. P.C., 36 P.3d 663 (Alaska 2002)(ICWA applies to proceeding where Indian custodian attempting to terminate parental rights of parent); but see Comanche Nation v. Fox, 128 SW2d 745 (Tex App. 2004)(ICWA not applicable to conservatorship proceedings involving custody dispute between grandparents and parents); Gerber v. Eastman, 673 NW2d 854 (Minn. App. 20040(ICWA not applicable to custody dispute between father and Indian grandmother); Pam R. v. State, 185 P.3d 67 (AK

2008)(Court rejects Indian custodian status for grandmother despite her active involvement in children's lives based primarily on fact that she was not the primary physical custodian and the father objected to her status as "Indian custodian.")

3. Minor In Need of Assistance - In Interest of B.B., 500 N.W.2d 9 (Iowa 1993) (ICWA applies to a proceeding in which a mentally retarded Indian child declared minor in need of assistance).

4. Criminal Conduct - State in Interest of T.D.C..,748 P.2d 201 (Utah App. 1988); In re Enrique Q., 137 Cal. App. 4th 728 (Cal. App. 5th Dist. 2006)(Court holds that ICWA notice not required in delinquency case).

5. Late Discovery of Indian Child - Matter of Welfare of B.W., 454 N.W.2d 437 (Minn. App. 1990); People In Interest of A.E., 799 P.2d 450 (Colo. App. 1987); In Interest of C.H., 510 N.W.2d 119 (S.D. 1993) (late discovery that Indian child is involved does not vitiate proceedings, but ICWA applies from that point on); but see, Matter of Adoption of Crews, 825 P.2d 305 (Wash. 1992); see also In re J.D.B., 584 N.W. 2d 577(Iowa App. 1998)(Court holds that failure of Tribe to participate in earlier proceedings prevented court from determining children's Indian status); Adoption of Jake and Adoption of Brian, 50 Mass. App. Ct. 743; 741 N.E.2d 456 (2001); In re S.B., 130 Cal. App. 4th 11489Cal. App 4th Dist. 2005)(mother who makes belated claim of native ancestry waives argument that ICWA applies).

6. Arizona Dept. of Economic Security v. Bernini, 48 P.2d 512 (Ariz. App. 2002)(Court erred in applying ICWA standards to emergency shelter care proceeding absent proof children were Indian).

D. Status of Existing Indian Family Exception to Indian Child Welfare Act
Child welfare practitioners may be tempted not to comply with the provisions of the Indian Child Welfare Act believing that the Indian child involved has never resided in an Indian family. The case law in this area is so conflicting that this would be a serious mistake.

1. Cases That Have Utilized Existing Indian Family Exception

a. In re Bridget R., 1996 Cal. App. Lexis 37 (Cal. Ct. App. 13 Dist. 1996)(Court elevates existing Indian family exception to constitutional dimensions by holding that ICWA does not apply to a child custody proceeding unless natural parents have substantial political, social or cultural ties to their tribe where they are members.)

b. In re Alexandria Y., 45 Cal. App. 4th 1483, 53 Cal. Rptr.2d 679 (Cal. App. 4th Dis. 1996)(Court adopts reasoning of Bridget R. and holds that ICWA

does not apply to proceeding where mother is enrolled Seminole Indian but who was raised in non Indian home. Court suggests that Bridget R. is too limiting and that trial court should be able to make determination whether ICWA applies in every case); see also In re Derek W., 73 Cal. App. 4th 828, 86 Cal. Rptr. 2d 742 (Cal. App. 2d Dist. 1999).

c. In Re Crews, 825 P.2d 305 (Wash. 1992). But see Matter of Adoption of M., 832 P.2d 518 (Wash. App. 1992)(Appeals Court refuses to follow Crews in a case where parents of Indian child petitioned to voluntarily terminate parental rights over child who lived most of life in Non-Indian home).

d. In re S.C., 833 P.2d 1249 (Okla. 1992) (Court holds that ICWA does not apply to the foster care placement of an Indian child removed from non-Indian mother); but see, In re Q.G.M.. 808 P.2d 684 (Okla. 1991)(ICWA does apply to dispute between N-I grandparents and I mother).NOTE -the Oklahoma legislature has apparently repealed the Existing Indian family exception. The Oklahoma Supreme Court also recently overturned these decisions in Matter of Baby Boy L., 103 P.3d 1099 (Okla. 2004) in a case where the Court held that a non-Indian mother could not assert EIFE in a private adopting proceeding to avoid the consent of the father.

e. C.S.A. v. F.J.P., 571 So.2d 1187 (Ala. Civ. App. 1990) (child who had been raised by non-Indian mother, aunt and uncle, where Indian father had little involvement not an Indian child).

f. C.E.H. v. L.M.W., 837 S.W.2d 947 (Mo. App. W.D. 1992) (dicta suggests that existing Indian family exception is doctrinally correct).

g .Barbry v. Darzat, 576 So.2d 1013 (La. App. 1991) (Court applies a state law declaring that illegitimate child assumes race of mother to defeat ICWA). See also In re Hampton, 658 So.2d 331 (La. App. 1995)(Court strongly endorses existing Indian family exception); but see Owens v. Willock, 690 So.2d 948 (La. App. 1997)(rejecting existing Indian family exception).

h. Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996)(Court applies existing Indian family exception to Indian child raised by Indian uncle and non-Indian wife of uncle to hold that child never resided in Indian family).

i. Matter of Adoption of Baby Girl S., 690 N.Y.S. 2d 907 (N.Y. 1999).

j. In re Santos Y., 92 Cal. App. 4th 1274; 2001 Cal. App. LEXIS 815; 112 Cal.Rptr. 2d 692; 2001 Cal. Daily Op. Service 8997; 2001 Daily Journal DAR 11209 (2001)(Court finds ICWA unconstitutional for a variety of reasons including a violation of the 10th amendment; equal protection clause and liberty rights of child.)

k. See Ex Part CLJ, ____So.2d _____, Ala. App. June 23, 2006(Court holds in dicta that only time existing Indian family exception would apply is when an illegitimate child of a non-Indian mother is involved). This decision addresses numerous issues in concurring opinions including what constitutes good cause to deny transfer; whether state law should be considered in determining good cause; whether a great-aunt should be considered an extended family member; and whether best interest of the child should be determined. All of these are dicta though because of ultimate determination.

l. In Interest of SNK, 78 P.3d 1032 (WY. 2003)(Court avoids deciding EIFE case by mooting out Tribe's appeal because of change of placement).

2.Cases That Reject:

a. In re Alicia S., 65 Cal. App. 4th 79, 76 Cal. Rptr. 2d 121 (Cal. App. 5th Dist. 1998).

b. Matter of Adoption of Riffle, 922 P.2d 510 (Mont. 1996)(Court expressly declines to follow California appellate court decisions constitutionalizing existing Indian family exception and rules that ICWA applies regardless of contacts of parents.)

c.. Utah in Interest of DAC, 933 P.2d 993 (Utah App. 1997)(Applies ICWA to intra-family dispute between wife, stepparent and Indian natural father. Strongly rejects the existing Indian family exception).

d. In re Elliott, 218 Mich. App. 196 (Mich. App. 1996)(Court rejects existing Indian family exception to requirement that qualified expert witness testimony be submitted to support a termination of parental rights.)

d. In re Adoption of T.N.F., 781 P.2d 973 (Alaska 1989).

e. In re Coconino County, 737 P.2d 829 (Ariz.App. 1989).

f. In re Adoption of S.S., 622 N.E.2d 832 (Ill. App. 1993) (contains a very thoughtful analysis of the exception. at 835-838).

g. Matter of Baby Boy Doe, 849 P.2d 925 (Idaho 1993).

h. In re Adoption of Lindsay C., 229 Cal.App. 3d 404, 280 Cal. Rptr. 194 (Cal. App. 1 Dist. 1991).

i. In re Oscar C., 559 N.Y.S.2d 431 (Fam Ct. 1990).

j. In re Adoption of Baby Child of Indian Heritage, 543 A.2d 925 (N.J. 1988).

k. Matter of Adoption of Baade, 462 N.W.2d 485 (S.D. 1990).

l. J.W. v. R.J., 951 P.2 1206 (AK 1998)(rejects in context of custody dispute between father and stepfather).

m. Michael J. v. Michael J., 7 P.3d 960 (Ariz. App. 2000).

n. Burks and Burks v. Arkansas Department of Human Services, 76 Ark. App. 71; 61 S.W.3d 184 (2001);

o. Matter of A.B., 663 N.W.2d 665 (N.D. 2003), cert denied ___, U.S. _____

p. In re Baby Boy C., 805 N.Y.S. 2d 313 (NY App. 2005)(EIFE not necessary to preserve constitutionality of ICWA).

.III. ADOPTION PLACEMENT ISSUES

A.Introduction

In Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) the Supreme Court indicated that the "most important substantive requirements imposed upon state courts" are the placement preferences expressed in section 1915 of ICWA. Holyfield, at 36. That section requires an Indian child to be placed in the least restrictive alternative which closely approximates his family and which is within reasonable proximity to his home.

B. Cases

1.Preferences Apply Even when Child Not Raised in Indian Home.

a. In re Adoption of M.T.S., 489 N.W.2d 2851 (Minn. App. 1992).

b. Matter of Appeal in Coconino Juvenile Action No. J - 10175, 736 P.2d 829 (Arizona App. 1987).

c. Contra, In re Baby Girl A., 230 Cal. App. 3rd 1611, 282 Cal. Rptr. 105 (Cal. App. 4 Dist. 1993) (Court suggests that an Indian mother raised by non-Indians would have right to place her own child for adoption with non-Indians over Tribe's objections).

d. Matter of Adoption of Riffle, 922 P.2d 510 (Mont. 1996)(Court refuses to follow California appellate decisions which recognize an exception to the placement preference requirements of ICWA when Indian child involved has never been raised in an existing Indian cultural setting and holds that ICWA requires placement with Indian uncle over non-Indian putative adoptive parents and that such a requirement is not unconstitutional. Court also follows Minnesota Supreme Court decision in S.E.G. By holding that the best interest of the child standard is not an appropriate factor in determining whether good cause exists to deviate from placement preference
provisions.)

2.Effect of Tribal Designation of Different Preference.

a. In re Laura F., 83 Cal. App. 4th 583, 99 Cal. Rptr. 2d 859 (Ca. App. 5th Dist. 2000)(Tribal resolution barring non-Indians from adopting tribal members held not to supersede state's right to place Indian child with non-Indian because such would violate state public policy under the full faith and credit provisions of ICWA. Court does not discuss the tribal law as a tribal designation of preference for adoption).

a. In re Guardianship of Q.G.M., 808 P.2d 684 (Okla. 1991) (Tribe can change order of preference without showing of good cause as long as the proposed placements were least restrictive alternative).

b. Matter of Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988), cert denied, 490 U.S.1069 (1989) (Court implies that right of Tribe to alter placement preference scheme does not apply in state court?).

c. Starr v. George, 175 P.3d 50 (AK 2008)(In custody dispute between competing grandparents of Indian children, State court refuses to uphold tribal council adoption decree because other grandparents did not have notice of the proceedings).

