SECTION 4 THE INDIAN CHILD WELFARE ACT

June 2018

The Indian Child Welfare Act of 1978 (ICWA) imposes special standards and requirements when a child welfare agency seeks to intervene to protect an "Indian child."[1] This statutory term is used in lieu of Native American child where necessary for legal accuracy , This federal law protects not only eligible Native Americanchildren, but their families and tribes.[2]

The U.S. Supreme Court has only issued two opinions addressing ICWA, the first in 1989 and the second, in June, 2013. In the most recent case, *Adoptive Couple v. Baby Girl* the Court interpreted ICWA narrowly, restricting the rights of a parent who has never had custody of an Indian child and limiting the circumstances when the placement preferences apply.[3]

Controversy surrounding the *Baby Girl* decision spurred changes in how ICWA is construed. In 2016, the Bureau of Indian Affairs ("BIA") issued new Guidelines for Implementing the Indian Child Welfare Act. ("Guidelines"). These Guidelines are not binding, but Texas courts have relied on the Guidelines in interpreting ICWA.[4] Regulations interpreting ICWA, described as the "minimum federal standards" for ICWA compliance,[5] are binding.

Authority

Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-63.
25 C.F.R. Part 23
Guidelines for Implementing the Indian Child Welfare Act. ("Guidelines")[6]

A case law summary follows this article.

[1] 25 U.S.C. §1903(4).
[2] 25 U.S.C. §1902.
[3] *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).
[4] *In re V.L.R.*, 507 S.W.3d 788 (Tex. App. — El Paso, Nov. 18, 2015, no pet.).
[5] 25 C.F.R. §23.106(a).
[6] A compilation of the Guidelines and regulations is available in the Practice Guide, SECTION 13, TOOLS, and Indian Child Welfare Act.

Common Misconceptions

Despite the fact that the ICWA was enacted 40 years ago, misconceptions that undermine compliance with the law persist. The following statements are repeated with some frequency, but each is *false*:

- If the tribe does not intervene, ICWA does not apply;
- If the parent or grandparent does not have a membership card, ICWA does not apply;
- If the tribe fails to respond to notice, ICWA does not apply;
- If the Native American blood quantum of the child is low, ICWA does not apply and
- If a child's Native American relative is a distant one, ICWA does not apply.

In each of these circumstances, more information is necessary to determine whether ICWA applies.

When Does ICWA Apply?

ICWA applies to any "child custody proceeding" involving an "Indian child," if the court "knows or has reason to know that an Indian child is involved."[7] Virtually all child protection suits are potentially subject to ICWA, including a suit seeking:

- Foster care placement,
- Termination of parental rights,
- Pre-adoptive placement or
- An adoptive placement.

The regulations clarify ICWA applies to a voluntary proceeding that "could prohibit the parent or Indian custodian from regaining custody of the child…."[8] This does not include voluntary placement made without threat of removal by a state agency, if a parent or Indian custodian may regain custody on demand.[9] If a parent or Indian custodian consents to voluntary foster care placement, that consent can be withdrawn at any time by filing a written document or testifying in court.[10]

ICWA does not apply to a status offense, unless the proceeding results in the need for out of home care and does not apply to custody actions in divorce or separation proceedings (unless custody may be awarded to a non-parent).[11]

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[7] 25 U.S.C. §1912(a).

[8] 23 C.F.R. §23.103(a)(1)(ii).

[9] 23 C.F.R. §23.103(a)(4).

[10] 23 C.F.R. §23.127.

[11] 25 U.S.C. §1903(1); 25 C.F.R. §23.103; Guidelines B.2.

Indian Child

An "Indian child" is defined as an unmarried person under age 18 who is either a member of an Indian tribe or eligible for membership and the biological child of a member.[12] An Indian tribe includes any of the more than 500 federally recognized tribes in the U.S. If DFPS becomes involved with an Indian child associated with any of these tribes, ICWA may apply.[13]

There are also three federally recognized tribes with reservations in Texas:

- Ysleta del Sur Pueblo, also known as the Tigua, in El Paso;
- Kickapoo Tribe of Texas, in Eagle Pass, Texas; and
- Alabama Coushatta Tribe of Texas near Livingston, Texas.

DFPS enjoys a good working relationship with each of these tribes. Children who reside on one of these reservations have specific legal protections (See Tribal and State Jurisdiction below) and, in some cases, DFPS and the Tribe have agreed to a written protocol for handling these cases.

Reason to Know

A court has reason to know a child is an Indian child:

- If any party, tribe or agency informs the agency or court that the child is an Indian child;
- Any participant, officer of the court or agency involved in the proceedings informs the court it has discovered such information;
- The child gives the court reason to know he or she is an Indian child;
- The domicile or residence of the child, parent or Indian custodian is on a reservation;
- The court is informed the child is or has been a ward of a Tribal court; or
- The court is informed either parent or the child has a Tribal membership card.[14]

How Are ICWA Cases Identified?

A common reason for failure to comply with ICWA is the failure to identify children subject the ICWA. Two important changes are designed to remedy this problem:

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[12] 25 U.S.C. §1903(4).

[13] For the current list of federally recognized tribes, See Practice Guide, SECTION 13, TOOLS, Indian Child Welfare Act.

[14] 25 C.F.R. §23.107(c).

- The Family Code requires Texas courts to ask the parties at the Adversary, the Status and at each Permanency Hearing: whether the child or child's family has Native American heritage and the identity of any Native American tribe the child may be associated with.[15]

- The regulations require that the state court judge ask each participant at the commencement of the proceedings whether the person knows or has reason to know the child is an Indian child and to instruct the parties to inform the court of any such information that arises later. [16]

A huge impact of failing to identify an ICWA case is that if key ICWA provisions are violated, *a final order can be invalidated*.[17] Similarly, if there is not sufficient information in the record to assess whether ICWA applies, an appeal can be abated and remanded to allow the trial court to take evidence and make a finding. Either way, permanency is delayed.

The best cure is prevention. In every case, everyone who touches the case must consider: *Could this child be an Indian child*? A number of CPS forms ask for information from family members about a child's possible Indian heritage.[18] Any suggestion of Native American ancestry on these forms requires follow up, but there is no substitute for interviewing family members and any child old enough about possible Native American family history. To avoid discovering that a case is subject to the ICWA late in the proceedings, these questions should be asked repeatedly, especially when new family members are found.

If a parent, child or family member denies Native American family history, this should be documented and included in the next court report. While this won't prevent a person from later claiming Native American ancestry, this will demonstrate the agency's diligent effort to comply with ICWA.

If any parent or family member's response suggests an Indian child may be involved in a DFPS case, the caseworker should document as much information as possible about the family history, because this information is often vital to a tribe's ability to verify a child or parent's membership status. The Indian Child and Family Questionnaire can be used for this purpose. The attorney representing DFPS should t be notified that a child may be an Indian child, and provided with the family history information, immediately, so that the tribe(s) can be notified without delay. If a court report fails to provide complete information about possible Native American family history, the best practice is for the attorney representing DFPS to follow up with the caseworker to make sure the necessary information is available at the earliest opportunity.

