

A Practical Guide to the Indian Child Welfare Act

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According to the Minnesota Department of Human Services 2012 Report on Child Welfare, American Indian children were placed in out-of-home care more than any other ethnic group, and at a rate 14 times that of white children.¹ Because American Indian youth are dramatically overrepresented in the foster care system it is important for CLC volunteer attorneys to understand the basics of the Indian Child Welfare Act (hereinafter "ICWA").² Armed with basic knowledge of ICWA and the assistance of CLC, volunteer attorneys ensure that their clients with Indian heritage are assessed for ICWA eligibility and potential tribal enrollment and that procedures are followed and rights are upheld when ICWA applies.

ICWA provides procedures that state courts must follow if an Indian child comes before them in a foster care, parental termination, or adoption proceeding. ICWA increases opportunities for tribal involvement, and requires the court and local social service agency to consider social and cultural issues relevant to the case. The Minnesota Indian Family Preservation Act (hereinafter "MIFPA")³ and its amendments strengthen and expand ICWA and the 2007 Amended Minnesota Tribal State Agreement (hereinafter "Tribal State Agreement") represents the development of a comprehensive working relationship between all eleven Minnesota tribes and the Minnesota Department of Human Services for the delivery of child welfare services.⁴

This practice point will trace the basic protections ICWA provides through the stages of a child protection matter. These protections include; notice, jurisdiction provisions, transfers to tribal court, qualified expert witnesses, and active efforts. This information will provide CLC volunteers with background knowledge about ICWA and a place to start if assigned an ICWA case.⁵

¹ Minnesota Department of Human Services, *Minnesota's Child Welfare Report 2012*, Report to the 2013 Minnesota Legislature (September 2013), available at <https://edocs.dhs.state.mn.us/lfserver/Public/DHS-5408E-ENG>.

² 25 U.S.C. §§ 1901, 1902. ICWA is a federal law passed in 1978 to address a century of forced removal of Indian children from their homes and communities at alarmingly high rates. These children were placed in boarding schools and in later decades with white families, which were perceived to be better than their families and tribal communities. The disproportionate rate at which Indian families were broken up resulted in severe consequences for Indian children, parents, and tribal communities.

³ §§ 260.751 – 260.835.

⁴ Tribal/State Agreement at Part 1, B.

⁵ The practice point is an overview of important procedures and protections but is not an in-depth reference guide. CLC has detailed resources addressing procedural and substantive issues that arise under ICWA and can be made available to volunteer attorneys upon request.

Applicability of ICWA: Who is Covered and When?

ICWA and MIFPA apply when an Indian child is involved in a child custody or child placement proceeding. An “Indian child” is defined as a child under the age of 18 who is a member of an Indian tribe or eligible for enrollment in an Indian tribe.⁶ Tribes determine eligibility for membership and these determinations are binding on state and federal governments.⁷

A “child custody proceeding” includes child in need of protection or services (hereinafter “CHIPS”) proceedings, termination of parental rights (hereinafter “TPR”) proceedings, voluntary placements, adoptions, status offenses like truancy or runaway if there is a chance the child might be removed from the home, third-party custody cases and delinquency cases if the placement is based on the parent’s inability to fulfill the child’s needs.⁸ For example, a case may start as a delinquency proceeding because of the youth’s action, but ICWA may apply to the following placement if the court determines that the child’s return home would be inappropriate because the parents are unable or unwilling to meet the child’s needs. ICWA and MIFPA do not apply to divorce proceedings or intra-family custody disputes, juvenile delinquency proceedings, or cases under tribal court jurisdiction.⁹ This practice point will focus on CHIPS and TPR proceedings.

Identification of Indian children and Notification

When a child becomes involved in a CHIPS or TPR proceeding, the local social service agency (hereinafter “the agency”) must make an initial determination about whether the child is Indian and must document its determination.¹⁰ The agency makes this determination by asking the child, child’s parents or custodian, and any other relevant individuals.¹¹ Under the Bureau of Indian Affairs’ (hereinafter “BIA”) guidelines, one reason to believe a child may be Indian is if the child believes he or she is Indian.¹²

Practice Tip: Even though the determination is made early, the obligation to identify children that are Indian is ongoing and new information can be brought to the attention of the agency or court by the child’s attorney at any time.