3.Effect Of Parental Preference and Child's Preference For Placement - 25 U.S.C. Sec 1915(c)

a. Matter of Baby Boy Doe, 902 P.2d 477 (ID 1995) (In a case where the lower court upheld adoption by non-Indian couple consented to by the natural mother, a non-Indian, the Court first holds that mother was proper party to proceedings because her voluntary consent to termination was invalid under ICWA; court did not err in holding that reasonable doubt standard did not apply to the provision that remedial and rehabilitative services be provided to the natural father; qualified expert witness standard met; and lastly that good cause to deviate from adoption placement preferences existed because of natural mother's preference and the emotional trauma that would befall child if removed from non-Indian home.)

b. Matter of Baby Girl Doe.,865 P. 2d 1090 (Mont. 1993) (Parent's request for anonymity does not override Tribe's right to notice in voluntary placement proceeding).

c. In re Baby Girl A., 230 Cal. App. 3d 1611, 282 Cal. Rptr. 101 (court suggests that natural mother's right to dictate placement overrides Tribe's right to enforce preference).

d. Adoption of N.P.S., 868 P.2d 934 (Alaska 1994) (mother's appointment of live-in boyfriend as guardian in will entitled to deference in determining adoption placement).

e. Matter of Adoption of B.G.J., 133 P.3d 1 (Kansas 2006)(Court relies upon mother's strong objection to child being placed with member of her Tribe and preference for non-Indian couple as one ground to deviate from placement preferences.); see also Matter of Adoption of Keith M.W., 79 P.3d 623(AK 2003).

e. BIA Guidelines, F. I Commentary, at 67594.

f. Matter of Adoption of F.H., 851 P.2d 1361 (Alaska 1993) (Preference of mother entitled to deference, although not absolute, in adoption proceeding).

g. In re Custody of S.B.R., 719 P.2d 154 (Wash. App. 1986) (non-Indian mother cannot defeat rights of father by asserting a preference for placement with her parents).

h. In Interest of J.W., 528 N.W.2d 657 (Iowa App. 1995) (failure of mother to object to placement taken as tacit request for placement that doesn't comply with ICWA).

i.In re A.E., 572 N.W. 2d 579 (Iowa 1997)(best interests of the child sufficient to deviate from placement preference provisions.)

j. In Matter of Adoption of B.G.J., 281 Kan. 552, 133 P.2d 1 (2006)- clear and convincing evidence required for good cause deviation from placement preferences. Mother's request for adoption by non-Indian couple constituted good cause.

4.. Extraordinary Needs of Child - BIA Guidelines F. 3 Commentary ("Highly specialized treatment services that are unavailable in the community where the families who meet the placement preference reside. Must be supported by qualified expert testimony").

a.L.G. v. State of Alaska, 14 P.3d 946 (AK 2000)(Court upholds adoption with non-Indian and rules that grounds existed to deviate from adoptive placement preferences because of serious emotional harm that would befall child by removing from foster care placement.); See also Matter of Adoption of Sara J., 123 P.3d 1017 (AK 2005)(two of three siblings had emotional problems that warrant adoption by non-Indian of three siblings).

b.In the Matter of C.H., 997 P.2d 776 (Mont. 2000)(Court rejects trial court's conclusion that bonding was an extraordinary need of child.

c.Matter of Custody of S.E.G., 507 N.W.2d 872 (Minn. App. 1993), rev'd, 521 N.W. 2d 357, (1994). (Appellate Court had upheld an adoption by non-Indians on the ground that the child had the extraordinary need for "stability" and that the child had bonded to N-I family. Supreme Court reversed and ruled that bonding was not extraordinary reason and that the Appellate Court had exceeded its authority by going beyond BIA guidelines). See also Matter of Adoption of Riffle, 922 P.2d 510 (Mont. 1996)

d. Matter of Oscar C. Jr., 559 N.Y.S.2d 431 (Fam. Ct. 1990).

e. In re Adoption of M.T.S., 489 N.W.2d 285(Minn. App. 1992) (Court holds that it is presumptively in best interest of Indian child to be placed with Indian relative over non-Indian couple) .

f. In re Jacqueline L., v. Eric L., 39 Cal.Rptr.2d 178 (Cal. App. Dist. 1995) (UNPUBLISHED) (children's interest in stable home outweighs their right to be raised in a home that reflects their culture).

g. Matter of Baby Boy Doe, 902 P.2d 477 (ID 1995)(court seems to suggest that the trauma associated with removal of child from non-Indian placement met the standard of extraordinary emotional needs.)

h. People ex rel. A.N.W., 976 P.2d 365 (Col. App. 1999)(Court relies upon Idaho Baby Boy Doe case to find that trauma caused by removal from foster home sufficient to justify deviating from placement preferences under ICWA.);

i.In Interest of C.G.L., D.G.L., and A.B.L., 63 S.W.3d 693; 2002 Mo. App. LEXIS 8 (2002)(Good cause to deviate from adoptive placement preference existed in that the child had extraordinary medical problems and bonding existed that would be contrary to best interest of child to break up).

j. Matter of Adoption of B.G.J., 133 P.3d 1 (Kansas 2006)(Court holds that bonding between non-Indian adoptive parents and child is a factor to be considered).

k. Fresno County Department of Social Services v. Superior Court,122 Cal. App 4th 626 (Cal App. 5th Dist. 2004)(avoiding separation of siblings grounds for deviation).

5.Inability To Comply - BIA Guidelines, F. 3 (a) (iii), at 67594.

a. In re Robert T., 246 Cal. Rptr. 168 (Ct. App. 6 Dist. 1988) (Court implies that the burden of coming forward with relative placements and Indian home placements rested with Tribe and Tribe's failure to come forward with placements justified deviation).

b. In re Krystle D., 37 Cal. Rptr. 2d 132, 30 Cal. App.4 1778 (Cal. App.6 Dist. 1994) App. 6 Dist. Dec. 21, 1994) (failure of Tribe to find home justifies deviation.)

c. Matter of Adoption of B.G.J., 133 P.3d 1 (Kansas 2006)(despite fact Tribe identified several native families to adopt one of its child Court deviated from placement preferences because identified families were not from the Tribe where child was affiliated).

6.Other Cases

a. In re Jullian B., 82 Cal. App. 4th 1337, 99 Cal. Rptr. 2d 241 (Cal. App. 4th Dist. 2000)(State law requirement that adoptive placement not have criminal record does not supersede placement preference provisions of ICWA and state required to seek waiver in order to comply with ICWA.)

b. In re Interest of C.W., 239 Neb. 817, 479 N.W.2d 105 (Neb. 1992) (Court whitewashes placement preference requirements by holding that parent cannot enforce preference if she previously agreed to deviation).

c. State ex. rel. Juv. Dept. v. Woodruff, 816 P.2d 623 (Or. App. 1991) (violation of foster care placement requirements is not a ground for dismissal of a termination petition); but see B.R.T. v. Executive Director, 391 N.W.2d 594, 601 n. 10 (N.D. 1986).

c. In re Quinn, 881 P.2d 795 (Or. 1994)(Court reverses decision of lower court allowing an Indian mother to withdraw her consent to adoption made the day of the birth of child on ground that the mother failed to show that the child involved was an Indian child because an affidavit from Tribe to that effect was inadmissible hearsay. As a sideline issues, it should be noted that the attorney for the mother was sued for malpractice and the case settled.)

d. In re Adoption of Lindsay C. 229 Cal. App. 3d 404 (Cal. App. 1 Dist.1991)(placement preferences apply in stepparent adoption).

e. A.M. v. State, 891 P.2d 815 (Alaska 1995)(court vacates termination of parental rights of incarcerated father, finding that section of ICWA requiring active remedial efforts had not been complied with and that need for permanency of children was factor to be considered in termination, but not conclusive.)

f. In Interest of B.M., 532 N.W.2d 504 (Iowa App. 1995)(court reverses a termination of parental rights on the ground that the termination was not the least restrictive alternative and remanded for the court to award great grandparents legal guardianship.)

g. In re Brandon M., 1997 Cal. App. Lexis 373 (Ca. App. 1st Dist. 1997)(Court holds that California's de facto parent statute, which gives a non-parent of a child preferential treatment under the law is not superseded by ICWA in a case where court places Indian children with non-Indian former stepparent)

h. Carson v. Carson, 13 P.3d 523 (Or. App. 2000)(non-Indian adoptive father lacks standing to challenge an adoption of Indian child in alleged violation of ICWA.)

i. Fresno County Dept. of Children and Family Services v. Superior Court of Fresno County, 122 Cal. App. 4th 626, 19 Cal. Rptr. 155(5th Dist. 2004)(In challenge to adoptive placement decision by trial court the Court finds that the need to keep two siblings together was good cause to deviate from placement preferences.)

7.Burden of Proof For Deviation - BIA Guidelines, F.3b at 67594.

a. Adoption of N.P.S., 868 P.2d 934 (Alaska 1994); Matter of Adoption of F.H., 851 P.2d 1361, 1363 (preponderance of evidence).

b. Matter of Custody of S.E.G., 507 N.W.2d 872, 878 (Minn. App. 1993), rev'd on other grounds, 521 N.W.2d 357 (1994) (clear and convincing evidence needed to deviate).

c. In re Alexandria Y., 45 Cal. App. 4th 1483, 53 Cal. Rptr.2d 679 (Cal. App. 4th District 1996)(in decision which upholds lower court's determination that ICWA not applicable because child and mother had no significant contacts with Tribe or reservation, Court suggests that party deviating from placement preferences must show beyond a reasonable doubt that good cause exists.)

d. Matter of Adoption of B.G.J., 133 P.3d 1 (Kansas 2006)(substantial abuse of discretion standard adopted).

III. QUALIFIED EXPERT TESTIMONY BIA GUIDELINES, D. 4(b) at 67593

A.Introduction

At three stages of ICWA there is a requirement of qualified expert testimony to support state court action - foster care placement, termination of parental rights and deviating from the foster care and adoptive placement preference due to the extraordinary needs of the child. 25 U.S.C. SS1912(e); 1912(f), BIA Guidelines, F. 3 at 67594. The failure to produced qualified expert witness testimony may vitiate any proceedings held in state court. See In re. K.H., 981 P.2d. 1190 (Mont. 1999); Doty-Jabbar v. Dallas County, 19 S.W.3d 870 (Tex. App. 5th Dist. 2000). The need for qualified expert witnesses applies in stepparent adoption proceedings also even when the claim is one of abandonment by the natural parent. See In re H.M.O., 962 P.2d 1191 (Mont. 1998). The qualified expert witness must offer an opinion that the continued custody of the parent or custodian would result in serious emotional or physical harm to the child as that is what is required under ICWA for a foster care placement or adoption to be sustained. See Steven H. v Ariz Dept of Econ Sec., 173 P.3d 479 (AZ App. 2008)(

1.Exceptions - No cultural bias

a . In the Interest of M.S., 624 N.W.2d 678 (ND 2001)(qualified expert witness testimony not necessary in case where cultural bias not involved: Court also rules that clear and convincing evidence is the standard in determining whether remedial and rehabilitative services provided); State ex rel. Children's Services Div. v. Campbell, 122 Or. App. 371, 857 P.2d 888 (Or. App. 1993) (expert testimony not necessary in foster care placement when nature of neglect suffered is due to mental illness of mother and not cultural bias); Long v. State Department of Human Services, 527 So.2d 133 (Ala. Civ. App. 1988); State ex jygjygrel. Juvenile Dept. v. Tucker, 710 P.2d 793 (Or. App. 1985). A Michigan appellate court has expressly rejected this exception. See In re Elliott, 218 Mich. App. 196 (Mich. App. 1996)

2.Failure to object

A few courts have ruled that the failure of Indian parent to object to lack of qualified expert testimony at trial bars review of issue. In Interest of R.L.F., 437 N.W.2d 599 (Iowa App. 1989) ; In re Riva M., 235 Cal. App. 3d 403, 286 Cal. Rptr. 592 (Cal. App. 4 Dist. 1991); In the Matter of Inquiry into K.M.G. and J.G., 2002 Mont. Lexis 6 (2002)(parents' failure to object to questions to alleged expert witness bars appellate review).