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[15] TEX. FAM. CODE §262.201(a-4);263.202(f-1); 263.306(a).
[16] 25 C.F.R. §23.107(a).
[17] The remedy for violation of key ICWA provisions is a petition to invalidate. 25 U.S.C. §1914.
[18] Child Placement Resources Form (Form 2625); Family Information Form (Form 2626; Indian Child Welfare Act Checklist (Form 1706) (all of these forms are available on the CPS intranet site).

Tribal and State Jurisdiction

Whether the family court or tribal court has jurisdiction depends on where a child resides, whether transfer to the tribal court is requested, and whether an exception to the mandatory transfer provision applies.

Exclusive Jurisdiction on the Reservation

If the child's residence or domicile is on the reservation, or if the child has been made a ward of the tribal court, the tribal court has exclusive jurisdiction, except when jurisdiction is otherwise vested in the state.[19] If a child who lives on a reservation comes into CPS custody, the state court must notify the tribe immediately, dismiss the suit and forward a copy of the legal file to the tribe.[20]

Emergency Exception

If an Indian child who resides on a reservation is temporarily off the reservation and an emergency removal is necessary "to prevent imminent physical damage or harm to the child," a state agency may act despite the fact that the tribal court otherwise has exclusive jurisdiction.[21] At that point the stage agency must act promptly to: (1) end the removal or placement as soon as it is no longer necessary to prevent imminent physical damage or harm to the child; and (2) move to transfer the case to the jurisdiction of the tribe or return the child to the parents, as appropriate.

Concurrent Jurisdiction

If the child's residence or domicile is not on the reservation, the tribal and state courts have concurrent jurisdiction, but there is a presumption of tribal jurisdiction in cases involving an Indian child.[22]

Notice Requirements

ICWA imposes many specific requirements governing the timing, the type of notice, and the persons and entities entitled to notice.[23] A fundamental issue is that without notice, a tribe cannot confirm or deny Indian child status. Even if a child turns out not to be subject to ICWA, if there is evidence of possible Native American family history, proof of compliance with notice requirements may be essential to to respond to a challenge based on violation of ICWA.

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[19] 25 U.S.C. §1911(a).
[20] 23 C.F.R. §23.110(a).
[21] 25 U.S.C. §1922.
[22] See 25 U.S.C. §1911(b)*; Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).
[23] *In re R.R.*, 249 S.W.3d 213 (Tex. App. — Fort Worth, March 19, 2009, no pet.).

What triggers notice?

Notice is required for each "child-custody proceeding." Defined as any action *except an emergency hearing* that may result in a foster care placement, termination of parental rights, preadoptive placement, or adoptive placement, this means any Suit Affecting the Parent Child Relationship filed by CPS requires notice. [24]

Timing (10 + 20 days) & Proof of Notice

No "foster care placement or termination of parental rights" hearing can be held until at least ten (10) days after notice is received (subject to an additional 20 days if the parent/custodian/tribe requests additional time for preparation).[25] To avoid a delay and potential challenge to the court's jurisdiction, the best practice is to set the initial ICWA compliance hearing at least 30 days after notice is given (in effect, this assumes that a 20-day continuance is requested and granted).

Two Kinds of Notice

Notice of Pending Custody Proceeding Involving Indian Child must be sent to:[26]

- Every known parent(s);
- Indian custodian;
- Each identified tribe; and
- The Regional Director, Bureau of Indian Affairs (BIA) (a representative of the Secretary of Interior). [27]

If the identity or location of a parent or Indian custodian is not known or the identity of the tribe cannot be determined, **Notice to Bureau of Indian Affairs: Parent, Custodian or Tribe of Child Cannot be Located or Determined**[28] must be sent to:

- The Regional Director, Bureau of Indian Affairs (a representative of the Secretary of Interior).[29]

Form notices with the required advisements which can be tailored with specific child and family information are available.[30] A copy of the petition should be attached as well as any

[24] 25 U.S.C. §1912(a); 25 C.F.R. §23.2.

[25] 25 U.S.C. §1912(a); 25 C.F.R. § 23.112 (a); Guidelines B.7.

[26] See Practice Guide, SECTION 13, TOOLS, Indian Child Welfare Act, Notice of Pending Custody Proceeding Involving Indian Child and BIA & Secretary of Interior Contact Information.

[27] 25 U.S.C. §1912(a); 25 C.F.R. § 23.11(a).

[28] See Practice Guide, SECTION 13, TOOLS, ICWA, Notice to Bureau of Indian Affairs: Parent, Custodian or Tribe of Child Cannot Be Located or Determined.

[29] 25 U.S.C. §1912(a); 25 C.F.R. §23.11(b).

[30] See Practice Guide, SECTION 13, TOOLS, ICWA.

additional family history, including family trees or copies of membership cards. Family history information can be critical to a tribe's ability to determine membership status.

If a parent has requested anonymity, the agency and the court should maintain confidentiality and relevant court documents should be under seal.[31]

The regulations permit notice by certified or registered mail, with return receipt requested.[32] As a practical matter, certified mail is preferred because this allows delivery to someone other than the addressee. If the intended recipient of registered mail is not available, registered mail must be returned to sender, making it necessary to resend notice. Notice may be sent by personal service or electronically *in addition*, but this does not satisfy the service requirement.[33] Similarly, notice by e-mail won't satisfy the statutory requirement, but may expedite determining whether ICWA applies.

A copy of each notice sent, with the return receipt or other proof of service must be filed with the court and should be admitted into evidence at trial.[34]

Parent/Indian Custodian

A parent includes the biological or adoptive parent of an Indian child,[35] including a non-Indian parent. An alleged father must acknowledge paternity or be legally determined to be the father before being recognized as a parent.[36]

A primary impact of the U.S. Supreme Court's *Baby Girl* opinion[37] was to limit the rights of a father who was a registered tribal member but had never had custody of his child. The Court found that an action for termination of parental rights against such a father could proceed without meeting the higher burden of proof or standards in 25 U.S.C. §1912(d) and (f). The impact of this decision on DFPS practice is limited by the following:

- The *Baby Girl* decision does not impact other substantive rights under ICWA, including the right to notice and appointment of counsel for indigent parents;
- A Texas court declined to extend the *Baby Girl* rationale to a parent who had prior custody of an Indian child, albeit not for the preceding twelve years;[38]
- TEXAS FAMILY CODE §263.202 (a)(1) and DFPS policy require that a diligent search be conducted and notice provided to a parent, including an alleged father;
- ICWA regulations define "continued custody" to include physical and/or legal custody (including under tribal law or custom) that a parent "already has or had at

[31] 25 C.F.R. §23.107(d); Guidelines, B.6 (d)(3);(f).

[32] 25 C.F.R. §23. 11(a); 25 C.F.R. §23.111(c).

[33] 25 C.F.R. §23.111(c).

[34] 25 C.F.R. §23.111(a)(2).

[35] 25 U.S.C. §1903(9); 25 C.F.R. §23.2.

[36] *In re V.L.R.*, 507 S.W. 3d 788 (Tex. App. —El Paso, Nov. 18, 2105, no pet.) (Unidentified tribe of a child's unwed father who fails to establish paternity is not the child's tribe).