After the initial determination, the agency notifies the tribe to confirm whether the child is an enrolled member or eligible for membership. The agency must contact any tribe with which the child may be affiliated.¹³ A child believed to be Indian must be treated as an ICWA eligible child until the tribe indicates ineligibility for membership or fails to respond to notice and requests for

⁶ 25 U.S.C. § 1903(4); Minn. Stat. § 260.755, subd. 8. Note that ICWA requires that an eligible child also be the child of an enrolled member, while MIFPA only requires the child to be enrolled or designated by the tribe as eligible for enrollment. *Id.* For the purposes of applying the Acts, “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians. 25 U.S.C. § 1903(8); Minn. Stat. § 260.755, subd. 12.

⁷ 25 U.S.C. § 1903(5); Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. No. 67586 (Bureau of Indian Affairs Nov. 26, 1979);

⁸ 25 U.S.C. § 1903(1); Minn. Stat. § 260.755, subd. 3.

⁹ *Id.*

¹⁰ Minn. Stat. § 260.765, subd. 1; The Minnesota Social Services Manual for American Indian Children at 3541 (hereinafter MN SS Manual).

¹¹ MN SS Manual at 3541.

¹² 44 Fed. Reg. 6758, 67587 (1979). MN SS Manual at 3541.

¹³ MN SS Manual at 3542.

eligibility determinations.¹⁴ If the agency does not know with which tribe the child is affiliated, but suspects the child is Indian, the agency must contact the local BIA office.^{15 16}

Practice Tip: If there is reason to believe your child client is Indian but has not been identified as such, following up with the relevant tribe(s) or the local BIA office with any new information may help. It is important to check to see if the correct spelling of the child's and parents' names were given to the tribe, which should be documented in the case file.

Beyond initial notification to the tribe to determine ICWA eligibility, agencies must provide notice to the tribe and child's parents or Indian custodian¹⁷ when there is a potential for a voluntary or involuntary out of home placement.¹⁸ MIFPA expands notice requirements of ICWA to apply to voluntary adoptive and preadoptive placement proceedings, stating that the Indian child's tribal agency must be notified.¹⁹ Notice must also be given to an Indian child, parents and the child's tribe(s) when there is good cause to deviate from ICWA's placement preferences; if the child will be returned from a placement; if there is a change in voluntary placement; or if there is going to be TPR trial.²⁰

Practice Tip: There are short time frames for providing notice in the various child custody proceedings. Failure to provide such notice can cause a jurisdictional defect that may result in any such proceeding to be overturned by state or tribal court.²¹ As such it is important to be aware that if notice was not followed and your client did not get the desired result, the child has right to petition the court to invalidate the proceeding.²²

Jurisdiction

When an Indian child is involved in a child custody proceeding, the tribal court holds either exclusive jurisdiction or concurrent jurisdiction dependent on several factors. Under ICWA, an Indian tribe has exclusive jurisdiction over an Indian child who resides or is domiciled within the

¹⁴ The MN SS Manual at 3541.

¹⁵ 44 Fed. Reg. 67,586 (1979); 25 C.F.R. § 23.11 (c); MN SS Manual at 3681, App. A; Content of Notice in Involuntary Proceedings. Contents of notice include: child's name, birthdate, birthplace, tribal affiliation, names and information regarding parents/Indian Custodians, a copy of the petition, the name of petitioner, the name and address of petitioner's attorney, statement of rights to intervene, counsel, transfer/object to transfer, availability of additional 20 days for preparation, if requested, information regarding the court, statement of consequences of an adjudication on future parental/custodial rights, and a statement to tribe regarding confidentiality of information. *Id.*

¹⁶ The local BIA office contact information is: 5600 W. American Blvd., Suite 500. Bloomington, MN 55347. Telephone: (612) 713-4400

¹⁷ ICWA defines an Indian custodian is "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." 25 U.S.C. § 1903 (6).

¹⁸ 25 U.S.C. § 1912(a); Minn. Stat. § 260.765, subd. 2; MN SS Manual at 3532-33.

