INDIAN CHILD WELFARE ACT (ICWA)

Please see Checklist Section for ICWA Checklist.

Important Note

On October 4, 2018, the U.S. District Court for the Northern District of Texas issued its opinion in *Brackeen v. Zinke*, 338 F.Supp.3d 514 (2018), declaring unconstitutional most of the Indian Child Welfare Act and its 2016 implementing regulations, also known as the Final Rule.

On August 9, 2019, the a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit filed an opinion in *Brackeen v. Bernhardt (*formerly *Brackeen v. Zinke*, 2019 U.S. App. LEXIS 23839 (5th Cir. Tex., Aug. 9, 2019) reversing the district court's ruling and upheld the Indian Child Welfare Act and Final Rule as constitutional. On November 7, 2019, the full Fifth Circuit vacated the August 9 decision for an *en banc* review and heard oral arguments on January 22, 2020.

As of the date of publication, all sections of the Indian Child Welfare Act and Final Rule are in effect and should be followed.

This chapter is excerpted from the DFPS Attorney Manual with permission of DFPS.

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 – 1963; 25 C.F.R. Part 23, is a federal law that imposes special standards and requirements when a child welfare agency seeks to intervene to protect an "Indian child," as defined by statute 25 U.S.C. § 1903(4). The law was enacted to protect not only Indian children, but their families and tribes. 25 U.S.C. § 1902.

In 2013, the United States Supreme 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 in *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).

In response, the Department of the Interior, Bureau of Indian Affairs (BIA) issued updated guidelines in February 2015 and a binding final rule to the regulations implementing ICWA (Final Rule or Regulations). 81 FR 38864 (June 14, 2016) and codified at 25 CFR Part 23. The final rule reflects public comment and carries forward the "gold standard" in child welfare best practices. Effective in December 2016, the final rule:

- Clarifies terms used in the statute such as what actions are necessary to prevent the breakup of an Indian family using the rule's definition of "active efforts";
- Provides definitive signposts for ICWA compliance;
- Allows for notice of involuntary proceedings by certified mail, return receipt requested, as a less costly alternative to registered mail, return receipt requested;
- Provides flexibility to allow local procedures for emergency removal and placement, as long as ICWA's statutory standard for emergency removal and placement is met, is as short as possible;
- Continues to allow for consideration of each child's unique circumstances, but establishes some parameters to ensure that ICWA's purposes are not frustrated;

- Ensures states have the flexibility to determine the best way to maintain their records and no longer requires the proposal for maintaining all Indian child custody records in a single location;
- Leaves intact a parent's prerogative to choose an adoptive family for their child in voluntary proceedings; the rule requires that the parents review families who meet the placement preferences before making a final decision; and
- Protects confidentiality of the parties in all child custody proceedings, requiring the BIA, states, and tribes to keep information confidential.

In December 2016, the BIA issued another edition of updated Guidelines for Implementing the Indian Child Welfare Act (Guidelines)[59]. The Guidelines are not legislative and are thus not binding, but Texas courts have relied on the Guidelines in interpreting ICWA. *In re V.L.R.*, 507 S.W.3d 788 (Tex. App. — El Paso, Nov. 18, 2015). The Guidelines state that "these guidelines explain the statue and regulations and also provide example of best practices."

A. 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." 25 U.S.C. § 1912(a).

1. Child Custody Proceedings

A suit seeking foster care placement, termination of parental rights, pre-adoptive or an adoptive placement is subject to ICWA. ICWA does not apply to most juvenile delinquency actions; nor does it apply to custody actions in divorce or separation proceedings (unless custody may be awarded to a non-parent).

The Regulations clarify ICWA applies to a voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child…" 25 C.F.R. § 23.103(a)(1)(ii) and (4). 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. 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. 25 C.F.R. § 23.127.

Indian Child

An Indian child is 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. 25 U.S.C. § 1903(4). 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.

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; and
- Alabama Coushatta Tribe of Texas near Livingston.

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 section 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 or in an Alaska Native village;
- 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. 25 C.F.R. § 23.107(c).

How Are Possible Indian Children Identified?