[37] *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

[38] *In re V.L.R.*, 507 S.W. 3d 788(Tex. App. — El Paso, Nov. 18, 2015, no pet.).

any point in the past," and specify that a biological mother has had custody of a child.[39]

"Indian custodian" is broadly defined as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." [40]

More Than One Tribe?

If a child has ties to more than one tribe, notice to each tribe is essential so that each tribe can make a determination of membership or eligibility. If more than one tribe responds affirmatively, the regulations direct the tribes to designate the child's tribe and if the tribes do not agree, the State court must do so, based on specified criteria.[41]

Contact Information

The best resource for contact information for individual tribes is the annual ICWA listing of Designated Tribal Agents for Service of Notice published in the Federal Register.[42] If a parent names an tribal ancestral group instead of a specific tribe, of if there are any questions about the proper tribe(s) to be contacted, the Guidelines recommend contacting the BIA Regional office (either in the region where the tribe is located or the local office).[43]

For notice to the Regional Directors in Texas:

For child custody proceedings In Texas, *except for notice to the Ysleta del Sur Pueblo of El Paso County:*
Anadarko Regional Director
BIA
P.O. Box 368
Anadarko, Oklahoma 73005

For child custody proceedings in *El Paso and Hudspeth counties in Texas*:
Albuquerque Regional Director
BIA
615 First St.
P.O. Box 26767
Albuquerque, New Mexico 87125.

[39] 23 C.F.R. §23.2.
[40] 25 U.S.C. §1903(6).
[41] 25 C.F.R. §23.109(c).
[42] See Practice Guide, SECTION 13, TOOLS, ICWA, Tribal Agents for Service 2018.
[43] Guidelines B.4., p. 18.

After Initial ICWA Notice

Once the initial **Notice of Pending Custody Proceeding Involving Indian Child** is sent as required, send notice to the same listed persons and Tribes as follows:

- Unless or until a tribe confirms a child is not a member or eligible for tribal membership, send notice of interim hearings, permanency planning meetings, family group conferencing or similar meetings to all persons and tribes entitled to notice by *regular first class mail*;

- If the pleadings are amended, or a final hearing is set, send a new Notice of Pending Custody Proceeding Involving Indian Child, with the petition and any additional child and family history information attached, by certified mail, return receipt requested.[44]

Indian Child Determination

A tribe's determination regarding the child's status is conclusive and a "State court may not substitute its own determination regarding a child's membership or eligibility for membership in a Tribe or a parent's membership in a Tribe."[45] Certain factors relied upon by courts in the past in determining whether a case is subject to ICWA are expressly excluded from this determination, including: a family's involvement with the tribe and cultural, social, religious or political activities; the child's blood quantum, or whether the parent ever had custody.[46] If the only identified tribe confirms that a child is neither a member nor eligible for membership, this evidence can support a request that the court find that the ICWA does not apply.

If a tribe fails to respond after being properly noticed, counsel should first verify that the agency has exercised due diligence to communicate with the tribe by phone, fax or e-mail. A state court may rely on facts or documentation indicating a tribal determination or membership or eligibility, such as an enrollment document, to make a determination regarding Indian child status. [47]

In the more common scenario, when documents showing a tribal determination are not available, a tribe's failure to respond to notice maybe problematic.. Once the court confirms by way of report, declaration or testimony on the record that due diligence was used to identify and work with all potential tribes, the regulations direct the court to "[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of "Indian child"….."[48]

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[44] 25 U.S.C. §1912(a); 25 C.F.R. §23.111 (c); Guidelines D.1, D.2. .
[45] 25 C.F.R. §23.108(b); Guidelines, B.3.
[46] 25 C.F.R. §23.103(c).
[47] 25 C.F.R. §23.108(c).
[48] 25 C.F.R. § 23. 107(b); Guidelines, A.3.(d).

Depending on the nature of the evidence that prompted giving notice to a tribe, imposing ICWA's requirements without confirmation from a tribe or independent evidence may not be legally supportable. Until there is further case law interpreting the regulations, the determination of a child's Indian status in the absence of tribal input may depend on the court's assessment of the nature and quality of the initial report of possible Indian child status and the evidence available after proper notice is provided.

If there is reason to give ICWA notice, the best practice is to request that the trial court make a finding as to the child's status on the record. This should be done as soon as possible, but certainly before a final hearing. Failure to do so may result in the issue being raised on appeal and the case remanded to take evidence and make a finding as to whether ICWA applies.

Emergency Removal

If an emergency removal is necessary "to prevent imminent physical damage or harm to [an Indian] child," the petition or supporting documents must contain specific information including the child or family's tribal affiliation, the specific imminent physical damage or harm, and the active efforts made to prevent the removal and to return the child to the home.[49] A format for an ICWA removal affidavit which conforms to these requirements is available.[50]

If a child is not returned home or the case transferred to the tribe, all proceedings must comply with ICWA. If a party asserts or the court has reason to believe an Indian child may have been improperly removed or retained, the court must terminate the proceedings unless returning the child would subject the child to "substantial and immediate danger or threat of such danger."[51]

Special Setting Following Emergency Hearing

An emergency proceeding should not be continued for more than 30 days unless the court finds:

- Returning the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
- The court has been unable to transfer the proceeding to the appropriate Tribe; and
- It has not been possible to initiate a "child-custody proceeding."[52]

When an Indian child is subject to removal, the best strategy is to set another hearing at the earliest possible date that accommodates the 30 day notice requirement applicable when a

[49] 25 C.F.R. §23.113(d).

[50] See PRACTICE GUIDE, Section 13, TOOLS, ICWA. .

[51] 25 C.F.R.§23.113(a),(c); Guidelines,C.1.-9..

[52] 25 C.F.R. §23.113(e).

foster care placement is requested under ICWA.[53] At that time, an ICWA compliant hearing can be conducted.

TIP: ***ICWA Pleadings***
If an Indian child is the subject of a Suit Affecting the Parent Child Relationship (SAPCR), the pleadings must reflect the child's status and the applicable findings. In general the best practice is to plead concurrently under the Texas Family Code and the Indian Child Welfare Act.[54] In the jurisdiction of the Houston 14th District Court of Appeals, however, pleadings for an Indian child should be limited to the ICWA findings without parallel findings under the Texas Family Code.[55] The DFPS HOTDOCS system includes both types of ICWA pleadings.

Rights of Parents, Indian Custodian and Tribe

The parents or an Indian custodian of an Indian child and the child's tribe have specific rights under the ICWA.

It is recommended that courts with the capacity permit family members and tribes to participate by telephone, video conference and other means.[56] If there is reason to know a parent or Indian custodian has limited English proficiency, the court must provide interpreter services.[57]

Mandatory Transfer to Tribal Court

A parent, an Indian custodian or the child's tribe may petition the state court to transfer a suit involving an Indian child to the tribal court. A transfer request may be made orally on the record or in writing, at any stage of the proceedings.[58] On receipt of a transfer request, the state court should immediately ensure the tribal court is notified. Notice may include a request a timely response regarding whether the tribe will decline the transfer.[59]

[53] 25 U.S.C. §1912.
[54] *In re G.C.* ,No. 10-15-00128-CV, 2015 WL 485888 (Tex. App. — Waco, 2015, no pet.) (mem. op); *In re K.S.*, 448 S.W.3d 521 *(*Tex. App.— Tyler 2014, pet. denied) .
[55] *In re W.D.H.*, 43 S.W.3d 30 (Tex. App. – Houston 2001, pet. denied).
[56] 25 C.F.R. §23.133.
[57] 25 C.F.R. §23.111(f).
[58] 25 C.F.R. §23.115.; Guidelines,F.3.-6..
[59] 25 C.F.R. §23.116.