3.Cases Finding Qualified Experts

a. In re Interest of C.W., 470 N.W.2d 105(Neb.1991) (psychologist with little experience working with Indian children qualified as expert).

b. In Interest of S.M., 508 N.W.2d 732 (Iowa App.1993) (social worker who worked with Indian families and who had training in Native cultures).

c. State ex rel. Juvenile Dept. v. Woodruff, 108 Or. App. 352, 816 P.2d.

d. In re L.N.W., 457 N.W.2d 17 (Iowa App. 1990) (social worker with 2 1/2 years of experience, half of cases, were Indian and Indian friends qualified); Cf., C.E.H. v. L.M.W., 837 S.W.2d 947 (Mo. App. W.D. 1992); In re Interest of D.S.P., 480 N.W.2d 234 (Wis. 1992),Matter of D.S., 577 N.E.2d 572 (Ind. 1991); Matter of L.F. and D.F., 880 P.2d 1365 (Mont. 1994); Matter of Baby Boy Doe, 902 P.2d 477(Idaho 1995).

e. In re Krystle D., 37 Cal. Rptr. 132, 30 Cal. App. 4 1778 (Cal. App. 6 Dist. 1994) (Court holds that fact that Q.E.W. testified sufficient even if those experts testified against termination).

f .In re Denice F. et al. , -A. 2d -, 199 5 WL 324789 (Me. 1995)

g. L.G. v. State of Alaska, 14 P.3d 946 (AK 2000)(social worker familiar with native american culture.)

h. Rachelle S. v. Dept of Economic Security, 958 P.2d 459,191 Ariz. 518 (Ariz. App. 1998)(Medical doctor in shaken baby case satisfies ICWA requirements.)

i. J.A. v. Alaska, 50 P.3d 395, Alaska 2002)(hypothetical questions to experts who reviewed file only and did not work with mother sufficient to support evidence by qualified expert witness. Court also holds that the State provided adequate remedial services to mother).

j. People In Interest of T.I. and T.I., 707 N.W.2d 826 (SD 2006)(State need not have QEW from each Tribe that the children have affiliation with and the ICWA director for one Tribe sufficiently met requirement).

k. Matter of Adoption of Sara J., 123 P.3d 1017 (AK 2005)(clinical psychologist QEW).

l. People in Interest of O.S., 701 NW2d 421 (SD 2005)(social worker with extensive experience working with Indian families and who had taken several ICWA trainings).

m. Matter of A.N., 106 P.3d 556 (Mont. 2005)(court allows expert to testify based solely on paper review of file without visiting with any of the parties

to the case. Court also finds that active efforts were made to prevent breakup of family).

n. Matter of T.H., 105 P.3d 354 (Okl. App. 2005)(member of Indian children's tribe not required to have educational qualifications for expert testimony).

o. Thomas H. v. State, 184 P.3d 9 (AK 2008)(psychologist's testimony that an Indian father had a antisocial personality disorder sufficed to show chance of emotional harm to children if parental rights were not terminated).

4.Cases Not Finding Q.E.W.

a.Matter of Welfare of B.W., 454 N.W.2d 437 (Minn. App. 1990) (Court-appointed psychologist not an expert under Minnesota's more restrictive guidelines).

b.Matter of Welfare of M.S.S., 465 N.W.2d 412 (Minn. App. 1991) (merely because social worker works with Indian families does not qualify her as an expert).

c.Matter of Custody of S.E.G., 521 N.W.2d 357 (Minn. 1994).

d. People in Interest of M.H., 691 N.W.2d 622 (SD 2005)(a lawyer professing general knowledge and experience practicing in tribal courts of Dakota tribes not expert on Lakota Tribes)

IV. FUNDING OF ICWA PROGRAMS

A.Introduction

New regulations, promulgated in the Federal Register, at Vol. 59, No. 9, at 2248, Jan. 13, 1994, remove the competitive nature of the award of Title II ICWA grants to Tribes. Non-tribal entities are still judged on a competitive basis.

B.Sources

1. ICWA - Title II - 25 U.S.C. SS 1931, 1932; 25 C.F.R. 23.25, as amended by Federal Register, Vol.59, No. 9 at 2248, Jan. 13, 1994. See Navajo Nation v. Hodel, 645 F.Supp. 825 (D. Ariz. 1986).

2. Title IV-B of Social Security Act - 42 U.S.C.628. TheAugust,1994 OIG report indicated that only 59 of 542 Tribes receive this funding. Title II ICWA grants can be used as match. 25 U.S.C. 1931(b).

3.Title IV-E of Social Security Act - 42 U.S.C. S670 et seq.

a. No direct funding - must be cooperative agreement under 25 U.S.C. 1919(a) and 42 U.S.C. SS672(a)(2).

b. Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985) (Alaska not required to make foster care payments to tribally licensed home absent cooperative agreement).

4.Title XX of Social Security Act - 42 U.S.C. 1397 et seq

V.RIGHT TO COUNSEL

A.Introduction

25 U.S.C. Sec.1912(b) mandates the appointment of counsel for parents or Indian custodian in a "removal, placement or termination proceeding". This appears broad enough to mandate the appointment of counsel in pre-adoptive and adoptive placement proceedings. This appears to include purely private disputes not involving a state, such as stepparent adoptions and intra-family squabbles.

B.Cases

1. Matter of J.W., 742 P.2d 1171 (Okla. App. 1987) (failure to appoint counsel is basis for reversal of trial court's action).

2. In re Interest of D.S.P., 458 N.W.2d 823, aff' 484N.W.2d234(Wis.1993)(ICWA does not require the appointment of guardian ad litem for incompetent Indian parent).

3. Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (counsel is not a due process right in termination proceeding).

4. V.D. v. State, 991 P.2d 214 (AK 1999)(State court should promptly appoint counsel in ICWA proceedings and delay may cause reversible harm.)

C.BIA Reimbursement 25 C.F.R. S23.13

VI.FEDERAL COURT LITIGATION:

A.Introduction

Federal court litigation reveals that most of the cases that seek review of a state court determination under the ICWA consider the state court judgments to have preclusive effect. Other federal court litigation involves conflicting state and tribal custody decrees or whether tribal courts have authority to hear a specific claim.

B.Cases: Federal Court Review of State Court Decisions

1.Mississippi Band of Choctaw Indians v. Holyfield. 490 U.S. 30 (1989)(exclusive tribal court jurisdiction where child considered to have reservation domicile)

2. Comanche Indian Tribe v. Hovis, 53 F.3d 298 (10th Cir. 1995)(Court reverses district court decision which had awarded custody of Indian child to Tribe, contrary to state court decision, on the basis that the Tribe was collaterally estopped from relitigating issue in federal court that it lost in state court under Section 1914.)

3.Morrow v. Winslow, 94 F.3d 1386 (10th Cir. 1996)(Natural father of Indian child barred by doctrine of abstention from invoking federal court jurisdiction to enjoin Oklahoma state court proceeding which declared that his consent to adoption was not necessary under Oklahoma law because he had abandoned child.)

4.Mowa Tribe of Oklahoma v. Lewis, 777 F.2d 587 (10th Cir. 1985, cert. denied 479 U.S. 872 (1986)(collateral review barred by doctrine of collateral estoppel under 28 U.S.C. 1738)

5.Kickapoo Tribe of Oklahoma v. Rader, 822 F.2d 1493 (10th Cir. 1987)(barred by res judicata)

6.Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 199l)(federal court has jurisdiction to hear tribal and individual causes of action that native villages have concurrent jurisdiction over Indian child custody proceedings in PL 280 jurisdiction); cf Matter of F.P., 843 P.2d 1214 (Alaska 1992)(holding native village did not have concurrent jurisdiction); Native Village of Nenana v. State, 722 P.2d 219 (Alaska 1986)(same).

7.Roman-Nose v. New Mexico Dept. of Human Resources, 967 F.2d 435 (10th Cir. 1992)(federal court has jurisdiction in termination of parental rights proceeding "to the extent" pro se mother alleges the State court violated either 25 U.S.C. 1911, 1912 or 1913)

8.Navaio Nation v. District Court, 624 F.Supp. 130, (D.Utah 1985), later related proceeding, In re Adoption of Halloway, 732 P.2d 962 (Utah 1986), aff'd, Navajo Nation v. District Court, 831 F.2d 929 (10th Cir. 1987)(barred by res judicata)

9.Fletcher v. State of Fla., 858 F.Supp. 169 (M.D.Fla. 1994)(damage claim under ICWA dismissed since ICWA provides only declaratory relief, not money damages)

10.Sitka Community Ass'n v. Perkins No. 185-018 (D.Alaska 1984) (unpublished)(tribes must exhaust state court remedies)

11. Doe. v. Mann, 415 F.3d 1038 (9th Cir. 2005)(Court holds that 1914 of ICWA is exception to Rooker-Feldman doctrine preventing federal courts from reconsidering state court interpretations of federal law. Court ultimately concludes that California can exercise jurisdiction over termination proceedings involving reservation-domiciled children because 1911 does not confer exclusive jurisdiction on tribal courts in PL 280 states unless they have gained retrocession of exclusive jurisdiction).

C.Cases: Federal Court Review of Child Custody Decisions

1.Shelifoe v. Dakota, 966 F.2d 1454 (6th Cir. 1992)(federal court lacks jurisdiction to review custody decision under tribal court jurisdiction)

2.Confederated Tribes v Superior Court, 945 F.2d 1138 (9th Cir. 1991)(federal court lacks jurisdiction to issue declaratory judgment where a tribe seeks reversal of interlocutory decision by state court which ruled that the tribal court was divested of jurisdiction over child custody dispute under PL 280)

3.In re Larch 872 F.2d 66 (4th Cir. 1989)(federal court has jurisdiction to address tribe's claim that state court interfered with tribal jurisdiction in not honoring tribal court custody order)

4.DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510 (8th Cir. 1989)(federal court has jurisdiction over non-Indian claim in divorce challenging tribal court's exercise of jurisdiction over claim)

5.Comanche Indian Tribe of Oklahoma v. Hovis, 847 F.Supp., 871 (W.D.OkI. 1994), reversed 53 F.3d 298 (10th Cir. 1995)(Federal court must grant comity to state court decision in ICWA case and cannot independently review state court decisions.)

6.LeBeau v. Dakota, 815 F.Supp. 1074 (W.D. Mich. 1993)(tribaI court jurisdiction waived by non-Indian grandmother who challenged non-Indian grandchild's placement by tribal court)

7.Sandman v. Dakota 816 F.Supp. 448 (W.D. Mich 1992), aff'd, 7 F.3d 234 (6th Cir. 1993)(federal court lacks jurisdiction to review tribal court's child custody determination)

8.Brown v. Rice 760 F.Supp. 1459 (D.Kan. 1991)(federal court has jurisdiction to resolve parents' claim that tribal court lacks jurisdiction where tribal law did not permit exercise of such jurisdiction even over ICWA component.

9.Johnson v. Frederick, 467 F.Supp. 956 (D.N.D. 1979)(in dicta court observes tribal court is responsible to determine best interest of Indian children and their supervision and those decisions not subject to review by federal court)

10.Native Village of Venetie v. Alaska, No. F86-0075 Civ Order dated November 23, 1994 (D. Alaska) (adoption decrees of the native courts of the Neets'aii Gwich'in tribe are entitled to full faith and credit from State of Alaska).

11. In Matter of Adoption of Erin G., No. S-11929 (Alaska Supreme Court August 4, 2006)(Court holds that the one-year state statute applies to motions under Section 1914 to challenge adoptions allegedly in violation of ICWA)

12. In re Enrique P., 709 N.W.2d 676 (Neb. App. 2006)(Court holds that denials of 1914 challenges are immediately appealable and the failure of the Court to articulate proper burden of persuasion is not grounds for setting aside adjudication).

VII.RECORD KEEPING REQUIREMENTS: DISCLOSURE

Section 1915(e) requires the state to keep a record of each adoptive placement of an Indian child which shall be made available upon the request of the Secretary or the Indian child's tribe. A copy of a state adoptive decree or order, along with other required information, must be provided to the Secretary under 1951(a). This information may be disclosed, subject to anonymity constraints, to the Indian child for tribal enrollment purposes pursuant to 1951(b).

