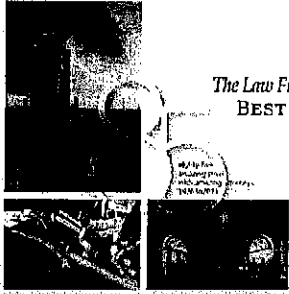


Section Three

The Indian Child Welfare Act (ICWA)






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The Indian Child Welfare Act
(and the Minnesota Indian family preservation act)

U.S.C. § 1901 et. seq.
Minn. Stat. § 260.751 et. seq.

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History- Before ICWA

Indian children placed in out of home care at alarmingly high rates

- Nationwide, 10-20 times more frequently than non-Indian children
- In Minnesota from 1972-1974
 - Out of home placements 5 times more frequent for Indian children
 - 1/4 Indian children under the age of 1 were adopted
 - nearly 98% of Indian children placed for adoption were placed with non-Indian families.

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Purpose of ICWA

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



Some Things to Keep in Mind:

- Many states have codified ICWA provisions
 - Minnesota Indian Family Preservation Act, adopted 1985
- Courts must apply the state or federal standard, whichever has a higher standard of protection of the rights of a parent or Indian Custodian. 25 U.S.C. § 1921
- Full faith & credit must be given to public acts, records & judicial proceedings of an Indian Tribe applicable to child custody proceedings. 25 U.S.C. § 1911 (d)



When does ICWA Apply?

- (1) "Indian Child"
- (2) "Child Custody Proceeding"
- (3) Child Removed from a "Parent" or "Indian Custodian"



If all three criteria exist, application of both ICWA and MIFPA is mandatory. 25 U.S.C. § 1903 (4); Minn. Stat. § 257.351, subd. 6



"Indian Child"

Unmarried
Under the age of 18
Either:

A Member of a recognized tribe OR
Eligible for enrollment in a recognized tribe

- *Note: The Federal law requires that an eligible child also be the biological child of a member. 25 U.S.C. § 1903(4)
- *Tribe determines eligibility for membership and determination is binding on state and federal governments
- *ICWA applies even if the Tribe is wrong



"Child Custody Proceedings"

Involuntary proceedings in State Court
Types of Cases Governed by both ICWA & MIFPA:

- *CHIPS
- *TPR
- *Voluntary Placements
- *Adoptions
- *Status Offenses
- *Guardianships
- *Third Party Custody Cases
- *Delinquency Cases (if placement based on parent's unfitness or child's needs)
- *Some other cases



"Parent" or "Indian Custodian"

Parent:
biological parent, or an Indian person who has adopted an Indian child under state law or tribal law or custom.

Indian Custodian:
any Indian person who has legal custody under state law, tribal law or custom, or to whom temporary physical care, custody and control has been transferred by a parent of such child.

25 U.S.C. § 1903 (6),(9)



ICWA Protections

- Jurisdiction provisions
- Notice
- Transfer to Tribal Court
- Intervention of Tribe
- GAL provisions
- Right to counsel
- QEW
- Active Efforts (Not Reasonable Efforts)
- Additional Requirements for Voluntary TPRs and Voluntary Foster Care Placements



Jurisdiction

NO state court jurisdiction if:

- The child lives/resides on a reservation with jurisdiction over child custody matters
 - Child is already a ward of a tribal court
- NO state court jurisdiction if:

Concurrent Jurisdiction



Transfer of Actions to Tribal Court

State courts shall transfer to a tribal court on the Petition of either parent or the tribe UNLESS:

- Either parent objects
- Tribe declines to exercise jurisdiction
- Any party opposing transfer demonstrates "good cause" not to transfer
NEVER socio-economic conditions or perceived inadequacy of tribal social services

Transfer is discretionary where:

- Proceedings are at a late stage and transfer was not promptly sought
- Child over 12 years old objects



Notice Requirements

Mandates notice to parents, Indian Custodians, and Tribes of the action.