Transfer to the tribal court is mandatory, unless the court makes a finding of good cause not to transfer, the tribe declines transfer or either parent objects.[60] The court cannot consider the following factors in assessing good cause:

- The advanced stage of the proceedings, if notice to the tribe did not occur until an advanced stage;
- Whether there was no petition to transfer in a prior proceeding involving the child;
- Whether transfer would affect the child's placement;
- The child's cultural connections with the Tribe or its reservation; or
- The socio-economic conditions of the Tribe, BIA social services or the judicial systems.[61]

The basis for any decision denying transfer must be a written order or in a statement on the record.[62]If transfer is ordered, the state court must promptly forward the court records.[63]

Appointment of Counsel

Appointment of counsel for indigent parents or Indian custodians is mandatory under ICWA, whether the action is for removal and placement in foster care or for termination of parental rights.[64] If a parent or Indian custodian appears without an attorney, the court must give an advisement of specific rights provided under ICWA. Appointment of counsel for a child is discretionary, but state law requires appointment of an attorney ad litem for a child if DFPS seeks conservatorship or termination.[65]

Right to Review Records

In a proceeding for emergency removal, foster care or termination of parental rights, each party (including the child's tribe and custodian) has the right to review all reports and records filed with the court.[66] Even before a tribe intervenes or in the event a tribe elects not to intervene, it is good practice to share these records with the child's tribe if requested. Unless prohibited by confidentiality rules, sharing information promotes collaboration with a tribe, in terms of locating resources, experts or vital family history information.

Right to Intervene

The tribe and the Indian custodian have the right to intervene in the state court action *at any time* in the proceedings.[67] Intervention may be accomplished informally, by oral

[60] 25 U.S.C. §1911(b); 25 C.F.R. §23.117; Guidelines,F.4..
[61] 25 C.F.R. § 23.118(c).
[62] 25 C.F.R. § 23.118(c).
[63] 25 C.F.R. § 23.119.
[64] 25 U.S.C. §1912(b).
[65] TEX. FAM. CODE §107.012.
[66] 25 U.S.C. §1912(c); 25 C.F.R. §23.134.
[67] 25 U.S.C. §1911(c).

statement or formally.[68] Most important, if an Indian child is involved, the ICWA applies whether or not the child's tribe intervenes.

Full Faith and Credit

ICWA requires that all courts give full faith and credit to the "public acts, records, and judicial proceedings" of any federally recognized Indian tribe regarding Indian child custody proceedings.[69]

Placement Preferences

ICWA mandates that placements for foster care and adoption be made according to statutory preferences, unless good cause is shown to deviate from the preferences.[70] The court must consider the preference of the Indian child or child's parent, where appropriate.[71] In a voluntary proceeding, if a parent requests anonymity, the court must give weight to that request in applying the preferences.[72]

All placements must be in the least restrictive setting that:

- Most approximates a family, taking sibling attachment into consideration;
- Allows any special needs to be met; and
- Is in reasonable proximity to the child's home extended family and siblings.[73]

The statutory preferences give priority as follows:

Foster care or pre-adoptive placement

- A member of the child's extended family;
- A foster home licensed, approved, or specified by child's tribe;
- An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- An institution for children approved by the tribe or operated by an Indian organization which has a program suitable to meet the child's needs.[74]

For an adoptive placement

- A member of the child's extended family:
- Other members of the child's tribe: or
- Other Indian families.[75]

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[68] *In re J.J.T.*, 544 S.W.3d 874 (Tex. App.—El Paso, no pet.)(denial of intervention because not in writing and untimely warrants reversal).

[69] 25 U.S.C.§1911(d).

[70] 25 U.S.C.§1915; 25 C.F.R. §23.129-131.

[71] 25 C.F.R.§23.131(d); 23.132(b).

[72] 25 C.F.R. §23.129(b).

[73] 25 C.F.R. §23.131.

[74] 25 U.S.C.§1915(b); 25 C.F.R. §23.131(b);Guidelines, H.1-2.

[75] 25 U.S.C. §1915(a); 25 C.F.R. §23.130.

The tribe can by resolution alter the order of preferences.[76] The tribe's preference should then be followed as long as it is still the least restrictive setting appropriate to the needs of the child.

Good cause to depart from the placement preferences must be shown by clear and convincing evidence, on the record or in writing, and be based on one or more of the following factors:

- The request of the Indian child's parent;
- Request of the child of sufficient age and capacity;
  Ability of placement to maintain sibling attachment;
- The "extraordinary physical or emotional needs of the child"; and
- The unavailability of a placement (despite a diligent search and active efforts to locate one).[77]

Neither the relative socioeconomic status of a placement nor ordinary bonding flowing from time spent in a non-preferred placement made in violation of ICWA will support deviation from preferences.[78] This creates yet another incentive to identify a child subject to ICWA quickly, to avoid a child bonding with a caretaker before a placement consistent with these preferences can be made.

In the *Baby Girl* case, the Supreme Court held that if no party eligible for preference formally seeks placement, the placement preferences do not apply.[79] This shifts the onus to a potential placement to seek placement, which is somewhat inconsistent with the best placement practices. Regardless of a child's ethnicity, DFPS does not wait for placements to come forward but seeks out extended family, fictive kin and other placement resources. When an Indian child is identified, the tribe is notified and may also identify potential placements. Any appropriate potential placement is assessed and a placement selected consistent with the statutory preferences and good casework practice. As a result, a potential placement's failure to make a formal request would not impact the selection process in a DFPS child protection suit.

Conservatorship or Termination of Parental Rights of Indian Child

If ICWA applies, the burden of proof and standards for an order placing a child in foster care or a final order seeking permanent managing conservatorship or termination of

[76] 25 U.S.C. §1915(c)
[77] 25 C.F.R. §23.132(c).
[78] 25 C.F.R. §23.132(d),(e).
[79] *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (no preference applies if no eligible party has come forward).

parental rights are different than under the Texas Family Code. In summary, if ICWA applies the requirements are:

Foster Care Placement
Clear and convincing evidence
Including testimony of one or more qualified experts that continued custody[80] by the parent or Indian custodian is likely to result in serious emotional or physical damage[81] to the child; and active efforts to provide remedial and rehabilitative services to prevent the breakup of the Indian family were made but proved unsuccessful.

Termination of Parental Rights
Evidence beyond a reasonable doubt
Including testimony of one or more qualified experts that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and active efforts to provide remedial and rehabilitative services to prevent the breakup of the Indian family were made but proved unsuccessful.
25 U.S.C. §1912(d), (f).