¹⁹ Minn. Stat. § 260.761, subd. 3.

²⁰ 25 U.S.C. § 1912(a); 44 Fed. Reg. No. 67,586 (1979).

²¹ Timelines for each type of proceeding can be found at <http://www.icwlc.org/docs/6-icwa-minnesota-social-services-manual.pdf>.

²² 25 U.S.C. § 1914.

Tribe's land.²³ Similarly, a tribe has exclusive jurisdiction over children who are already a ward of a tribal court.²⁴ If a child is not domiciled on tribal land, and is not a ward of tribal court, then concurrent jurisdiction between the state district court and the tribe exists. ICWA expresses a preference for tribal jurisdiction in Indian child custody proceedings. If either parent or the tribe petitions the state district court to transfer the case to tribal court, the state court must do so unless; (1) either parent objects, (2) the tribe declines to exercise jurisdiction, or (3) any party opposing transfer demonstrates "good cause" not to transfer.

Practice Tip: Ask your client about their connection to the tribe and if they want the tribe to be involved. If your child client does not want tribal involvement, it is important to remember to make the court aware of this because transfer to tribal court is discretionary when a child over 12 years old objects.²⁵ ICWA does not define good cause but BIA guidelines say if an Indian child over twelve years of age objects to the transfer there is good cause not to transfer.²⁶

Practice Tip: Requirements for admission to practice in tribal court vary by tribe. Contact CLC for more information if a petition to transfer the case to tribal court is filed.

Active Efforts

In all child protection cases involving a removal of a child, the agency must make reasonable efforts to reunite the child with his or her parents by creating a case plan and providing rehabilitative and supportive services aimed at addressing the issues that led to the child's removal.²⁷ In cases where ICWA applies, active efforts must be made to prevent the breakup of the Indian family; this is a higher standard than the reasonable efforts otherwise required. The Tribal State Agreement defines active efforts to mean "a rigorous and concerted level of case work that uses the prevailing social and cultural values, conditions and way of life of the Indian child's tribe to preserve the child's family and to prevent placement of an Indian child and, if placement occurs, to return the child to the child's family at the earliest time possible."²⁸ Courts must recognize traditional helping and healing systems of an Indian child's tribe and use these systems as the core to help and heal the Indian child and family.²⁹ The agency must seek input from the tribe concerning what resources are available and what barriers the family faces.³⁰ In TPR proceedings, the agency must prove beyond a reasonable doubt that they have provided remedial services and rehabilitative programs and that these efforts were not successful.³¹

Practice Tip: What constitutes active efforts is dependent on the facts of the case. A rule of thumb is that "active efforts" is to engage the family while "reasonable efforts" simply offers

²³ 25 U.S.C. § 1911(a).

²⁴ *Id.* Note that "ward of tribal court" is not defined in ICWA but in Minnesota a ward of tribal court is an Indian child who is being treated as such by the tribal court and does not require the Indian child's parent's rights be terminated. MN SS Manual at 3521.

²⁵ *See* 25 USC § 1911(b); Transfer is also discretionary when proceedings are in a late stage and transfer was not promptly sought. *Id.*

²⁶ 44 Fed. Reg. No. 67,590 (1979).

²⁷ Minn. Stat. § 260 (c).301 subd. 5.

²⁸ Tribal/State Agreement at Part 1, E.4.

²⁹ *Id.*

³⁰ *Id.*

³¹ 25 U.S.C. § 1912(d); MN SS Manual at 3521, 3559; Tribal/State Agreement at Part 1, E.4.

referrals to the family, and leaves it to them to seek out assistance.³² If you believe active efforts are not being used in your case or want clarity on active efforts, please contact CLC.