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

At the Adversary, Status, and each Permanency Hearing, Texas courts are required to ask the parties whether the child or child's family has Native American heritage and identity any Native American tribe with which the child may be associated. Tex. Fam. Code § 262.201(f), Tex. Fam. Code § 263.202(f-1), and Tex. Fam. Code § 263.306 (a-1)(3).

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. 25 C.F.R. § 23.107(a).

By far the most significant impact of failing to identify an ICWA case is if key ICWA provisions are violated, *a final order can be invalidated*. The remedy for violation of key ICWA provisions is a petition to invalidate. 25 U.S.C. § 1914. Similarly, if there is not sufficient information in the record to assess whether ICWA applies, an appeal can be abated. Either way, permanency is delayed.

Special Issue: If any parent or family member's response suggests an Indian child may be involved in a DFPS case, 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. If all family members deny any tribal family history, this should be documented. If there is any information to suggest a tribal association, by giving the tribe notice and following up as necessary to verify a child's status you can eliminate a potentially devastating delay that can undermine permanency.

B. Tribal and State Jurisdiction

Whether the family court or tribal court has jurisdiction over a case involving an Indian child depends on where the child resides, whether transfer to the tribal court is requested, and whether an exception to the mandatory transfer provision applies. If a case involves an Indian child, however, the state court proceedings must comply with ICWA, whether or not the tribe intervenes or the case is transferred to a tribal court.

1. 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. 25 U.S.C. § 1911(a).

2. Emergency Exception

When an Indian child who resides on a reservation is temporarily off the reservation and emergency removal or placement is necessary "to prevent imminent physical damage or harm to the child," the state child welfare agency may act despite the fact the tribal court otherwise has exclusive jurisdiction. 25 U.S.C. § 1922. In such circumstances, the state child welfare 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.

3. Concurrent Jurisdiction Off the Reservation

If the child's residence or domicile is not on the reservation, the tribal and state court have concurrent jurisdiction. 25 U.S.C. § 1911(b). Even in this circumstance, however, there is a presumption of tribal jurisdiction in cases involving an Indian child. *Mississippi*, 490 U.S. 30 (1989).

C. Required Notice

ICWA imposes many specific requirements governing the timing, the type of notice, and the persons and entities entitled to notice. *In re R.R.*, 249 S.W.3d 213 (Tex. App. — Fort Worth, March 19, 2009, no pet.). One overarching 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 Indian child status, proof of compliance with notice requirements can be essential to counter a challenge based on violation of ICWA.

1. When is Notice Required?

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, pre-adoptive placement, or adoptive placement, this means any Suit Affecting the Parent Child Relationship filed by CPS requires notice. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.2.

2. Timing (10 + 20 days)

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 U.S.C. § 1912(a); 25 C.F.R. § 23.112 (a).[60]

To avoid a delay and potential challenge to the court's jurisdiction, the best practice is to set the initial hearing at least 30 days after notice is given (in effect, this assumes that a 20-day continuance is requested and granted).

3. When Identity of Parent / Indian Custodian is Known

Notice of a pending custody proceeding involving an Indian child must be sent to:

- Every known parent;
- Indian custodian;
- Each identified tribe; and
- Regional Director, Bureau of Indian Affairs (a representative of the Secretary of Interior). 25 U.S.C. § 1912(a); 25 C.F.R. § 23.11(a).

4. When Identity is Not Known

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** must be sent to:

- Regional Director, Bureau of Indian Affairs (a representative of the Secretary of Interior). 25 U.S.C. § 1912(a); 25 C.F.R. § 23.11(b).

5. How to Send Notice

DFPS notices include the required advisements which can be tailored with specific child and family information. A copy of the petition should be attached as well as any 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. 25 C.F.R. § 23.107(d).[61]

The Regulations will allow giving notice by registered or certified mail, with return receipt requested in either case. 25 C.F.R. § 23.11(a); 25 C.F.R. § 23.111(c). 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. 25 C.F.R. § 23.111(c). Particularly where an email contact is provided, sending a duplicate notice this way is best practice to expedite the process of determining a child's status.

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. 25 C.F.R. § 23.111(a)(2).