Causation + Serious Emotional or Physical Damage

Whether a foster care placement or termination of parental rights is at issues, there must be evidence of "a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child."[82] Without a causal relationship, evidence of "community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself" constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

Active Efforts

With any request for an order to place a child in foster care or to terminate parental rights, the agency must show it has made "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, which efforts were unsuccessful.[83]

- "Active efforts" is generally construed to require more than the "reasonable efforts" otherwise required for children in foster care. The regulations and Guidelines offer detailed examples of what constitutes active efforts;[84]
- DFPS staff should request input from a child's tribe, extended family, tribal social services, or Indian caregivers and to the extent possible, tailor appropriate services for individual children and families. The goal is to incorporate culturally

[80] "Continued custody" and "custody" are defined terms. 25 C.F.R. §23.2.
[81] 25 U.S.C. §1912(e).
[82] 25 C.F.R. §23.121(a); Guidelines,G.1.
[83] 25 U.S.C. §1912 (d); 25 C.F.R. §23.120; Guidelines E.1-.6.
[84] 25 C.F.R. § 23.2.

appropriate tribal services, help families overcome barriers, promote involvement of the tribe, and to maintain sibling, family and tribal relationships; and.

- Even if a court may find “aggravated circumstances" in an ICWA case, this does not warrant an exception to the active efforts requirement.[85]

Perhaps most important, active efforts should be documented in the record.[86]

Who is a Qualified Expert Witness?

The statute does not define what constitutes a qualified expert under ICWA. The regulations *require* that an expert be qualified to testify as to whether the child's continued custody by the parent or custodian is "likely to result in serious emotional or physical damage," and direct that an expert *should be* qualified to testify as to the "prevailing social and cultural standards" of the child's tribe.[87] The social worker assigned to the child's case may not serve as an expert (although a caseworker may testify as to the parent's compliance with the service plan, visitation and other issues).

Without question, the child's tribe is the best source for an expert. A qualified expert witness “should be someone who can provide a culturally informed, outside opinion to the court regarding whether the continued custody by a parent is likely to result in serious emotional or physical harm to the child.”[88] However, “if such knowledge is plainly irrelevant to the particular circumstances” an expert with knowledge of social and cultural standards may not be necessary. For example, in a child sexual abuse case, an expert can testify to the serious damage presented by return of a child to the parent who perpetrated such abuse, without reference to specific tribal social and cultural standards.

Separate expert witnesses may be used to demonstrate emotional or physical damage and to establish the prevailing social and cultural tribal standards. The fact that an expert on tribal child-rearing is not qualified to diagnose substance abuse does not preclude testimony regarding the impact of substance abuse on the tribe and child protection.[89]

If the tribe is in agreement with the agency's legal strategy, and has an expert willing and able to testify, or can recommend an expert, this is ideal. . If the court will approve telephonic testimony, that may facilitate a tribal expert's testimony.[90]

However, some tribes have a policy against providing an expert witness or supporting termination of parental rights in any circumstance.

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[85] *In re K.S.* 448 S.W.3d 521 *(*Tex. App. — Tyler 2014, pet. denied).
[86] 25 C.F.R. §23.120(b).
[87] 25 C.F.R. §23.122.
[88] Guidelines, G.2..
[89] *Caitlyn E. v. State*, 399 P.3d 646 (2017)
[90] Courts with capability should allow participation by phone, video conferencing or other methods. 25 C.F.R. §23.133.

If a tribe cannot or elects not to offer an expert or to recommend an expert recognized by the tribe, document the request and the tribe's response. Then consider:

- Whether "serious emotional or physical damage" can be proven with objective and culturally neutral evidence, so that a tribal expert is not necessary;
- An internet search for an expert depending on the case, this may include tribal hospitals, tribal drug treatment programs, and academic programs for Native American studies.,
- Contacting Native American advocacy groups or tribal experts from a related or culturally similar tribe.

The DFPS Office of General Counsel may be able to assist in locating expert witnesses.

Voluntary Relinquishment of Parental Rights

Under ICWA a valid consent to terminate parental rights (a "relinquishment" in DFPS terms) must be in writing and *be taken on the record before a judge*.[91] A valid consent to termination of parental rights cannot be given prior to or within 10 days after birth of the child.[92]

The judge must explain the terms and consequences of the consent and sign a certificate verifying the process was followed and that the parent or Indian custodian fully understood the explanation whether provided in English or by an interpreter.[93] The consent need not be taken in open court if necessary to protect confidentiality.[94]

Unlike a relinquishment made to DFPS under the Texas Family Code, a parent or Indian custodian of an Indian child *may withdraw consent for any reason at any time prior to entry of a final decree of termination or adoption*.[95] This can be done by filing a written document or testifying in court. If this happens, the court must promptly notify the person who arranged the placement and return the child to the parent or Indian custodian as soon as practicable.[96] If consent is obtained by fraud or duress, a parent may withdraw consent and the court shall invalidate a decree of adoption up to two years after entry of the decree (or beyond the two years if otherwise permitted under state law).[97]

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[91] 25 U.S.C. §1913(a); 25 C.F.R. § 23.125; Guidelines,I.6..

[92] 25 C.F.R.§23.125(e).

[93] See Practice Guide, SECTION 13 TOOLS, Indian Child Welfare Act, Consent to Relinquish Parental Rights, which includes the judge's certificate.

[94] 25 C.F.R. §23.125(b),(d).

[95] 25 C.F.R. §23.128.

[96] 25 C.F.R. §23.128.

[97] 25 U.S.C. §1913(d); 25 C.F.R. §23.137.

Failure to Comply with the ICWA

A child, parent, Indian custodian or Tribe may petition to invalidate an action for foster care or termination of parental rights if violation of 25 U.S.C. §1911, 1912 or 1913 is made, whether or not the petitioner's rights were violated. [98]

A court can also remand a potential ICWA case to require proper notice, to ascertain a child's Indian status, or otherwise address a gap in the trial court record. Whether a final order is reversed or a case abated pending remand to the trial court, the resulting delay can be devastating to permanency efforts.

The best cure is prevention. Consistently asking every family member, including any child old enough, about possible Native American heritage, will minimize the possibility of an Indian child's status being overlooked in the course of a child protection suit. Courts, caseworkers, attorneys, and guardians ad litem all must be aware of the issue, document the results of these questions and follow up as necessary when new family members are located or new information is found. Whether a case turns out to be subject to the ICWA or not, a thorough and well-documented inquiry, followed up by proper notice as appropriate, is good insurance.

[98] 25 U.S.C. § 1914; 25 C.F.R.§23.137.