A. Cases:

1.Matter of Adoption of Rebecca, 158 Misc.2d 644, 601 N.Y.S.2d 682 (Sort. 1993)(good cause to disclose adoption information under ICWA to establish tribal membership, but only to tribal administrator to protect rights of biological parents)

2.Matter of Hanson, 470 N.W.2d 669 (Mich. App. 1991) (good cause to inspect adoption information under ICWA to establish Indian ancestry, but disclose only to tribe)

3. Matter of Adoption of Mellinger, 672 A.2d 197, 288 N.J. Super 191 (N.J. App. 1996)(ICWA provision allowing adopted Indian child access to state court records preempts state confidentiality law.)

4.BIA Guidelines, G.2 Commentary, p. 67595.

5.Matter of Adoption of Linda J., 682 N.Y.S. 2d 565 (NY Family Court1999)(Court holds that Canadian Indian entitled to have her adoption records released to Canadian band under ICWA).

VIII.TRANSFER OF JURISDICTION:

A. Notice.

A tribe has a right to receive notice of involuntary child custody proceedings, including adoption proceedings. 25 U.S.C.1912. In the voluntary setting some Courts have held

that ICWA does not explicitly require notice and that notice is not therefore jurisdictional, especially when the parent requests anonymity. People in Interest of J.J., 454 N.W.2d 317 (S.D. 1990) However, it appears that several provisions of ICWA would be rendered meaningless if the tribe were not notified because a tribe is an interested party in child custody proceedings involving its tribal children so as to require notice and right to intervene. See, Matter of Baby Girl Doe, 865 P.2d 1090, 1095 (Mont. 1993); In re Kahlen W., 285 Cal.Rptr. 507, 511 (CalApp. 5 Dist. 1991); In re adoption of Lindsey C.. 280 Cal.Rptr. 194, 201 (CalApp. 1 Dist. 1991); Compare Catholic Social Services, Inc. v. Cook Inlet Tribal Council, 783 P.2d 1159 (Alaska 1989.)(tribal intervention rights granted in involuntary proceeding as expressly stated in ICWA, but not for voluntary termination); BIA Guidelines, 44 Fed. Reg. 67584, at 67586 (1979). In any event, to prevent reversible error, sufficient notice must be given. In the Interests of J.W., 498 N.W.2d 417 (Iowa 1993)(reversed termination of parental rights where notice to tribe did not advise of right to intervene.) State must give notice to two tribes where evidence that children were eligible in both tribes, People ex rel. DSS In Interest of C.H., 510 N.W.2d 119 (S.D. 1993)(state failed to given adequate notice under ICWA to tribe so remand for notice compliance); In re Desiree F., 83 Cal. App. 4th 460, 99 Cal. Rptr. 2d 688 (Cal. App. 5th Dist. 2000)(failure to give adequate notice and to permit intervention by Tribe reversible error); Adoption of Arnold, 20012 MASS APP. LEXIS 216 (Proceedings should not be vitiated by late discovery that children were Indian in light of Parties' failure to notify the Court earlier of Indian status); Family Independence Agency v. Maynard, 592 N.W.2d 751 (Mich. App. 1999); In re A.U., 141 Cal. App. 4th 326 (2006)(Failure of state agency to give notice to several Tribes after mother and relatives self-identified as Indian violates notice provision of ICWA.). A recent Nebraska case, In Interest of Walter W., ____NW2d ____14 Neb. App. 891 (2006) held that a non-Indian father has standing to appeal a lack of adequate notice to an Indian tribe under ICWA even though Tribe and Indian mother abandoned the argument. Court reversed a termination order because of defective notice to Yankton Sioux Tribe of termination proceedings even though Tribe in foster care proceeding indicated it did not object to termination. See also Matter of Dependency of T.L.G., 108 P.3d 156 (Wash App. 2005).

Several states, especially Michigan in a series of unpublished opinions, have held that defective notice should not vitiate the state court proceedings unless it is demonstrated that the child is Indian. These courts have taken the approach that rather than reverse a decision for lack of notice, the more appropriate remedy is to grant a conditional stay to a termination order pending notice to an Indian tribe. If the child is not Indian the stay shall be lifted and the termination order effective. See e.g. Matter of Jackson, 2001 Mich. App. LEXIS 2501 (2001); Matter of Bennett, 2001 Mich App. LEXIS 2341 (2001). These cases are representative of dozens of recent cases where parties have attempted to claim some Indian heritage as a manner of defending against termination proceedings in state courts. Michigan seems to be a state that will strictly enforce notice requirements of ICWA. See Matter of N.E.G.P., 245 Mich App. 126, 626 N.W.2d 921(Mich App. 2001)(Court erred in continuing with termination proceedings before notifying the Tribe of the child); See Matter of TM, 245 Mich. App. 181, 628 N.W.2d 570 (Mich. App. 2001)(state complied with notice requirements by notifying all potential tribes and BIA.)

California courts have also utilized this form of limited remands, In re I.G., 133 Cal. App. 4th 1246, 35 Cal. Rptr. 3d 427 (Cal. App. Ist Dist. 2006), In re Jonathan S., 129 Cal. App. 4th 334, 28 Cal. Rptr. 3d 495 4th Dist. Cal. 2005); In re Brooke C., 127 Cal. App. 4th 377, 25 Cal. Rptr. 3d 590 (2nd Dist. 2005), In re SM, 118 Cal. App. 4th 1108, 13 Cal. Rptr. 606 (4th Dist. 2004), and in In re Francisco W., 139 Cal. App 4th 695 (Cal. App. 4th 2006) the Court rejected the argument that this type of appellate review was violative of substantive due process because it did not permit the trial Court to consider mitigating factors that arise after the remand and avoids labeling the child a "legal orphan." See also In re Merrick V., 122 Cal. App. 4th 235 (Cal. App. 4th Dist, 2004); In re D.T., 113 Cal. App. 4th 1449(Cal. App. 3d Dist. 2003). Iowa recently joined this club of courts allowing limited remands to correct notice deficiencies. In Interest of R.E.K.F.,698 NW2d 147 (Iowa 2005).

Miscellaneous: In re custody of Sengstock, 477 N.W.2d 310 (Wis App. 1991) (tribe had identifiable and protectable interest, as described in UCCJA, to permit it to intervene in child custody proceeding and tribe successful, as a matter of comity, in dismissing state proceeding to give effect to tribal court order); Matter of Welfare of MSS, 936 P.2d 36 (Wash. App. 1997)(Court holds that notice sent to wrong administrative office of Tribe coupled with failure to wait the statutory ten days after notice received vitiated termination proceedings); In re Levi U., 78 Cal. App. 4th 191, 92 Cal. App. 2d 648 (Cal. App. 3d Dist. 2000)(State court not required to inquire further regarding Indian status of Tribe after BIA failed to respond to state court notice): In Interest of C.Y., 925 P.2d 447 (Kan. App. 1996)(Court holds that Tribal Court must decline to exercise jurisdiction or Court must make finding that there is good cause to contrary to refuse transfer); In re Marinna J., 90 Cal. App. 4th 731, 109 Cal. Rptr.2d 267 (Ca. App. 3d Dist. 2001)(failure of parents to object to lack of notice does not bar appellate review). Several courts have held that a state court must conduct a transfer hearing prior to transferring jurisdiction. See Ex Part CLJ, ____So.2d _____, Ala. App. June 23, 2006.

A California Court has recently noted that ICWA requires that proceedings not commence until at a minimum 10 days after the Tribe receives notice, not from the time notice was mailed to the Tribe. See In re S.C., 138 Cal. App 4th 396 (Cal. App. 3rd Dist. 2006). Although a rather obscure ICWA case, there is great attorney castigation in this case especially in the following description of the mother's opening brief:

> This is an appeal run amok. Not only does the appeal lack merit, the opening brief is a textbook example of what an appellate brief should not be.
>
> "In 76,235 words, rambling and ranting over the opening brief's 202 pages, appellant's counsel has managed to violate rules of court; ignore standards of review; misrepresent the record; base arguments on matters not in the record on appeal; fail to support arguments with any meaningful analysis and citation to authority; raise an issue that is not cognizable in an appeal by her client; unjustly challenge the integrity of the opposing party; make a contemptuous attack on the trial judge; and present claims of error in other ways that are contrary to common sense notions of effective appellate advocacy--for example, gratuitously and wrongly insulting her client's daughter (the minor in this case) by, among other

things, stating the girl's developmental disabilities make her "more akin to broccoli" and belittling her complaints of sexual molestation by characterizing them as various "versions of her story, worthy of the Goosebumps series for children, with which to titillate her audience."

B.Objection by Natural parent

Several Courts have recently reaffirmed that if a natural parent objects to a transfer of jurisdiction to tribal court, transfer is precluded. See Matter of Appeal of Maricopa County Juvenile Action No JD-6982, 922 P.2d 319 (Ariz. App. 1996)(Even though natural mother was schizophrenic represented by a guardian ad litem who consented to transfer, trial court erred in transferring because natural mother objected. Mother's acquiescence in placement on reservation not consent to transfer); In re Larissa G. 43 Cal. App. 4th 505, 51 Cal. Rptr. 2d 16 (Ca. App. 4th Dist.1996); In re A.E., 572 N.W. 2d 579 (Iowa 1997). But see Matter of Andrea Lynn M., 10 P.3d 191 (N.M. App. 2000)(father objected to transfer but case was nonetheless transferred. It appears that this Court may have ruled that the child's domicile was on reservation however); see also People in Interest of G.R.F., 569 N.W.2d 29 (SD 1998). A child through his guardian ad litem, however, does not have the authority to veto a transfer but instead must demonstrate good cause not to transfer. Michael J. v. Michael J., 7 P.3d 960 Ariz. App. 2000). Matter of Welfare of Child of T.T.B. and G.W., 710 N.W.2d 799 (Minn. App 2006)(Court overturns a denial of transfer on inconvenient forum grounds on ground that 400 miles was not inconvenient forum. Court applies abuse of discretion standard to transfer of jurisdiction decisions. The Minnesota Supreme Court has granted review of this case and the Tribal Judicial Institute assisted on the appellate brief for amicus tribes); People In Interest of T.I. and T.I., 707 N.W.2d 826 (SD 2006)(Court holds that trial court did not err when it denied a transfer of jurisdiction to Sisseton-Wahpeton Tribe because children were enrolled with another Tribe when proceedings were commenced and only became enrolled with SWO after appeal); Matter of Guardianship of JCD, 686 NW2d 647 (SD 2004)(Court erred in denying transfer of guardianship petition to tribal court); but see In Interest of D.M., 685 NW2d 768 (SD 2004)(Tribe's motion to transfer not timely and denial upheld).

C. Best Interests Standard

The ICWA contains statutory presumptions, which must be followed absent good cause to the contrary, articulating what is in the best interest of Indian children, parents and tribes. See 25 U.S.C. §§1902, 1911, 1915; Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989). It is presumed to be in their best interest (1) that a tribal court decide the future of an Indian child, Sec.1911; (2) that the Indian child be placed in a home, either temporarily or permanently, where his racial and cultural identity will be maintained, §1915; and (3) that the relationship between the Indian child and tribe be perpetuated, Holyfield supra; Matter of Baby Girl Doe, supra.