6. Parent/Indian Custodian

A parent includes the biological or adoptive parent of an Indian child, including a non-Indian parent. 25 U.S.C. § 1903(9); 25 C.F.R. § 23.2. An alleged father must acknowledge paternity or be legally determined to be the father before being recognized as a parent. *In re V.L.R*. 507 S.W.3d 788 (Tex. App. — El Paso, Nov. 18, 2015, no pet.) (unidentified tribe of a child's unwed father who fails to establish paternity is not the child's tribe).

A primary impact of the U.S. Supreme Court's *Baby Girl* opinion 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). *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013). The impact of this decision 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; *In re V.L.R.* 507 S.W.3d 788 (Tex. App. — El Paso, Nov. 18, 2015, no pet.).

Tex. Fam. 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;

The Regulations now define "continued custody" to include physical and/or legal custody (including under tribal law or custom) that a parent "already has or had at any point in the past," and specify that a biological mother has had custody of a child. 25 C.F.R. § 23.2.[62]

“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.” 25 U.S.C. § 1903(6).

7. 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. 25 C.F.R. § 23.109(c).[63]

8. Contact Information

The best resource for contact information for individual tribes is the ICWA notice published in the Federal Register or the BIA’s website using the ICWA Designated Agents Listing.[64]

For tribes without a listing, the Regulations mandate contacting the tribe directly to find out the proper contact person. If the Tribe fails to respond to written communication, seek assistance from the Bureau of Indian Affairs.

For notice to the Regional Director:

For child custody proceedings in Texas, *except for notice to the Ysleta del Sur Pueblo of El Paso County:*

Southern Plains Regional Director
BIA
P.O. Box 368
Anadarko, Oklahoma 73005
(405) 247-6673 Ext. 217; Fax: (405) 247-5611

For child custody proceedings in *El Paso and Hudspeth counties in Texas*:

Southwest Regional Director
BIA
1001 Indian School Road NW
Albuquerque, New Mexico 87104
Phone: (505) 563-3103; Fax: (505) 563-3101

9. 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, DFPS will 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*; and

- If the pleadings are amended, or a final hearing is set, DFPS will 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 or registered mail, return receipt requested. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111.

D. 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." 25 C.F.R. § 23.108(b).[65] 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. 25 C.F.R. § 23.103(c).[66] 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 email. 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. 25 C.F.R. § 23.108(c).[67]

In the more common scenario, when documents showing a tribal determination are not available, a tribe's failure to respond to notice may present a distinct difficulty. 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'…" 25 C.F.R. § 23.107(b).[68]

Depending on the nature of the evidence that gave the court reason to know that the child is an Indian child and prompted notice, 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.

The Regulations state that there is no exception to ICWA based on the premise that if the child's parent does not have a social, cultural, or political connection with an Indian tribe that ICWA should not apply. This judicially-created doctrine, called the existing Indian family doctrine, had not been addressed in Texas courts but is now specifically denounced in the Regulations.

E. 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. 25 C.F.R. § 23.113(d). DFPS has an ICWA removal affidavit which conforms to these requirements.

An emergency removal must be terminated as soon as it is not necessary to prevent the imminent physical harm. An emergency removal will terminate on the:

- Filing of a child-custody proceeding,
- Transfer of the case to the Tribe's jurisdiction, or
- Return of the child to the parent or Indian custodian.

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." 25 C.F.R. § 23.113(a) and (c).[69]

F. 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."

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 foster care placement is requested under ICWA. 25 U.S.C. § 1912. At that time, an ICWA compliant hearing can be conducted.

G. Rights of the Parents, Indian Custodian, and Tribe

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

It is recommended that courts with the capacity permit family members and tribes to participate by telephone, video conference, and other means. 25 C.F.R. § 23.133.[70] If there is reason to know a parent or Indian custodian has limited English proficiency, the court must provide interpreter services. 25 C.F.R. § 23.111(f).[71]

1. 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. 25 C.F.R. § 23.115.[72] On receipt of a transfer request, the state court should immediately ensure the tribal court is notified. Notice may include a request for timely response regarding whether the tribe will decline the transfer. 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. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117.[73] 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. 25 C.F.R. § 23.118(c).

The basis for any decision denying transfer must be a written order or in a statement on the record. 25 C.F.R. § 23.118(d). If transfer is ordered, the state court must promptly forward the court records and work with the Tribal court to accomplish a smooth transfer with minimal disruption in services to the family. 25 C.F.R. § 23.119.