Case Notes

U.S. Supreme Court

Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, (1) higher burden of proof and standard for termination of parental rights under ICWA do not apply to Indian parent who never had custody and cannot resume or continue to have custody of an Indian child; (2) requirement that "active efforts" be made to prevent the breakup of an Indian family does not apply to a parent who abandons a child before birth and never had custody; and (3) placement preferences do not bar a non-Indian family from adopting when no other eligible candidate (relative, tribal member, or other Indian person) seeks to adopt an Indian child)

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (denial of tribe's motion to vacate adoption decree reversed on appeal, where both parents were members of the tribe and resided on the reservation, left the reservation prior to twins' birth and signed consent to adoption. Where children neither reside nor are domiciled on reservation, 25 U.S.C. §1911(b) creates concurrent but presumptive tribal jurisdiction that requires the state court to transfer jurisdiction unless good cause is shown or tribe declines)

Texas Courts

→ INDIAN CHILD STATUS

In re E.A.H., 2018 WL 2451824 (Tex. App.—Austin June 1, 2018, no pet. h.) (mem.op.)(where Department gave notice with relevant family history to three Cherokee tribes and BIA and none confirmed Indian child status ICWA does not apply and notice to other tribes on the Dawe's Roll not required)

In re C.C. and Z.C., 2018 WL 718987 (Tex. App. — Tyler February 6, 2018, no pet.) (mem.op.) (ICWA does not apply where parent's asserted affiliation is with Azteca, which is not a federally recognized tribe for purposes of ICWA); original case, *In re C.C. and Z.C.*, 2018 WL 3184319 (Tex. App. — Tyler, 2017, no pet.)(remand necessary where despite father's report of "Indian blood", status report indicating each child's Native American status yet to be determined and permanency reports showing both parents denied Native American status, without explanation, trial court failed to make determination of Indian child status)

In re A.E., 2017 WL 4707488 (Tex. App. —Dallas 2017, no pet.)(mem.op.)(where mother denied Indian heritage until trial was underway, appellate court abated case for further investigation; after caseworker testified that twenty recognized tribes all responded that the child was neither enrolled nor eligible for enrollment, trial court did not know or have reason to know of Indian child status)

In re C.D.G.D.M, v. DFPS, 2017 WL 4348237 (Tex. App. —Austin 2017, no pet.)(mem.op.) (ICWA does not apply where Department gave to all Cherokee tribes, and all concluded child did not meet Indian child definition)

In re T.R., 491 S.W.3d 847 (Tex. App. — San Antonio 2016, no pet.) (termination affirmed where mother repeatedly denied Native American ancestry and great-grandmother reported no family member was registered with the Choctaw Nation and her own membership was in a Cherokee tribe not recognized by Congress)

In re Z.C., No. 12-15-00279-CV, 2016 WL 1730740 (Tex. App. — Tyler 2016, no pet.) (mem.op.) (case abated and remanded for trial court to make findings as to Indian child status; three permanency reports referenced Indian child status and CASA volunteer reported father refused hair follicle drug test on grounds that he was Indian and could not cut hair required notice to the tribe;).

In re D.D, No.12-15-00192-CV, 2016 WL 7401925 (Tex. App. — Tyler 2016, no pet.) (mem.op.) (in separate opinions involving two parents, appeal of termination case abated and remanded, for failure to address issue of child's tribal heritage and give proper notice under 25 USCA § 1912 and 25 CFR § 23.11 despite references in the record to family tribal history)

In re N.A., No. 02-13-00345-CV, 2014 WL 814195 (Tex. App. — Fort Worth 2014, no pet.) (information in progress reports that mother reported her great-great-grandfather was a registered Cherokee sufficient to trigger notice to tribe requirement)

In re C.T., No. 13-12-00006-CV, 2012 WL 6738266(Tex. App. — Corpus Christi-Edinburg 2012, no pet.) (where child's grandmother testified child was half-Indian because she is half Black Foot and the mother is half Cheyenne, but failed to indicate whether parents or children were members or children were eligible for membership, failure to apply ICWA not error)

In re J.J.C., 302 S.W. 3d 896 (Tex. App.—Waco 2009, no pet.) (allegation that maternal grandmother is member of Chippewa Indian Nation sufficient to give court "reason to believe" Indian child involved)

In re R.R., 294 S.W. 3d 213 (Tex. App.—Fort Worth 2009, no pet.) (where grandmother is enrolled tribal member and tribe requested more information, notice to tribes and Bureau of Indian Affairs required before trial court can determine child's status as Indian child)

In re R.M.W., 188 S.W. 3d 831 (Tex. App.—Texarkana 2006, no pet.) (assertion of Indian heritage or blood without evidence of membership or eligibility for membership in an Indian tribe insufficient to put court on notice of Indian child; court distinguishes *Doty-Jabbaar*, noting DFPS did not admit child was Indian, and court made no finding that any children were tribal members)

Doty-Jabbaar v. Dallas County Child Protective Services, 19 S.W. 3d 870 (Tex. App. — Dallas 2000, pet. denied) (termination reversed for failure to adhere to ICWA requirements

where caseworker notified the tribe in a prior proceeding for termination of parental rights and again in this case, court concluded "it is apparent [the agency] acknowledged the child's status as an Indian child … .”)

→NOTICE

In re T.R., 491 S.W.3d 847 (Tex. App. — San Antonio April 4, 2016, no pet.) (ICWA notice not required where mother repeatedly denied Native American ancestry and great-grandmother reported no family member was registered with the Choctaw Nation and her own membership was in a Cherokee tribe not recognized by Congress)

In re K.S., 448 S.W. 3d 521 (Tex. App. —Tyler 2014, pet. denied) (where Cherokee Nation had actual notice, intervened, participated in the case and attended hearings, failure to strictly comply with notice requirements did not invalidate termination order)

In re R.R., 294 S.W. 3d 213 (Tex. App.— Fort Worth, no pet.) (strict compliance with specific ICWA notice requirements necessary to avoid exposing a termination decree to a petition to invalidate at some future date)

→ICWA APPLICATION

In re J.J.T., 544 S.W. 3d 874, No. 08-17-00162-CV, (Tex. App. — El Paso, no pet.)(termination judgment reversed where tribal intervention denied because untimely and not in writing)

Villarreal v. Villarreal, No. 04-15-00551-CV, 2016 WL 4124067, (Tex. App — San Antonio no pet.) (mem. op.) (a divorce is not a "child custody proceeding" subject to ICWA)

In re E.G.L., 378 S.W. 3d 542 (Tex. App.— Dallas 2012, pet. denied) *(*ICWA does not apply to suit by stepfather seeking adjudication of father's paternity and appointment as conservator)

In re B.O., No. 03-12-00676-CV, 2013 WL 1567452 (Tex. App.—Austin 2013, no pet.) (mem.op.) (argument that ICWA should apply because father is a tribal member even though children are not members or eligible for membership in a tribe rejected)

Comanche Nation v. Fox. 128 S.W.3d 745 (Tex. App. —Austin 2004, no pet.) (ICWA does not apply to proceeding to modify child conservatorship where no public or private agency is attempting to remove a child from an Indian family)

Doty-Jabbaar v. Dallas County Child Protective Services, 19 S.W.3d 870 (Tex. App.— Dallas 2000, pet. denied) (even if tribe does not intervene, court must apply ICWA if Indian

child involved and "[w]hen, as here, an ICWA proceeding takes place in state court, rather than a tribal forum, the trial court should take great precaution to ensure the prerequisites of the ICWA have been satisfied.")