1.Procedural Cases: State's best Interest standard is not good cause:

a. People in interests of JLP, 870 P.2d 1252 (Colo.App. 1994) (adoption of State's best interests standard would defeat purpose underlying ICWA, therefore, State's standard cannot be considered).

b. Matter of Ashley Elizabeth R. 863 P.2d 451 (N.M.App. 1993) (State's best interest standard inapplicable when considering transfer of jurisdiction).

c. In Interest of Armell, 550 N.E.2d 1060 (Ill.App. 1990), Appeal denied , 555 N.E.2d 37 , cert. denied, 498 U.S. 940 (1990) (State's best-interest-of-the-child considerations cannot establish "good cause").

d.BIA Guidelines, C.3 Commentary, p. 67591

2. Procedural Cases: State's best interest standard is good cause:

a. In re Interest of C.W., 479 N.W.2d 105 (Neb. 1992)

b.Matter of Maricopa County Juvenile Action, 828 P.2d 1245 (Ariz.App. 1991)

c. Matter of T.S., 801 P.2d 77 (Mont. 1990), cert. denied, 500 U.S. 917 (1991)

d. Department of Social Services v. Coleman, 399 S.E.2d 773 (S.C. 1990)

e. People in Interest of J.J., 454 N.W.2d 317 (S.D. 1990)

3. Substantive cases: State's best interest standard is not good cause:

a. Adoption of M.T.S., 489 N.W.2d 285 (Minn.App. 1992) (ICWA preempts state's best-interest-of-the-child standard and, absent good cause to the contrary, requires placement of an Indian child with an Indian family)

b. Matter of Baby Girl Doe, 865 P.2d 1090 (Mont. 1993) (recognizing ICWA placement provisions achieve purpose of protecting best interests of Indian children by retaining connection to their tribes)

c. Matter of Custody of S.E.G., 521 N.W.2d 357 (Minn. 1994) (good cause to avoid placement preference of SS1915 should be based upon a finding of one or more of the factors described in BIA guidelines)

4. Substantive cases: State's best interest standard is good cause:

a. Matter of Adoption of F.H., 851 P.2d 1361 (Alaska 1993) (good cause to deviate from adoptive placement. preference shown by paternal preference for

adoption by non-Indians, bonding between non-Indian and child and the need for permanent placement).

b. Adoption of M. v. Navaio Nation, 832 P.2d 518 (Wash.App. 1992) (case was remanded for determination of whether good cause existed not to make preferential placement and best interest was a factor that would be considered on the discretion of the trial court).

c. See also, Adoption of N.P.S. 868 P.2d 934 (Alaska 1994) (good cause to deviate from adoptive placement preference proved by preponderance of the evidence to permit Caucasian to adopt Indian child over Indian maternal grandmother); see also In re A.E., 572 N.W. 2d 579 (Iowa 1997)(best interests of the child sufficient to deviate from placement preference provisions.)

VIII Burden of Proof Issues in Terminations and Foster Care Placements

The ICWA expressly contains two burdens of proof: for foster care placement, the standard is "clear and convincing' evidence, see Matter of LF. 880 P.2d 1365 (Mont. 1994); and for termination of parental rights, the standard is 'beyond a reasonable doubt" People in Interest of A.R.P., 519 N.W.2d 56 (S.D. 1994); In re L.N.W., 457 N.W.2d 17 (Iowa App. 1990); Matter of D.D.S. 869 P.2d 160 (Alaska 1994). Some courts have bifurcated a proceeding to apply different standards of proof depending on the evidence. In re Matthew Z., 80 Cal. App. 4th 545, 95 Cal. Rptr. 2d 343 (Cal. App. 4th Dist. 2000). In adoption proceedings in some states where a party asserts that the consent of the natural parent is not necessary because of abandonment or some other factor, ICWA seems to mandate a showing beyond a reasonable doubt in order to justify termination of the parental rights of the natural parent. . See In re H.M.O., 962 P.2d 1191 (Mont. 1998); In the Interest of M.S., 624 N.W.2d 678 (ND 2001)(state grounds must be demonstrated by clear and convincing evidence and federal grounds by evidence beyond reasonable doubt.)See J.J. v. Alaska, 38 P.3d 7 (Alaska 2001)(Court reverses termination of parental rights order because petitioner failed to demonstrate by evidence beyond reasonable doubt that continued care with mother would cause serious emotional harm). Matter of S.M.H., 103 P.3d 976 (Kan. App. 2005)(failure to cite to federal burden of persuasion under ICWA warrants reversal); but see Matter of M.R.G., 97 P.3d 1085 (Mont. 2004)(failure of Court to cite to ICWA burden of proof not grounds for reversal); Knoll v. K.B., 674 NW2d 273 (ND 2004)(clear and convincing burden applied to certain grounds for termination and ICWA standard applied to others).

In order to sustain a foster care placement under ICWA the petitioning party must demonstrate by clear and convincing evidence, supported by the testimony of a qualified expert witness, that the continued care or custody of the parent or Indian custodian would cause serious emotional or physical harm to a child and that active efforts have been provided to prevent the break-up of the family. Courts are all over the place on whether the burden of persuasion applies to the active efforts showing. The same things must be

demonstrated in order to terminate parental rights except it must be carried by evidence beyond a reasonable doubt.

1.Matter of J.R.B., 715 P2d 1170 (Alaska 1986)(reasonable doubt standard applies only to findings of serious harm to child resulting from continued parental custody, and it is not required for any additional findings mandated under state law)

2.In re Interests of D.S.P., 480 N.W.2d 234 (Wis. 1992) (dual burden of proof was appropriate in proceeding for involuntary termination of parental rights; since ICWA did not mandate using beyond a reasonable doubt standard for proof of abandonment under Wisconsin law, only ICWA's requirement for termination shall be governed by Act's standard of proof while additional state law safeguards should be governed by proof required under state law)

3.New York City DSS v Oscar C., 600 N.Y.S.2d 957 (A.D.2 Dept. 1993)(court applied dual burden of proof in child neglect proceeding: "preponderance of the evidence' standard of proof in its fact finding phase and "clear and convincing evidence' standard in dispositional phase)

4.Utah in Interest of SAE and KLE, 912 P.2d 1002 (Ut. App. 1996)(Court holds that state grounds for termination must still be shown by clear and convincing evidence).

5.A.H. v. Department of Social Services, 10 P.3d 1156 (AK. 2000(Court seems to utilize state standard of clear and convincing evidence to terminate notwithstanding the beyond a reasonable doubt standard in ICWA.)

6. In re J.A., 962 P.2d 173 (AK 1998)(probable cause standard applicable to emergency custody hearing involving Indian child.)

7. In re H.A.M., 961 P.2d 716 (Kan. App. 1998)(Court applies a clear and convincing standard to state grounds for termination and beyond a reasonable doubt for ICWA grounds.)

8. Family Independent Agency v. Dougherty, 599 N.W.2d 772 (Mich. App. 1999)(Court holds that a state agency need not provide remedial services to a parent convicted of sexual abuse because he was not part of family at time he committed offense.)

9. In Interest of Sabriena B., 9 Neb. App. 888 (Neb. App. 2001)(failure to properly plead all required showings under ICWA in termination proceeding is subject to dismissal in state court even if state shows all necessary elements.)

10. In re Barbara R., 137 Cal. App. 4th 941 (Cal. App 4th Dist. 2006)(In an interesting case involving a potential conflict of interest for a guardian ad litem who represented two siblings, one Indian and one non-Indian, the Court, over a vigorous dissent, holds that the GAL did not have a conflict of interest in recommending termination of parental rights of mother and adoption by non-Indian paternal grandparents. Court also upholds the findings of the Court in the adjudicatory hearing in the permanency planning hearing despite those findings being 11 months old)

11. Matter of L.M. H., 33 Kan . App. 424, 103 P.3d 976 (Kan. App. 2005)(Court must make detailed findings in accordance with ICWA in addition to state court findings- Failure to do so will result in reversal of termination order. Court also notes that there must be express findings regarding the qualified expert witness testimony).

12. Wilson W. v. State, 185 P.3d 94 (AK 2008)(State excused from providing active efforts in situation where father threatened bodily harm to social worker if she came to his house).

13. Maisy W. v. State Dept of Health and Social Services, 175 P.3d 1263 (AK 2008)(failure of mother to adhere to case service plans supported finding that active efforts had been made).

IX.INTERVENTION BY TRIBE: AT ANY POINT IN THE PROCEEDING

The ICWA expressly provides that "the Indian child's tribe shall have a right to intervene at any point in the proceeding." 25 U.S.C. 1911(c). See e.g., Matter of Guardianship of O.G.M., 808 P.2d 684 (0k]. 1991) (tribe permitted to intervene on eve of trial in guardianship action); People in Interest of J.J., 454 N.W.2d 317 (S.D. 1990) (tribe intervened into appellate proceeding); Matter of Begay, 765 P.2d 1178 (N.M.App. 1988) (Pueblo intervened into appellate proceeding); cf. State ex rel.Juvenile Department of Lame County v. Shuey, 850 P.2d 378 (Or.App. 1992) (ICWA preempts state law requiring groups to be represented by attorney when applied to tribe's attempt to intervene in ICWA proceeding); Compare In re Baby Girl A., 282 Cal.Rptr. 105 (Cal.App. 4 Dist. 1991) (ICWA did not give tribe automatic right to intervene in ancillary proceeding intended to assist in completing voluntary adoptive placement; however, ICWA did not preclude intervention and tribe's interest is great enough to intervene). One Court has held that former foster parents of an Indian child, however, have not standing to intervene in a termination and pre-adoptive placement proceeding. See In Interest of H.N.B. and A.J.B., 619 N.W.2d 340 (Iowa 2000). Relatives who meet the adoptive placement preference standards may however intervene to express their interest. See In Re. C.G.L. v. Bilyeu, 28 S.W.3d 502 (Mo. App. 2000); see also In re Matter of C.G.L., 28 S.W.3d 502; 2000 Mo. App. LEXIS 1518(Adoption reversed because family member not permitted to intervene. But see IN THE INTEREST OF H.N.B. and A.J.B., Minor Children, B.L.and C.L., Appellants., 619 N.W.2d 340; 2000 Iowa Sup. LEXIS 218 (Trial court did not err in denying request to intervene from former foster parents including the

father who was a Canadian Indian implying that the potential intervenor was not federally-recognized Indian.) Ressler v. C.B. and R.F., 707 NW2d 75 (ND 2006)(order granting right of Indian tribe to intervene in ICWA proceeding not immediately appealable); In re Baby Boy C., 805 N.Y.S. 2d 313 (NY App. 2005)(Although ICWA does not vest tribe with right of intervention in voluntary adoption proceeding it does have intervention rights under discretionary intervention standard).

IX. Adoption and Safe Families Act and ICWA

Courts have recently begun to examine whether the mandates of the ASFA and ICWA conflict. Several recent cases appear to side with ASFA, but the South Dakota Supreme Court has expressly rejected the argument that ASFA overrides ICWA requirements. See People in Interest of J.S.B., 691 N.W.2d 611 (SD 2005)(Court holds that ASFA does not relieve the State of obligation to provide active efforts to Indian parents in an attempt to rehabilitate them up to point of termination).

1. In the Matter of the Custody and Parental Rights of A.L.R., 2002 MT. 183 (2002) (Mother's failure to comply with family services plan sufficient cause to terminate her parental rights).

2. J.S. v. Alaska, 50 P.3d 388 (Alaska 2002)(father not entitled to remedial services when he was convicted of child sexual abuse. ASFA trumps ICWA).

3. Adoption of Arnold, 50 Mass. App. Ct 743, 741 N.E.2d 456 (Mass. App. 2001)(court did not err in terminating father's parental rights for sexual abuse notwithstanding lack of services to him).

4. In re Cari B., 327 Ill. App.3d 743, 763 N.E.2d 917 (Ill. App. 2002)(active efforts required to rehabilitate father even when he is incarcerated in another state. Burden of showing efforts is preponderance of evidence and was demonstrated in this case).

5. In re William G., 89 Cal. App. 4th 423, 107 Cal. Rptr.2d 436 (Ca. App 3d Dist. 2001)(father's argument that termination inappropriate because he was denied rehabilitative efforts rejected because he refused to avail himself of such efforts.)

6. Matter of T.H., 105 P.3d 354 (Okl. App. 2005)(Severe abuse inflicted upon children warranted waiving remedial services).