2. 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. 25 U.S.C. § 1912(b). 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. Tex. Fam. Code § 107.012.

3. Right to Review Records

In a proceeding for emergency removal, foster care placement 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. 25 U.S.C. § 1912(c); 25 C.F.R. § 23.134.[74] 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.

4. 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. 25 U.S.C. § 1911(c). Intervention may be accomplished informally, by oral statement, or formally. Most important, if an Indian child is involved, ICWA applies whether or not the child's tribe intervenes.

5. Full Faith and Credit

The 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. 25 U.S.C. § 1911(d).

H. 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. 25 U.S.C. § 1915; 25 C.F.R. § 23.129-131. The court must consider the preference of the Indian child or child's parent, where appropriate. 25 C.F.R. § 23.131(d); 25 C.F.R. 23.132(b). In a voluntary proceeding, if a parent requests anonymity, the court must give weight to that request in applying the preferences. 25 C.F.R. § 23.129(b).

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. 25 C.F.R. § 23.131.

The statutory preferences give priority as follows:

1. 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. 25 U.S.C. § 1915(b); 25 C.F.R. § 23.131(b).[75]

2. For an Adoptive Placement

- A member of the child's extended family;
- Other members of the child's tribe; or
- Other Indian families. 25 U.S.C. § 1915(a); 25 C.F.R. § 23.130.

3. Departing from ICWA Preferences

The tribe can by resolution alter the order of preferences. 25 U.S.C. § 1915(c). 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, mental, or emotional needs" of the child; and
- The unavailability of a suitable placement (despite a diligent search and active efforts to locate one). 25 C.F.R. § 23.132(b)-(c).

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. 25 C.F.R. § 23.132(d)-(e).

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. *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552. This shifts the burden to a potential placement to seek placement, which is at odds with the best placement practices for child protection. 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.

I. Conservatorship or Termination of Parental Rights of Indian Child

1. Burden of Proof

If ICWA applies, the burden of proof and standards for an order placing a child in foster care (in effect a removal) or a final order seeking permanent managing conservatorship or termination of 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 qualified expert testimony 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 by proved unsuccessful. 25 U.S.C. § 1912(e).

- Termination of Parental Rights – Evidence Beyond a Reasonable Doubt

  Including qualified expert testimony 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) and (f).

2. Causal Relationship

Whether a foster care placement or termination of parental rights is at issue, 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." 25 C.F.R. § 23.121(c).[76] 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." 25 C.F.R. § 23.121(d).

3. Active Efforts

There must be evidence of “active efforts” to alleviate the cause for removal, taking into account the prevailing social and cultural conditions and way of life of the Indian child’s tribe. 25 U.S.C. § 1912(d). 25 C.F.R. §23.120.[77] Active efforts are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts. **“Active efforts” is generally construed to require more than the “reasonable efforts” otherwise required for children in foster care. The Regulations offer detailed examples of what constitutes active efforts:**

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available; and

(11) Providing post-reunification services and monitoring. 25 C.F.R. § 23.2.

Strategies that promote diligent identification of tribes, incorporate culturally appropriate tribal services, help families overcome barriers, promote involvement of the Tribe, and maintain sibling relationships and family visits are all encouraged.

The Guidelines recommend that State agencies work with Tribes, parents, and other parties as soon as possible, even in an emergency situation, to begin providing active efforts to reunite the family.[78] **To the extent possible, DFPS staff should work with a child's tribe, extended family, tribal social services, and individual Indian caregivers to tailor appropriate services for individual families.**

The Regulations specify that active efforts must be documented in detail in the record. 25 C.F.R. § 23.120(b).

J. 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. 25 C.F.R. § 23.122. The social worker assigned to the child's case may not serve as an expert (although a caseworker may testify otherwise, 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. If the tribe is in agreement with the agency's legal strategy, and has an expert willing and able to testify, this is ideal. However, if a tribe has a policy against termination of parental rights, or is not in agreement with DFPS on a specific case, finding an ICWA expert can be challenging. Understandably, many tribal members do not want to take a position in a court proceeding adverse to a fellow tribal member and with very small tribes, the pool of potential experts is limited. The DFPS Office of General Counsel may be able to assist in identifying expert witnesses. Courts with capability should allow participation by phone, video conferencing, or other methods. 25 C.F.R. § 23.133.