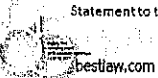
- Notice to be provided to all tribes in which a child may be eligible for enrollment
- If not sure of tribal affiliation, provide notice to the Secretary of the Interior, who will provide proper notice
- Emergency Holds- notice to Tribe by phone or fax
- Short time frames for providing notice



Notice Requirements-Contents of Notice

Contents of the notice:

- Child's name, birthdate, birthplace, tribal affiliation
- Names and Information regarding parents/Indian Custodians
- Copy of Petition, name of petitioner
- Name & 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
- Statement to tribe regarding confidentiality of information



Right of Tribe to Intervene

- In foster care/TPR proceedings, Tribe can Intervene
- Mandatory, can be exercised at any point.
- Tribal representative

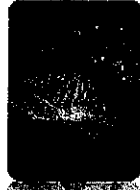
Why?

- Ensure Tribal participation if not transferred
- Monitor ICWA compliance
- Educate state courts
- Resource for Information regarding cultural/social standards of the Tribe



GAL Provisions (MIFPA only)

- Appointment of a GAL who is Indian, and preferably a member of the child's tribe
- If not possible, GAL should demonstrate
 - knowledge and appreciation of
 - the child's tribal heritage.



Right to Counsel

- Gives Indigent Parents and Indian Custodians the right to counsel.
- If not provided for in state law, the Secretary of the Interior will pay reasonable fees for counsel.



QEWs

Why? To reduce the risk of cultural bias by providing the court with evidence regarding social and cultural standards and child-rearing practices of the tribe.

QEWs are:

- Member of the tribe recognized by the tribe as knowledgeable in tribal customs in child-rearing
- Lay expert with substantial experience in providing child and family services to Indians/ extensive knowledge of prevailing social and cultural standards and child-rearing practices within the child's tribe
- Professional person with substantial education and experience with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community.



QEW & Burdens of Proof

The Court must make a determination that continued custody is likely to result in serious emotional/physical damage to the child.

Foster Care:

Determination must be supported by clear and convincing evidence, including testimony by a QEW.

TPR:

Determination must be supported beyond a reasonable doubt, including testimony by a QEW.



Active Efforts

•Active efforts must be made to provide services designed to prevent the breakup of the Indian Family.

•NOT "Reasonable Efforts"



Voluntary TPRs & Voluntary Foster Care Placements

- Must be in writing
- Must be signed before a Judge
- Must be accompanied by a certification by the Judge.

If procedure not followed:

- Withdrawal Provisions
- Final decrees of adoption can be vacated



Placement Preferences

- Placement Preferences In Tribal Law will trump.
- MIFPA: If Tribe has intervened, agencies must defer to tribal judgment as to the suitability of a particular home.



Placement Preferences – Default Provisions

25 U.S.C. § 1915(a)

- Foster care/pre-adoptive placement
 - Extended Family member
 - Foster home licensed, approved, specified by child's tribe
 - Indian foster home otherwise licensed
 - Institution approved by a tribe or operated by an Indian organization
- Adoptive Placement
 - Extended family member
 - Member of the child's tribe
 - Other Indian families



Consider it solved.



Thank you

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A Practical Guide to the Indian Child Welfare Act

CLC wishes to especially thank Jenny Austin, Esq. Baker McKenzie, LLP for her invaluable research, insight and assistance provided to CLC on this topic.

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. §§ 1901-1963. 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 Minn. Stat. §§ 260.751 – 260.835 (2013).