7. Dept of Health and Soc Services v. Native Village of Curyung, 151 P.3d 388 (AK 2008)(Court holds that an Indian village can bring a parens patriae suit on behalf of its members against state under 42 USC §1983 asserting rights

under the ASFA provisions protecting the right to have individualized case service plans prior to permanency decisions).

INDIAN CHILD WELFARE ACT

BJ Jones- Tribal Judicial Institute UND Law School

Chief Judge-Sisseton-Wahpeton Oyate and Prairie Island Indian Community

jones@law.und.edu

“Let us put our minds together and see what kind of life we can make for our children”

Sitting Bull- Hunkpapa

WHAT I'M GOING TO TALK ABOUT

- Some brainteasers on ICWA and the role of state courts in the implementation of the law
- Look at some emerging issues in Florida and other states that will affect native children
- A little on why ICWA was enacted
- Examine when ICWA applies and when it does not and jurisdictional provisions of ICWA
- Examine the procedures for transfer of jurisdiction to tribal courts and procedures when cases remain in state courts (including a discussion of the Adoption and Safe Families Act)
- Examine placement issues under ICWA

LET'S START WITH A QUIZ

- True or False (Hint- they are all false)
  - The Indian Child Welfare Act applies to custody disputes between a non-Indian and Indian parent
  - A state court can transfer a child custody proceeding to a tribal court even if a parent objects if the parent did not have custody of the child prior to removal?
  - State courts must notify Indian tribes of voluntary adoption proceedings involving their members in state courts?
  - Indian tribes must be represented by attorneys in state court ICWA cases.

Some emerging issues in ICWA arena

- Interplay between ICWA and Adoption and Safe Families Act
  - Are active efforts required to prevent breakup of family when an aggravated circumstance under federal or tribal law exists?
  - When a state case reaches permanency stage under ASFA is the proceeding too late to transfer to tribal court- recent Minnesota Supreme Court Case seems to indicate it is but ND decision in AB may not agree- See Matter of Welfare of T.T.B
  - Must a county seek termination of parental rights after child is in foster care a certain period of time? ASFA seems to say yes unless a compelling circumstance exists while ICWA silent on the subject
  - Is a permanency placement meeting a proceeding which Tribes are entitled to notice of if the permanency plan is changed?

Other emerging issues

- Impact of psychology on cases involving native children
  - Rates of mental illness among children have increased dramatically (bipolar disorder for example up five-fold in ten years), especially among native children
  - Many native children are medicated both in state and tribal custody
  - Mental illness now frequently being cited as basis for deviating from placement preferences of ICWA and grounds for denying transfers
  - Have psychologists become too important and over-utilized in the child protection system and the family courts overall?

A few more emerging issues

- Indian children in placements due to status or delinquent behavior
  - Although ICWA generally does not apply to placements based upon delinquent behavior more and more placements due to initial delinquent behavior are really foster care placements (recent case in South Dakota involving rape of foster care children in custody of state legislator and wife for example)
  - Should we be applying ICWA notice and evidentiary standards to these cases?
  - ICWA does apply to status offenses (minor consumption, etc) but are ICWA standards being applied?

Future of ICWA

- Indian children continue to be placed into substitute care at alarmingly disproportionate rates- Why?
  - ICWA is not a balm for the problems confronting native families- alcoholism, drug addiction, recovery from historical trauma- These problems need to be addressed at the tribal level but Tribes get little or no funding under ICWA and are not eligible for Title IV-E directly
  - Demographics of Indian communities- very young populations with the caretakers already exhausted in certain situations

PURPOSES OF ICWA

- Prevent the unwarranted removal of Indian children from their families and Tribes because of cultural bias or ignorance
- Assure that children who were removed maintain affiliation with their culture and Tribe
- Maximize tribal decision-making regarding Indian children

WHY ICWA

- 7 Generations of Eroding Indian Families and Indian Culture-Attempts to assimilate Indian children in order to “save” them
- Devastating impact upon the Indian family-Loss of language, child’s sense of her role in her extended family, spirituality, customs and traditions
- Congress concluded that attempts at assimilation had harmed Indian families, not helped them-Many children in substitute care, adoptions to Non-Indians very common

HOW WAS ASSIMILATION ATTEMPTED

- Upon the children:
- It is admitted by most people that the adult savage is not susceptible to the influence of civilization, and we must therefore turn to his children, that they might be taught how to abandon the pathway of barbarism and walk with a sure step along the pleasant highway of Christian civilization .... They must be withdrawn, in their tender years, entirely from the camp and taught to eat, to sleep, to dress, to play, to work and to think after the manner of the white man.

- See Comm'n Ind. Aff. Ann. Rep., H.R. Exec. Doc. No. 50-1, at XIX (1888).

BOARDING SCHOOLS

- The children were usually kept at boarding school for eight years during which time they were not permitted to see their parents, relatives or friends. Anything Indian-dress, language, religious practices, even outlook on life ... was uncompromisingly prohibited. Ostensibly educated, articulate in the English language, wearing store-bought clothes, and with their hair short and their emotionalism toned down, the boarding school graduates were sent out either to make their way in a white world that did not want them, or to return to a reservation to which they were now foreign.

- Farb, supra note 41, at 257-59.

BIA started as part of the War Department

EFFECTS OF ASSIMILATION

- Threat to survival of Indian tribes and their unique values and traditions- 25 to 30% of all Indian children in some states in foster care
- Substantial number of Indian children raised in non-Indian homes and institutions-Psychological problems more abundant- 1 out of 4 Indian children under 1 in Minnesota adopted out to non-Indians
- Lost Bird syndrome-Indian children seeking some cultural identity
- Cultural shame-Indian parents not wishing to have their children in tribal homes
- Indian families in upheaval-Abnormal became accepted

PROBLEMS WITH ICWA IMPLEMENTATION

- Many do not accept premise that cultural identity is a fundamental need of a child, especially when that value is in conflict with perceived psychological and physical needs of the child
- Problems with defining a culture, when that culture has been so degraded
- Stereotypes regarding native values and traditions-Killing the White Man’s Indian

TYPES OF PROCEEDINGS ICWA APPLIES TO

- Abused and neglected Child
- Child In need of supervision or emotionally disturbed
- Status offenses (truant,unruly,incorrigible, alcohol offenses)
- Intrafamily Disputes
- Stepparent Adoptions
- Termination Proceedings
- Adoptions (Public and Private)

DOES NOT APPLY

- Custody Disputes Between Parents
- Delinquency proceedings (Unless termination is sought or basis for petition is act which if committed by adult not crime)
- Paternity and Child Support
- Voluntary Placements Where Child Can Be Regained Upon Demand
- Protection Orders

WHO IS AN INDIAN CHILD

- Unmarried Child Under 18
- Member of Federally-Recognized Tribe, or
- Eligible for Membership and Biological Parent is Member of Federally-Recognized Tribe
- Canadian Tribes Not Tribes under ICWA

HOW TRIBES DETERMINE MEMBERSHIP

- Remember that membership in a Tribe may differ from enrolment in a Tribe, especially with Tribes that determine membership based upon lineal descendancy and not some blood quantum (Cherokee Nation of Oklahoma is an example)
- The best evidence of membership or eligibility for membership is a tribal determination or tribal court determination- Such determinations are conclusive on state courts and subject to full faith and credit under 25 USC §1911(d)

WAYS TRIBES DETERMINE MEMBERSHIP

- Blood quantum- typical BQ is 1/4th, but how this is determined varies from Tribe to Tribe
  - Example- Standing Rock Sioux Tribal Constitution requires child to be 1/4 Standing Rock blood to be a member- Tribe does not consolidate other Indian blood, not even blood from other Sioux Tribes
  - Other Tribes, such as the Turtle Mountain Band of Chippewa, consolidates all Indian blood including non-Chippewa blood

EXAMPLES OF JUDICIAL DISTORTION OF ICWA

- Existing Indian Family Exception to ICWA application-Indians must be real Indians before ICWA applies
- Some state courts have held that the Indian Child Welfare Act should not apply to a child custody proceeding where an Indian child is not being removed from an “existing Indian family”

Florida’s consideration

- Florida has never considered the issue so it may be raised one day in the State
- Florida has not adopted a state law that repudiates the exception

JURISDICTIONAL PROVISIONS OF ICWA

- 25 USC §1911
  - 1911(a)- In non PL 280 states Tribe has exclusive jurisdiction over reservation-domiciled Indian children and wards of tribal courts
  - A ward of a tribal court is a child who is currently subject to the jurisdiction of a tribal court in a child custody proceeding or who was explicitly designated as a ward by the Tribal Court in a previous proceeding
  - Emergency jurisdiction under 1922- State court may exercise emergency jurisdiction over Indian child domiciled on reservation, but temporarily off, or a ward of Court, in emergency situations- State court must immediately restore jurisdiction to tribal court after emergency abates (No transfer motion required)
  - Transfer jurisdiction- §1911(b)-Tribe, Indian parent, or custodian can seek transfer to tribal court of a foster care placement proceeding or termination of parental rights proceeding (technically does not permit transfer of pre-adoptive and adoptive placements but some states permit this)

Mississippi Band of Choctaw Indians v. Holyfield

- Reservation-domiciled Indian parents go off reservation to give birth and place children for adoption
- Mississippi Supreme Court held that children were not subject to ICWA and parents could place the children for adoption without interference by Tribe
- Court holds that domicile must have a uniform definition nationwide or purposes of ICWA would be defeated
- Children assume domicile of parents and the parents' domicile here was on reservation

TRANSFER JURISDICTION

- 25 USC 1911(b)- In foster care placement or termination of parental rights proceeding state court, absent good cause to the contrary, shall transfer proceeding to tribal court, absent objection by parent. Transfer subject to declination by tribal court
- Supreme Court in Holyfield refers to this as presumptive tribal court jurisdiction

BURDEN OF PROOF

- A party objecting to a transfer of jurisdiction has the burden of proving that good cause exists to deny a transfer of jurisdiction-Most common burden of persuasion is clear and convincing evidence

PARENTAL OBJECTION

- Seems to be an absolute veto right in parent- See Matter of Appeal of Maricopa County Juvenile Action No JD-6982, 922 P.2d 319 (Ariz. App. 1996)(Court holds that schizophrenic incompetent mother can veto transfer to tribal court)
- Note that definition of parent does not include non-Indian adoptive parent but does include Indian adoptive parent
- Parent under ICWA includes father of child born out of wedlock if the father has acknowledged paternity or court has adjudicated paternity
- Some state courts have used the objection of parent who voluntarily terminated parental rights as basis for denying transfer

GOOD CAUSE TO DENY A TRANSFER OF JURISDICTION

- Some state courts have adopted a “best interest of the child”standard in deciding transfer issues- These courts have decided that the state court has the right to determine whether the proposed placement by the Tribe is in the child’s best interest or whether removing the child from his present placement is in the child’s best interest
- North Dakota has rejected the “best interest of the child standard” for denying transfer in Matter of A.B.; South Dakota Supreme Court adopted it in Interest of JJ and Minnesota courts have never adopted this standard nor rejected it

PROCEDURE ON TRANSFER

- Once the State court transfers jurisdiction and dismisses the case the child goes out of state or county custody so Tribe must be prepared with a placement
- Oftentimes the State or County will also terminate foster care subsidy and medical assistance upon transfer
- Nothing in ICWA prevents Tribal Court from keeping child in legal custody of state or county after transfer- For example when all family live in urban area far from reservation community Tribal Court may take jurisdiction but leave child in legal custody of state or county Child Protection Program

EFFECT OF TRANSFER

- Transfer is a shifting of legal jurisdiction and does not necessarily entail a change of placement for the child- Many tribes may transfer jurisdiction but leave a child in the legal custody of the State or County child welfare agency