Qualified Expert Witnesses (QEWs)

Volunteer attorneys may encounter the term Qualified Expert Witness (hereinafter “QEW). The purpose of having a QEW is to provide the court with evidence concerning the social and cultural standards of the tribe’s child-rearing practices to reduce the risk of cultural bias and the unnecessary break up of an Indian family. The use of a QEW is required in foster care placements and actions for termination of parental rights.³³ The QEW’s testimony regarding the appropriateness of the child’s placement outside of the home or termination of parental rights is considered when the court decides whether the moving party (usually the agency) has proved by clear and convincing evidence that a parent’s or Indian custodian’s continued custody of the Indian child will result in serious emotional or physical damage (or beyond a reasonable doubt that a parent’s rights should be terminated).^{34 35}

Practice Tip: What can be done if your client’s wishes differ from what the QEW’s recommendation is? Challenge the qualifications of a QEW if you suspect the QEW does not have tribe specific knowledge either first hand or through other training. Ask questions about the QEW’s personal or professional knowledge of the youth’s tribe and their culture including: (1) Are you a member of the child’s tribe? (2) How are you involved with the child’s tribe? (3) How long have you been involved with the child’s tribe? (4) How are you familiar with the childrearing practices of the child’s tribe? (5) How are you familiar with the child’s tribe’s culture? (6) How are you familiar with the delivery of child welfare services in the child’s tribe?

Placement Issues and Preferences

The tribe in which the Indian child is a member, or eligible for membership, prescribes specific placement preferences. If the tribe does not have placement preferences outlined, ICWA provides default placement preferences with the purpose of keeping Indian youth with Indian relatives, their tribes, or Indians of a different tribe when they cannot go home unless good cause dictates otherwise.³⁶ The Indian child shall be placed in the least restrictive setting, within reasonable proximity to his family and giving preference to placements in the following order: (1) in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met; (2) within reasonable proximity to his home, taking into account any special needs of the Indian child; and according to the following order; (1) with a member of the

³² Native American Rights Fund. Resources: Frequently Asked Questions: Active Efforts, <http://www.narf.org/icwa/faq/active.htm>

³³ 25 U.S.C. § 1912 (e), (f).

³⁴ 25 U.S.C. § 1912 (f), MN SS Manual at 3595.

³⁵ While ICWA requires a QEW it does not define it. The BIA guidelines explain that QEWs are not required to have any legal training. Ideally, a QEW is a member of the child’s tribe and is recognized by the tribe as knowledgeable in tribal customs in child rearing. A QEW could be a lay expert with substantial experience in providing child and family services to Indians and have extensive knowledge of prevailing social and cultural standards and child-rearing practices within the child’s tribe. If tribal members or lay and professional people with extensive knowledge specific to the child’s tribe are not available, a professional person with substantial education, experience and knowledge of prevailing social and cultural standards of child-rearing practices within the general Indian community can be a QEW. *See* Fed. Reg. 44 67,584 at F.3 (1979).

³⁶ 25 U.S.C. § 1915 (b).

Indian child's extended family; (2) with a foster home licensed, approved, or specified by the Indian child's tribe; (3) with an Indian foster home licensed or approved by an authorized non-Indian licensing authority (e.g., the Department of Homeland Security); or (4) with an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.³⁷

Practice Tip: It is important for attorneys to know about placement preferences and good cause to deviate from the preferences in cases where the child objects to a preferred placement. Good Cause not to follow placement preferences: (1) The request of the biological parent(s) or the Indian child, when the child is of sufficient age where appropriate; (2) the unique physical or emotional needs of the child; or (3) the unavailability of a suitable family within the placement preferences.³⁸

Miscellaneous Practice Tips:

- If your client is aging out of care, ensure that the child has any available tribal papers or documentation because tribal affiliation may impact funding available for post-secondary education.
- Many ICWA violations can result in an invalidation of the action that took place. For example, if proper notice is not given, a termination of parental rights results, this action may be invalidated by any court.

Conclusion

Although improving, there are still disproportionately high numbers of American Indian youth in the foster care system. ICWA-eligible youth are not always identified or procedures are not always followed. It is important for attorneys working with youth to be aware of ICWA and the special protections it provides to eligible youth. Because youth may be identified as ICWA eligible at any point within a case, it is important for CLC volunteer attorneys to understand issues surrounding ICWA eligibility, identification, and relevant procedures and rights to ensure our clients receive the protections to which they are entitled to.

³⁷ *Id.*; MN SS Manual at 3556.

³⁸ 44 Fed. Reg. 67,594 (1979); Tribal/State Agreement (2007) Part 1 E 15(a)-(c).