→BURDEN OF PROOF

In re G.C., No. 10-15-00128-CV, 2015 WL 4855888(Tex. App.—Waco Aug. 13, 2015, no pet.) (mem. op) (Section 1912(f)'s requirement of a finding beyond a reasonable doubt is limited to the finding expressly stated in section 1912(f) and does not apply to the termination findings under the Texas Family Code)

In re K.S., 448 S.W.3d 521 *(*Tex. App. — Tyler 2014, pet. denied) (there must be proof beyond a reasonable doubt that active efforts to prevent the breakup of the Indian family were made and proved unsuccessful)

→ PLEADINGS & JURY CHARGE

In re G.C., No. 10-15-00128-CV, 2015 WL 4855888 (Tex. App.—Waco, Aug. 13, 2015, no pet.) (mem.op.) (concurrent application of the ICWA and the Texas Family Code to proceedings involving Indian children provides additional protection to parents of Indian children because it requires the party seeking termination to prove state and federal grounds before the parent-child relationship may be terminated.)

In re K.S., 448 S.W.3d 521 *(*Tex. App.— Tyler 2014, pet. denied) (when ICWA applies both Texas Family Code and ICWA burdens of proof must be satisfied; use of broad form jury charge for concurrent findings not error)

In re W.D.H., 43 S.W.3d 30 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (termination reversed, citing failure to make requisite ICWA findings and error in making findings on best interests and on statutory grounds for termination under the Texas Family Code

→ACTIVE EFFORTS

In re K.S. 448 S.W.3d 521 *(*Tex. App. — Tyler 2014, pet. denied)(in *dicta* the court observes, "[b]ut when aggravated circumstances exist and reasonable efforts for reunification are not required by the family code, the ICWA requirements must still be satisfied because they provide a higher degree of protection than state law," an approach consistent with the generally strict interpretation of ICWA by Texas courts.)

→ EXPERT WITNESS

In re S.P., 2018 WL 1220895 (Tex. App. — Austin, March 9, 2018, no pet. h.) (mem.op.) (testimony of foster parent and Department caseworker fails to satisfy requirement for evidence, including qualified expert testimony, that "the continued custody of the child by the parent is likely to result in the serious emotional or physical damage to the child," and necessitates remand)

In re V.L.R., 507 S.W. 3d 788(Tex. App. — El Paso, 2015, no pet.) (caseworker without tribal membership, recognition by tribe of her substantial experience in the delivery of child and family services to Indians, or knowledge of the prevailing social and cultural standards and childrearing practices within the tribe, not a qualified expert).

Doty-Jabbaar v. Dallas County Child Protective Services, 19 S.W. 3d 870 (Tex. App. — Dallas, 2000, pet. denied) (without reference to the particular grounds for removal (cocaine exposed infant), court found social worker's nine and a half years' experience insufficient qualification as ICWA expert, citing the lack of evidence of social worker's education and familiarity with Indian culture and childrearing practices)

→JURISDICTION/TRANSFER

Yavapai-Apache v. Mejia, 906 S.W.2d 152 (. Tex. App.— Houston [14th Dist.] 1995, no writ) (error to use "best interests of the child" and the children's lack of contact with the tribe to determine good cause to deny transfer to tribal court; court approves use of a modified forum non conveniens doctrine, citing location of evidence and witnesses, to assess good cause and affirm denial of transfer, observing that "when a state court keeps a case in a concurrent setting, it is still required to apply the relevant sections of the ICWA. In other words, avoiding tribal court jurisdiction does not render the ICWA inapplicable.")

→REMEDY FOR ICWA VIOLATION

In re V.L.R., 507 S.W. 3d 788 (Tex. App. — El Paso, 2015, no pet) (violation of ICWA requires reversal of termination judgment)

In re G.D.P., No. 09-14-00066-CV, 2014 WL 3387639(Tex. App. — Beaumont, 2014, no pet.) (mem. op.) (parties agreed to reverse termination judgment based on violation of ICWA)

In re P.J.B., No. 10-12-00286-CV, 2013 WL 1286677 (Tex. App.—Waco, March 28, 2013, no pet.) (mem. op.) (no ICWA violation where appeal abated and trial court found ICWA did not apply)

In re J.J.C., 302 S.W. 3d 896 (Tex. App. — Waco 2009, no pet.) (trial court's failure to follow the ICWA can be raised for the first time on appeal; appeal abated pending trial court determination of Indian child status; *disp. on merits*, 2010 WL 1380123(Tex. App.-

-Waco, April 7, 2010, no pet.) (mem. op.) (termination reversed and remanded based on determination that children were Indian children)

Doty-Jabbaar v. Dallas County Child Protective Services, 19 S.W. 3d 870 (Tex. App. — Dallas 2000, pet. denied) (termination judgment reversed for failure to adhere to ICWA requirements)

→STANDARD OF REVIEW

In re V.L.R., 507 S.W. 3d 788(Tex. App. — El Paso, 2015, no pet.) (where burden of proof is beyond a reasonable doubt in ICWA termination case, the *Jackson v. Virginia* standard requires review of evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found 25 U.S.C. § 1912(d) and (f) were satisfied beyond a reasonable doubt)

Other State Courts

→ INDIAN CHILD STATUS

In re N.S., 837 N.W. 2d 680, (Iowa Ct. App. 2013) (where all three Ute tribes notified, two confirmed child was not a member and the third provided sufficient evidence for the court to conclude child was not a member, trial court properly concluded that ICWA did not apply)

In re Jack, 122 Cal. Rptr.3d 6 (Cal. Ct. App. 2011) (father and children's lack of tribal enrollment does not determine Indian child status; differences in tribal membership criteria and enrollment procedures mean that whether a child is an Indian child depends on "the singular facts of each case")

In re B.R., 97 Cal. Rptr. 890 (Ca. Ct. App. 2009) (where children's biological father was adopted by Apache parent, error not to allow tribe to determine Indian child status)

In re E.H., 46 Cal. Rptr.3d 787 (Cal. Ct. App. 2006) (mother's failure to repond to trial court's repeated exhortations that she disclose Indian heritage or to challenge social worker's report stating ICWA did not apply prompts court to observe "this is the most cynical and specious ICWA claim we have encountered." It is also worth noting that even on appeal, the mother did not assert that the children were subject to ICWA, but merely that the case should be reversed because the state agency and the court had made insufficient inquiries about whether ICWA applied to these children)

In re Gerardo A., 14 Cal. Rptr. 3d 798 (Cal. Ct. App. 2004) (error to find ICWA did not apply where child welfare department failed to share additional Indian heritage information with all proper tribes. Without available Indian family history information, neither the tribe nor the Bureau of Indian Affairs can investigate and determine if child is an "Indian child")

In re O.K., 130 Cal. Rptr. 2d 276 (Cal. Ct. App. 2003) (no reason to believe child is an Indian child where the only evidence is paternal grandmother's vague and speculative statement that child's father "may have Indian in him.")

→ACTIVE EFFORTS

Damon W., 2018 WL 1357357, No. S-16739 (Alaska 2018) (agency's efforts over the entire case, showing efforts beyond developing case plan and leaving parent to complete it on his own, satisfy "active efforts").