BIA GUIDELINES FOR DENYING TRANSFER

- Tribe does not have a tribal court or the tribal court declines to accept jurisdiction
- Tribe need not have a formal court system- even the Tribal Council may act as a court
- Tribe or parent should always confer with the Court to make sure that the Tribal Court will accept jurisdiction over a transfer

Proceeding at an advanced stage and motion is not timely

- This BIA ground permits the State court to deny a transfer made, for example, on the eve of a termination of parental rights trial
- Two elements to this- proceedings are at advanced stage and the motion to transfer is not timely- States differ on what is timely
- ND Supreme Court in AB held that in determining this issue must look at foster care placement and termination proceedings as discrete proceedings

Child Over 12 Objects

- This basis for denial of transfer was specifically rejected by Congress but BIA threw it into the BIA Guidelines
- Usually raised by GAL
- Creates some problems when there are several children and this is used to deny transfer for one child but the other children are transferred- Tribe may not want to separate children

INCONVENIENT FORUM

- Usually reserved for situation where tribal court is situated far away from where the child resides and where most witnesses reside
- For example, child lives in California and is member of Spirit Lake Band California court may find that transfer to tribal court would create an inconvenient forum
- Way to respond to this objection is for tribal court to agree to conduct proceedings at site of most witnesses or child resides

RIGHT TO NOTICE OF PROCEEDINGS

- 1912(a) gives Tribes the right to notice of any “involuntary” proceeding involving Indian child in state court- Some states have held that there is no right to notice in voluntary proceedings- Notice is triggered when the state court or social services agency has any reason to believe child may be Indian
- However, under Minnesota state law, the tribal social services agency is entitled to notice, see Minn. Stat. 260.765, subdivision (2) in voluntary proceedings

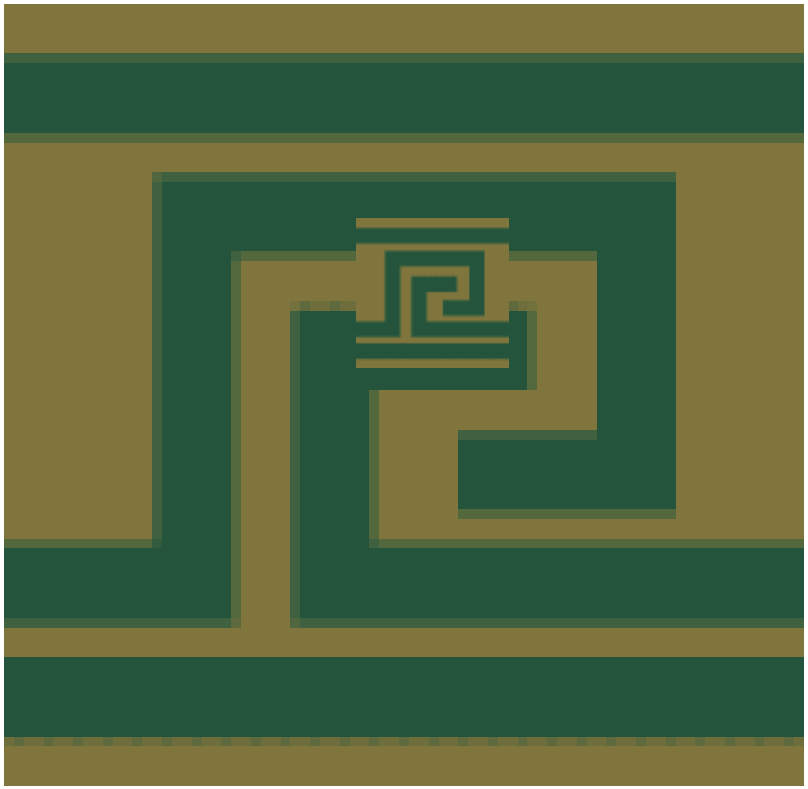
TYPE OF NOTICE REQUIRED

- Registered mail, return receipt requested, to Tribe, parent and custodian (note that some state laws require personal service on parents and this would be required)
- Notice must be at least 10 days before any foster care placement or termination of parental rights proceeding- This requirement does not prevent a state court from conducting a 48 hr or shelter care hearing (hearing to determine if there is cause for the emergency removal of an Indian child
- Who to notify- 25 CFR gives tribal contacts for ICWA notices

Intervention rights under ICWA

- §1911(c) of ICWA gives Tribe, Indian custodian or parent right to intervene in foster care placement or termination proceeding (Why not adoptions)?
- Seems to apply to voluntary placements also
- Type of intervention is as of right and not permissive- Some Courts have permitted intervention even on appeal
- ND Supreme Court has held that order granting right of Tribe to intervene is not immediately appealable

Right to counsel



- Indigent parent or Indian custodian entitled to court-appointed counsel in “any case.”
- Indigent parent already entitled to counsel in most states, but extending to Indian custodian is an expansion of rights
- If state law does not mandate appointment of counsel state or county can apply to BIA for reimbursement

WHAT DOES A PARTY HAVE TO DEMONSTRATE TO GAIN AN INVOLUNTARY FOSTER CARE PLACEMENT OF AN INDIAN CHILD

- ICWA Requirements: Clear and convincing evidence that:
  - Continued custody of child with parent or Indian custodian will result in serious emotional or physical harm to child
  - Active efforts were made to provide remedial and rehabilitative services to prevent the removal of the child and the efforts were unsuccessful

  These showings must be supported by the testimony of a qualified expert witness,

Look though to state law for possible additional requirements- Foster care placements

- Reasonable efforts were made to prevent removal of child
- Out of home placement least restrictive alternative

What does a party have to demonstrate in order to gain an involuntary termination of parental rights

- ICWA requirements: Evidence beyond a reasonable doubt that:
  - Continued custody of child with parent or Indian custodian will result in serious emotional or physical harm to child
  - Active efforts were made to provide remedial and rehabilitative services to prevent the removal of the child and the efforts were unsuccessful

  These showings must be supported by the testimony of a qualified expert witness- But see MS case

ADDITIONAL STATE LAW REQUIREMENTS FOR TERMINATIONS

- Look to state law for burden of persuasion (some may only require clear and convincing evidence)
  - Reasonable efforts were provided to parent to prevent termination but efforts were unsuccessful
  - Least restrictive alternative
  - Best interest of the child

ACTIVE VS. REASONABLE EFFORTS

- Active efforts
  - Culturally appropriate treatment services
  - Transport to required programs (parenting classes, counseling, etc)
  - Referral to tribal elders for services
- Reasonable efforts
  - Typical AA treatment regimen
  - Provide list of required parenting and counseling sessions

WHO IS A QUALIFIED EXPERT WITNESS

- Basically, two questions are involved, First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents by persuaded to modify this conduct?
- The party presenting an expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on these questions that are substantially more reliable than judgments that would be made by non-experts.

- BIA Guidelines, D.4 Commentary, at 67593.

TYPES OF FOLKS THAT MAY QUALIFY

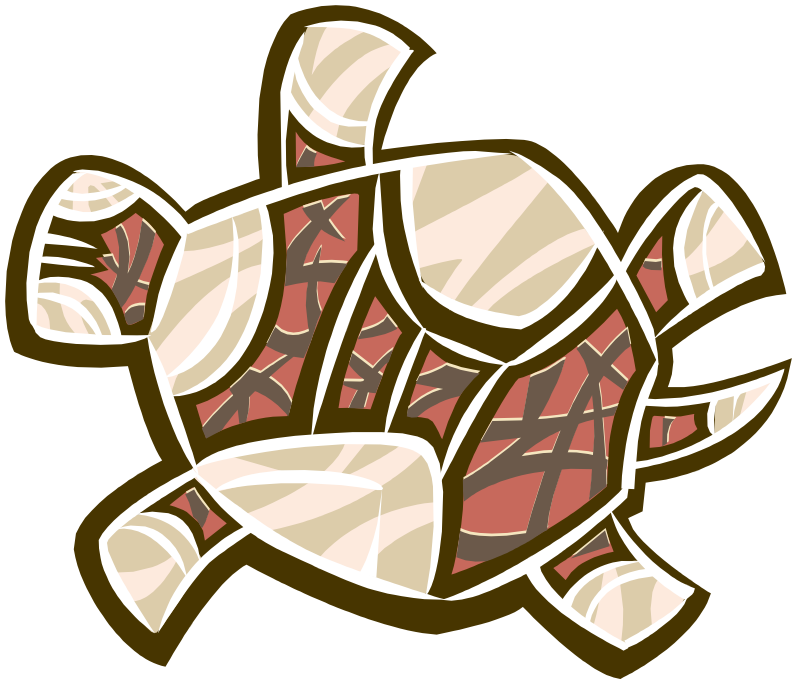
- (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
- (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indian, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.
- (iii)A professional person having substantial education and experience in the area of his or her specialty.

- BIA Guidelines, D.4, at 67593.

EXCEPTIONS TO QEW REQUIREMENT

- In the Interest of M.S., 624 N.W.2d 678 (ND 2001)(qualified expert witness testimony not necessary in case where cultural bias not involved)
- Not clear what this means as it is unlikely that a petition would be filed alleging termination based upon a person's race or culture
- Abandonment not susceptible to cultural biases?

In Interest of MH, 691 N.W.2d 622 (SD 2005)



- Issue is whether an attorney who served as prosecutor for one Tribe and represented another in ICWA cases was a QEW for a Tribe he did not have experience with
- Court seems to say generic expertise not sufficient- Must have experience with particular Tribe

The Adoptions and Safe Families Act (1997)

Purpose: to remedy chronic problems with the child welfare system

Brief history of child protection and family protection initiatives

ASFA amended the federal foster care law Titles IV-B and IV-E of the Social Security Act

All states passed legislation in order to be in compliance with ASFA

Made safety and permanency the primary focus of the law

The ASFA Regulations

U.S. Department of Health and Human Services (HHS) issued the Final Rule on January 25, 2000, and the regulations went into effect on March 27, 2000.

- **Represent a shift in focus from an emphasis on case file documentation to a more outcome-driven approach where programs are measured according to actual results.**
- **Incorporate provisions of the Multi-Ethnic Placement Act**
- **States are granted sufficient flexibility to address deficiencies, and to develop and implement a program improvement plan.**

Time Periods

2 different starting points in defining time periods:

(1) Actual Removal

(date the child is removed from the home)

(2) Foster Care Entry

defined as the *earlier* of:

- the date the court found the child neglected or abused; or
- 60 days after the child's actual removal.

Time Periods

Requirement	Deadline	Starting Date
Case Plan	**60 days**	**Actual Removal**
Reasonable Efforts to Prevent Removal	**60 days**	**Actual Removal**
Six-Month Periodic Review	**6 months**	**Foster Care Entry**
Permanency Hearing	**12 months**	**Foster Care Entry**
Reas Efforts to Finalize Permanency Plan	**12 months**	**Foster Care Entry**
Mandatory Termination Petition Filing	**15 of the last 22 months**	**Foster Care Entry**

ASFA REQUIREMENTS

Termination Petition must be filed when

- **Child in foster care 15 of the most recent 22 months**
- **Court has adjudicated child to be abandoned**
- **Court has waived duty to provide reasonable efforts to reunify**
- Exceptions:
- **Child living with a relative**
- **Agency has failed to provide services**
- **Compelling Reasons**

REASONABLE EFFORTS TO REUNITE FAMILY NOT REQUIRED UNDER ASFA

- *Mandatory*
- 1. The parent or guardian has committed the murder of another child (as that term is defined at 18 USC 1111(a))) of that parent or guardian;
- 2. The parent or guardian has committed voluntary manslaughter of another child (as that term is defined at 18 USC 1112(a)) of that parent or guardian;
- 3. The parent or guardian has aided, abetted, attempted, conspired or solicited to commit murder or voluntary manslaughter of a child of that parent or guardian;
- 4. The parent or guardian has committed a felony assault against the child or another child of the parent or guardian that resulted in serious bodily injury to the child;
- 5. The parent or guardian's parental or custodial rights over a sibling to that child have been involuntarily terminated by the Tribal Court or another court with jurisdiction over the sibling;

Optional aggravated circumstances

- 42 U.S.C. 671(a)(15)(D) mandates that a State need not provide reasonable efforts in the following circumstances:
- (i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

ICWA: Active Efforts

The Indian Child Welfare Act, 25 U.S.C. § 1912(d)

- Efforts to reunite Indian families before termination or foster care proceedings
- "(d)Remedial services and rehabilitative programs; preventive measures"

Must satisfy the court that there have been Active Efforts:

- to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and
- must show that these efforts have proved unsuccessful.
- Not much guidance in the legislative history to explain Congress' intent in this language.