K. Voluntary Relinquishment of Parental Rights

ICWA imposes significantly different requirements for a valid voluntary relinquishment of parental rights, or “consent to termination of parental rights," as ICWA denotes the process, when an Indian child is involved than the Texas Family Code does. 25 U.S.C. § 1913(a). The most significant difference is that a valid relinquishment to terminate parental rights must be in writing and be taken on the record before a judge. The Guidelines also state that notice of voluntary proceedings to the Indian tribe is a recommended practice, while the statutory notice provision is limited to involuntary proceedings. 25 U.S.C. § 1912(a).[79]

In addition, ICWA requires the judge to attach a certificate that indicates that the terms and consequences of the consent were fully explained and that the parent or Indian custodian fully understood the explanation whether provided in English or by an interpreter. 25 U.S.C. § 1913(a). Consent to voluntary relinquishment of parental rights cannot be given until the eleventh day after birth of the child and must contain the child’s name, birth date, the name of the child’s tribe, any tribal affiliation and membership, name and address of the consenting parent or Indian custodian, and the name and address of the person or entity that arranged any adoptive or pre-adoptive placement.

Unlike a relinquishment made to CPS under the Texas Family Code, a parent of an Indian child may withdraw consent for any reason at any time prior to entry of a final decree of termination or adoption. 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). 25 U.S.C. § 1913(c)-(d).

L. Case Notes

1. U.S. Supreme Court

Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (Court held: (1) the 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)

2. 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 notice 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 Tex. App. LEXIS 4546 (Tex. App. — Tyler April 29, 2016, no pet.) (mem.op) (termination abated and remanded for trial court to make findings as to Indian child status; three permanency reports referencing Indian child status and report from CASA volunteer that father refused hair follicle drug test on grounds that he was Indian and could not cut hair sufficient to trigger duty to give notice to the tribe;) (*In the Interest of Z.C.*, No. 12-15-00279-CV, 2017 Tex. App. LEXIS 3896 (App.—Tyler Apr. 28, 2017) On remand, proceeding reinstated and

proper notice was sent. The court found child's possible tribe was not an ICWA recognized tribe. Trial court judgement was then affirmed.)

In re D.D, No.12-15-00192-CV, 2016 WL 7401925 (Tex. App. — Tyler 2016, no pet. h.) (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 despite references in the record to family tribal history)

In re N.A., No. 02-13-00345-CV, 2014 LEXIS 2377 (Tex. App. — Fort Worth, February 28, 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 LEXIS 10746 (Tex. App. — Corpus Christi-Edinburg, Dec. 27, 2013, 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, March 19, 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 S.J.H., 594 S.W.3d 682 (Tex. App.—El Paso 2019, no pet.) (reversed and remanded for failure to provide notice to a potential tribe, even as other tribes were notified and determined ineligible.)

In re A.E., No. 02-19-00173-CV (Tex. App.—Fort Worth Oct. 1, 2019, pet. denied) (mem. op.) (ICWA notice requirement must be strictly adhered to under 25 C.F.R. § 23.111(a)(2), (d)).

In re A.M., a Child, 570 S.W.3d 860 (Tex. App. – El Paso 2018, no pet.) (ICWA notice is not required during an emergency removal)

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) (failure to strictly comply with formal notice not basis for invalidation where tribe had actual notice, intervened, and participated in case)

In re R.R., 294 S.W. 3d 213 (Tex. App. — Fort Worth, March 19, 2009, 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 A.M., a Child, 570 S.W.3d 860 (Tex. App. – El Paso 2018, no pet.) (alleged defects in temporary orders do not invalidate a final termination order when the final order complies with all ICWA requirements, including supporting qualified expert testimony and all necessary ICWA findings.

In re J.J.T., 544 S.W. 3d 874 (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 Tex. App. LEXIS 8272 (Tex. App — San Antonio Aug. 3, 2016, no pet. h.) (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 LEXIS 4712 (Tex. App.—Austin, April 12, 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 ICWA have been satisfied.")