→ACTIVE EFFORTS

In re L.M.B., 54 Kan. App.2d 285 (Kan. Ct. App. 2017) ("active efforts" does not require "absolutely every effort;" a narrow focus on what the caseworker failed to do ignores the other ways that the provider engaged in active efforts)

State v. Yodell, ,367 P.3d 881 ((N.M. Ct. App 2015) (no active efforts found where the Department created a service plan and referred the father to a parenting class but otherwise took a passive role and shouldered father with burden of locating and obtaining services and ensuring providers communicated with Department)

In re J.S.B., 691 N.W.2d 611 (S.D. 2005) ("we do not think Congress intended that ASFA's "aggravated circumstances" should undo the State's burden of providing 'active efforts' under ICWA.")

In re D.S., 806 N.W.2d 458 (Iowa Ct. App. 2011)(responding to tribe's statement that parents should be allowed up to five years additional time to reunify, court found active efforts to reunify were made, explaining "[w]hile the ICWA focuses on preserving Indian culture, it does not do so at the expense of a child's right to security and stability.")

In re D.A., 305 P.3d 824 (Mont. 2013) (attempting to work around parent's incarceration, supervision, and chemical dependency problems, "[t]he Department's active efforts matched the Department's words in its desire to facilitate reunification.")

N.A. v. Alaska, 19 P.3d 597 (Alaska 2001) (citing long list of efforts by child welfare agency as well as Dept. of Corrections to address parent's substance abuse and reunify family, court concludes state's efforts were not only active, but exemplary)

In re Leticia V., 97 Cal. Rptr.2d 303 (Cal. Ct. App. 2000) (active efforts does not require duplicative reunification services or the performance of idle acts; where parent failed to respond to substantial but unsuccessful efforts to address drug problem in one child's case, repeating those efforts for the same parent in another child's case is not required)

→ EXPERT WITNESS QUALIFICATIONS

Matter of I.W., 2017 WL 7048813 (Okla. Ct. App. 2017) (tribal social services director who is an elder in the tribe and licensed as a social worker witness is not disqualified as expert witness under ICWA because he was not the primary caseworker on the case; however, an expert's equivocal testimony that fails to support the required finding does not satisfy the burden)

Bob. S. v. State, 400 P.3d 99 (Alaska 2017) (proof that parent's continued custody likely to result in serious damage to the child may be established with the testimony of one or more experts or by aggregating testimony of lay and expert witnesses).

In re L.M.B., 54 Kan. App.2d 285 (2017) (despite lack of experience in the direct delivery of child and family services, tribal doctor who is a member of the same tribe as the children, with a PhD in Native American history, who is professor of indigenous American Indian studies and has taught the Indian Child Welfare Act is a qualified expert).

Caitlyn E. v. State, 399 P.3d 646 (2017) (tribal woman with tribal social work experience who testified that members of Yupik tribes "don't raise our children being verbally abusive" is a qualified expert).

In re K.S.D., 904 N.W. 2d 479 (North Dakota 2017)(despite testimony from agency experts qualified in child deprivation and welfare, termination reversed and case remanded in the absence of testimony from qualified expert that continued custody by parent or Indian custodian is likely to result in serious emotional or physical damage to the child).

In re D.B., 414 P. 3d 46 (Colo. Ct. App. 2017)(ICWA expert not required to specifically state that continued custody of the Indian child by the parent will likely result in serious physical or emotional harm to the child; rather, expert's testimony must be a part of the evidence that support the court's finding to this effect)

In re Diana P., 355 P.3d 541 (Alaska, Sept. 1, 2015) (where the basis for termination of parental rights is "culturally neutral," expert testimony combined with lay testimony can be sufficient to establish "serious emotional or physical damage.")

In re Shane, 842 N.W.2d 140 (Neb. Ct. App. 2013) (licensed mental health practitioner and certified professional counselor whose practice serving abused or neglected children and those with behavioral problems, includes Indian children, who has experience working with Indian youth at a youth shelter and at a high school program, qualifies as expert witness)

Brenda O. v. Arizona Dep't of Economic Security, 244 P.3d 574 (Ariz. Ct. App. 2010) (mental health professional qualified as expert witness, without extensive knowledge of prevailing social and cultural standards and childrearing practices of the Navajo where "there was no evidence at trial that Navajo culture or mores are relevant to the effect Brenda's demonstrated alcohol problem has on her children.")

Marcia V. v. Alaska, Office of Children's Services, 201 P.3d 496 (Alaska 2009)(legislative history suggests "expertise beyond the normal social worker qualifications" or "substantial education in the area of his or her specialty" are necessary but "[w]hen the basis for termination is unrelated to Native culture and society and when any lack of familiarity with cultural mores will not influence the termination decision or implicate cultural bias in the termination proceeding, the qualifications of an expert testifying under § 1912(f) need not include familiarity with Native culture.")

→JURISDICTION/TRANSFER

*In re Tavian B.***,** 874 N.W.2d 456 (Nebraska 2016) (advanced stage of the proceedings not a valid basis for finding good cause to deny motion to transfer jurisdiction to a tribal court, based on new BIA Guidelines. Notably, the later enacted 25 C.F.R. §23. 118(c) (1) only prohibits consideration of this factor if the ICWA notice was given at an advanced state of the proceedings.)

In re Jayden D., 842 N.W. 2d 199 (Neb. Ct. App. 2014) (no good cause to deny transfer to tribal court where no evidence introduced regarding the current location of parent and children, the identity and location of witnesses, location of the tribal court, or the ease with which evidence might be presented in the tribal court)

Navajo Nation v. Norris, 331 F.3d 1041 (9th Cir. 2003) (denial of tribe's challenge to adoption of Indian child based on state court's lack of jurisdiction affirmed, because Indian parents were not domiciliaries of the reservation at the time of the child's birth and as such, state court had concurrent jurisdiction)

→ PLACEMENT PREFERENCES

In re R.H., 20 Cal. App.5th 747 (Cal. Ct. App 2018)(good cause to deviate from the placement preferences established where mother obstructed efforts to place with maternal family, tribe failed to respond to repeated messages from the agency, child .had never had any contact with the Tribe and was bonded to prospective adoptive parents).

In re D.L., 298 P.3d 1203 (Ok. Civ. App. 2013) (tribal family failed to show good cause to deviate from the mandatory placement preferences**,** which give first preference **t**o extended family, whether or not family is associated with a tribe)

In re Enrique P., 913 N.W.2d 513 (Neb. Ct. App. 2012)(in the absence of evidence showing good cause to deviate from placement preferences, court order to cease search for relative placements reversed)

Navajo Nation v. Arizona Dep't of Economic Security, Z., 284 P.3d 29 (Ariz. Ct. App. 2012)(good cause to deviate from placement preferences where infant placed in foster home at one month of age, removal would create severe distress, and family agreed to

expose child to tribal culture; original placement was with extended family of alleged father later excluded as father)

→REMEDY FOR ICWA VIOLATION

In re S.E., 158 Cal. Rptr. (Cal. Ct. App. 2013) (failure to investigate child's Indian heritage and provide information to the tribe requires reversal of guardianship order and remand)

In the Matter of Erin G., 140 P.3d 886 (Alaska 2006) (although ICWA contains no statute of limitations for a petition to invalidate , state law limiting challenge of adoption decree not based on fraud or duress to one year applies in the absence of explicit congresional intent to impose no time limit on such actions)