BIA GUIDELINES ON ACTIVE EFFORTS

1979 BIA Guidelines interpreting ICWA

- provide little assistance on the active efforts issue
- provide some guidance on culturally appropriate remedial and rehabilitative programs:

- **D.2. Efforts to Alleviate Need To Remove Child From Parents or Indian Custodians**
- <u>These efforts:</u>
- shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe.
- shall also involve and use the available resources of the extended family, the tribe, Indian social services and individual Indian care givers.

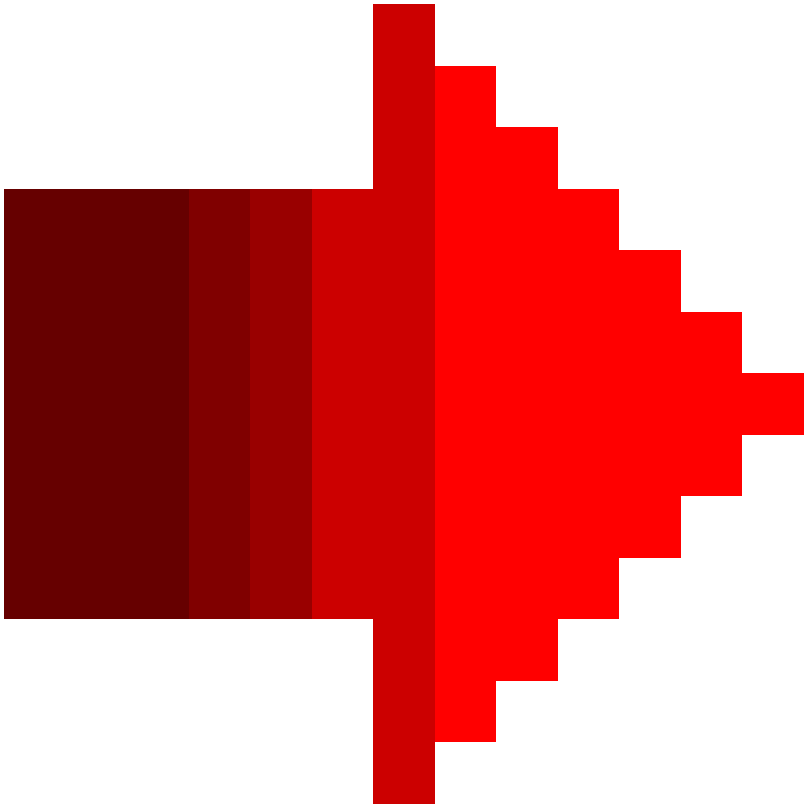
ICWA VS. ASFA

- ASFA makes no mention in the statute itself or ICWA legislative history how the two statutes should interact in the event of a conflict.
- rules of statutory construction do not necessarily help
- there are two potentially conflicting principles of statutory construction
- principal 1: more recent statute (ASFA) controls in the event of a conflict
- principal 2: more specific statute (ICWA) controls
- yet another statute states that statutes should be interpreted where reasonable so as to avoid conflicts

SOME RECENT CASES

- Matter of JSB, 691 NW2d 611 (SD 2005)(lower court had found that active efforts need not be provided to rehabilitate father because of prior adjudications and his chronic drug and alcohol abuse)
  - Court held that ASFA does not rescind requirement of active efforts
  - Court seems to suggest that no provisions of ICWA overruled by ASFA

CONTRARY OPINION



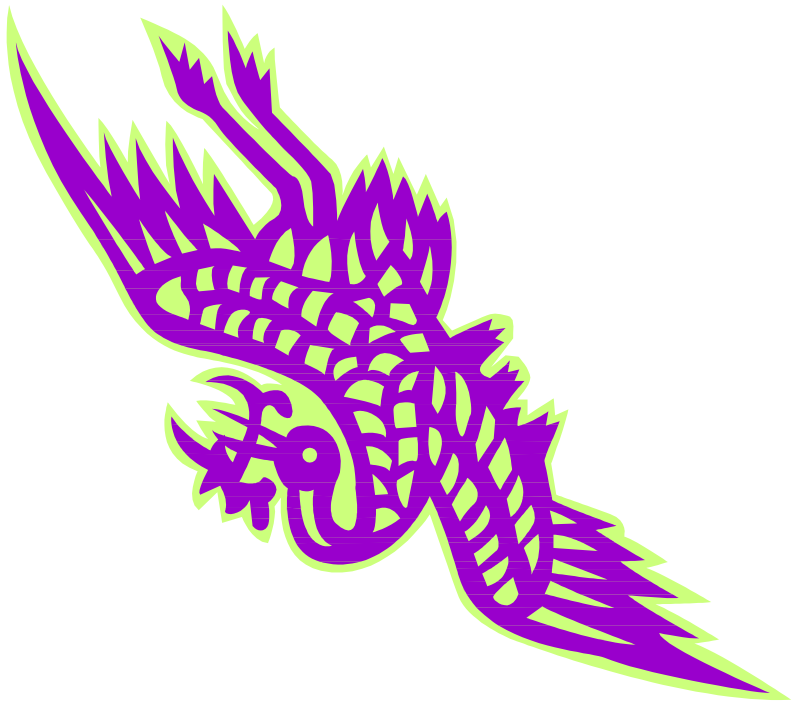
J.S. v. Alaska, 50 P.3d 388 (Alaska 2002)(father not entitled to remedial services when he was convicted of child sexual abuse. ASFA trumps ICWA).

PLACEMENT PROVISIONS OF ICWA- SECTION 1915

- Called by the US Supreme Court in Holyfield the "most important substantive requirements imposed upon state courts" are the placement preferences expressed in section 1915 of ICWA. Holyfield, at 36.
- Purpose of the placement requirements of ICWA are to assure placements of Indian children in foster care and adoptive care in homes that closely approximate their family and maintain their tribal ties, or in some cases to initiate their tribal ties

WATCH THE EXCEPTIONS TO PLACEMENT PREFERENCES

- Just as some state courts have failed to apply ICWA to Indian children not being removed from “existing Indian families”, some courts have similarly held that placement preferences of ICWA do not apply when Indian child has not resided in an Indian family- Matter of Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988), cert denied, 490 U.S.1069 (1989)



GENERAL RULES- FOSTER CARE PLACEMENTS- §1915

- In the absence of good cause to deviate, a state court shall place an Indian child in a foster care placement that:
  - Is the least restrictive setting
  - Most approximates his family
  - Meets his special needs, if any
  - Is in reasonable proximity to his home

GENERAL RULES- FOSTER CARE PLACEMENTS- §1915

- In the absence of good cause to deviate, a state court shall place an Indian child in a foster care placement that:
  - Is the least restrictive setting
  - Most approximates his family
  - Meets his special needs, if any
  - Is in reasonable proximity to his home

FOSTER CARE PLACEMENTS, IN ORDER OF PREFERENCE

- Member of the child's extended family (this includes non-Indian family members)
- A tribally-licensed foster home
- An Indian foster home licensed by non-tribal agency
- An institution or home that has been licensed by a Tribe and can meet the child's needs

Some observations

- Tribe can alter the placement preferences by resolution- . In re Guardianship of Q.G.M., 808 P.2d 684 (Okla. 1991)
- Probably the most violated section of ICWA
  - Tribal licenses do not equate to foster care payments
  - Because of liability issues some placements can only be approved after exte3nsive investigations
  - Placements impacted by Central Registries

When Placement Preferences Conflict with State Laws

- In re Jullian B., 82 Cal. App. 4th 1337, 99 Cal. Rptr. 2d 241 (Cal. App. 4th Dist. 2000)(State law requirement that adoptive placement not have criminal record does not supersede placement preference provisions of ICWA and state required to seek waiver in order to comply with ICWA.)
- In re Brandon M., 1997 Cal. App. Lexis 373 (Ca. App. 1st Dist. 1997)(Court holds that California's de facto parent statute, which gives a non-parent of a child preferential treatment under the law is not superseded by ICWA in a case where court places Indian children with non-Indian former stepparent)

VOLUNTARY PLACEMENTS UNDER ICWA

- Not only was Congress concerned about the removal of Indian children from their families against their wishes, but there was an attempt to regulate “voluntary” placements of Indian children
- It is in the area of voluntary placements where the respective wishes of parents and Tribes may conflict
- Who should speak for a child when a parent wishes to place the child for adoption- the parent or the Tribe?

PARENT-TRIBAL CONFLICTS IN ICWA

- Notice to Tribe- Congress mandates notice in involuntary placements but does not in voluntary proceedings- Parental rights prevail
- Transfer of jurisdiction- Parent has absolute veto rights- Parental rights prevail
- Right to dictate placement- Placement preferences apply in voluntary placements but parental preference can be used as a bias to deviate from preferences- Neutral perspective

ADOPTIVE PLACEMENT PREFERENCES

- An extended family member
- Other members of the Indian child's tribe
- Other Indian families, including single parent households (latter part added by BIA guidelines)

GOOD CAUSE TO DEVIATE

- For both foster care placements and adoptive placements a state court may not comply with the placement preferences if good cause is established
- Burden of proof is upon party requesting deviation and the Courts vary on the standard (Minnesota- clear and convincing evidence, Alaska- preponderance of the evidence)
- Some courts have held that state law may give good cause to deviate also- For example de facto parent statutes

BIA GUIDELINES- GOOD CAUSE EXAMPLES

- Request of biological parents or parent
- Request for anonymity of parent and whether compliance would violate that request
- Request of child old enough to state preference (twelve is probably the standard because it is the standard for objecting to transfers)
- Extraordinary emotional or physical needs of child as established by testimony of qualified expert witness
- Inability to find homes that comply after diligent nationwide search

Voluntary foster care placements

- Governed by §1913
  - Consent must be executed in writing before Court of competent jurisdiction (tribal if on-reservation, state if off-reservation)
  - Presiding Judge must certify that the consequences were explained to the parent in a language he/she understands
  - Cannot be executed prior to child being 10 days old
  - Can be withdrawn at any time and the law requires the child to be returned upon demand (no best interest analysis)

Some observations about voluntary foster care placements

- Query- If ICWA only applies to foster care placements where the child cannot be regained upon demand, and §1913 requires a child to be returned upon demand, can a party argue that a voluntary foster care placement is not covered by ICWA?
- Good example of mental gymnastics but probably not impressive to most judges
- If a party who gains a voluntary placement of an Indian child refuses to return the child upon demand, ICWA seems to bar that party from petitioning a Court for an involuntary placement order under §1920
- §1920 routinely ignored by most state courts who will use voluntary placements as evidence of neglect of a child

VOLUNTARY CONSENTS TO TERMINATION OR ADOPTION

- Governed by §1913
  - Consent must be executed in writing before Court of competent jurisdiction (tribal if on-reservation, state if off-reservation)
  - Presiding Judge must certify that the consequences were explained to the parent in a language he/she understands
  - Cannot be executed prior to child being 10 days old
  - Can be revoked and child returned upon demand, but revocation must occur prior to order terminating parental rights or permitting adoption takes place.