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 in the process, the obligation to identify a child as an Indian child 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

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.

until the tribe indicates ineligibility for membership or fails to respond to notice and requests for eligibility determinations.¹⁴ If the agency does not know to which tribe the child is affiliated, but suspects the child is an Indian child, the agency must contact the local BIA office.^{15 16}

Practice Tip: If there is reason to believe your client is an Indian child but has not been identified as such, follow up with the relevant tribe(s) or the local BIA office. It is important to check to see if the correct spelling of your client's and parents' names were given to the tribe. The tribal notice should be documented in the court 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 pre-adoptive 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 child protection proceedings.²¹ Failure to provide the required notice can cause a jurisdictional defect that may result in the proceeding to be overturned by state or tribal court.²² Additionally, your client has a right to petition the court to invalidate the proceeding if the required notice provisions of ICWA were violated.²³ Thus, it is critical to know whether or not proper notice was provided by the county agency.

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 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." 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 *See*, 25 U.S.C. §§1912, 1914.

²³ 25 U.S.C. § 1914

Tribe's land.²⁴ Similarly, a tribe has exclusive jurisdiction over children who are already a ward of a tribal court.²⁵ 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 her connections to her tribe and if she wants the tribe to be involved. If your child client does not want tribal involvement, it is important to inform the court of your client's objections since the transfer to tribal court is discretionary when a child over 12 years of age objects.²⁶ 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.²⁷

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.²⁸ 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.²⁹ 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."³⁰ 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.³¹ The agency must seek input from the tribe concerning what resources are available and what barriers the family faces.³² 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.³³

Practice Tip: What constitutes active efforts is dependent on the facts of the case. One suggested rule of thumb is that "active efforts" require the agency to actively engage the family

²⁴ 25 U.S.C. § 1911(a).

²⁵ *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.

²⁶ See 25 USC § 1911(b); Transfer is also discretionary when proceedings are in a late stage and transfer was not promptly sought. *Id.*

²⁷ 44 Fed. Reg. No. 67,590 (1979).

²⁸ Minn. Stat. § 260.012 (2013).

²⁹ *Id.* at (c).

³⁰ Tribal/State Agreement at Part 1, E.4.

³¹ *Id.*

³² *Id.*

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

while “reasonable efforts” can require offers of referrals to the family and then have the family seek out the assistance.³⁴ 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.³⁵ 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).^{36 37}

Practice Tip: If your client’s wishes differ substantially from the QEW’s recommendations, you may wish to consider challenging the qualifications of the QEW. Before challenging the qualifications, you will want to determine whether or not the QEW has specific tribal knowledge gained either through firsthand knowledge or through other training. You may wish to ask the following questions about the QEW’s personal or professional knowledge of your client’s tribe and culture: (1) Are you a member of my client’s tribe? (2) How are you involved with my client’s tribe? (3) How long have you been involved with my client’s tribe? (4) How are you familiar with the childrearing practices of my client’s tribe? (5) How are you familiar with the tribal culture of my client’s tribe? (6) How are you familiar with the delivery of child welfare services in my client’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.³⁸ 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:

³⁴ Native American Rights Fund. Resources: Frequently Asked Questions: Active Efforts, <http://www.narf.org/icwa/faq/active.htm>

³⁵ 25 U.S.C. § 1912 (e), (f).

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

³⁷ 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).

³⁸ 25 U.S.C. § 1915 (b).

(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; (a) with a member of the Indian child's extended family; (b) with a foster home licensed, approved, or specified by the Indian child's tribe; (c) with an Indian foster home licensed or approved by an authorized non-Indian licensing authority (e.g., the Department of Homeland Security); or (d) 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.³⁹

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.⁴⁰

Miscellaneous Practice Tips:

- If your client is aging out of care, ensure your client has any available tribal papers or documentation since tribal affiliation may impact funding available for your client's post-secondary education.
- ICWA violations may result in substantial ramifications including, the dismissal of the CHIPS petition or the invalidation of an adoption.

Conclusion

There are disproportionately high numbers of American Indian youth in Minnesota's foster care system. Since ICWA-eligible youth are not always identified and ICWA 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. CLC volunteer attorneys with ICWA clients need to understand the issues surrounding eligibility and identification as well as the processes and rights under ICWA to ensure their clients receive all their entitled protections.

³⁹ *Id.*; MN SS Manual at 3556.

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