BURDEN OF PROOF

In re G.C., No. 10–15–00128–CV, 2015 Tex. App. LEXIS 8527 (Tex. App.—Waco, August 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 AND JURY CHARGE

In re G.C., No. 10–15–00128–CV, 2015 Tex. App. LEXIS 8527 (Tex. App.—Waco, August 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 ICWA and the Texas Family Code must be satisfied; not error to submit broad form jury charge where charge included instruction on statutory language and burden of proof under both ICWA and the Family Code; and, there must be proof beyond a reasonable doubt that "active efforts" were made and were unsuccessful to prevent the breakup of the Indian family under 25 U.S.C. § 1912(d))

In re W.D.H., 43 S.W.3d 30 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (termination order reversed, citing failure to make requisite ICWA findings and error in making findings on best interests (“an Anglo standard”) and on statutory grounds for termination under the Texas Family Code. Father's whereabouts and status as a member of the Cheyenne-Arapaho tribe of Oklahoma were unknown when child was removed at birth and only after reunification was in progress and father was convicted of burglary did he advise the agency he was one-fourth Indian)

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

N. M. v. Texas Dep't of Family and Protective Servs., No. 03-19-00240-CV (Tex. App.—Austin Sept. 26, 2019, no pet.) (mem. op.) (Termination order reversed where no qualified expert witness testified as required under the ICWA.)

In re D.L.N.G., 2019 WL 3214151 (Tex. App. – Dallas, July 17. 2019, no pet. h.) (reversed and remanded trial court’s final order finding the trial court failed to comply with the ICWA requirement of a qualified expert witness before appointing the foster parents as managing conservators.)

In re D.E.D.L., 568 S.W.3d 261 (Tex. App.—Eastland 2019, no pet.) (the trial court was able to determine the Indian tribe's representative met the requirements for a qualified expert witness even though the Department did not specifically designate her, and the trial court did not expressly certify her as a qualified 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, Nov. 18, 2015, no pet. h.) (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 of 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 Tribe v. Mejia, 906 S.W.2d 152 at 169 (Tex. App.—Houston [14th Dist.] 1995) (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 ICWA. In other words, avoiding tribal court jurisdiction does not render ICWA inapplicable.")

REMEDY FOR ICWA VIOLATION

In re V.L.R., 507 S.W.3d 788 (Tex. App. — El Paso, Nov. 18, 2015, no pet. h.) (violation of ICWA requires reversal of termination judgment)

In re G.D.P., No. 09–14–00066–CV, 2014 Tex. App. LEXIS 7477 (Tex. App. — Beaumont, 2014, no pet.) (parties agreed to reverse termination judgment based on violation of ICWA)

In the Interest of P.J.B., No. 10-12-00286-CV, 2013 LEXIS 4076 *(*Tex. App. — Waco, March 28, 2013, no pet.) (no 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 ICWA can be raised for the first time on appeal; appeal abated pending trial court determination of Indian child status; *disp. on merits*, 2010 Tex. App. LEXIS 2513 (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, Nov. 18, 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)

3. Other State Courts

INDIAN CHILD STATUS

In the interest of 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. 3d 890 (Ca. Ct. App. 2009) (where children's biological father had been adopted by Apache parent, error 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.")

EXPERT WITNESS QUALIFICATIONS

Oliver N. v. State, 2019 WL 2896647 (Alaska 2019) (Based on the court's findings in *Eva H.* and reviewing two separate appeals in a consolidated opinion, an expert witness was qualified to speak to tribal social cultral standards but lacked the ability to testify to the risk of harm and did not qualify as an expert witness for the purposes of ICWA; similiarly, an expert in ICWA compliance was not qualfiied to testify to the risk of harm)

Eva H. v. State, 436 P.3d 1050 (Alaska 2019) (evidence was unsufficient to qualify an attorney, who had previously served as a guardian ad litem, as an expert witness for the purposes of ICWA; The court based its reasoning on a plain reading of 25 C.F.R. § 23.122(a) which requires an expert witness be qualified to to testify to the risk of harm in every case but the ability to testify to prevailing social and cultural standards isn not essential in every case)

Matter of I.W., 419 P.3d 362 (Okla. Civ. 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 (Kan. Ct. App. 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 (Alaska 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 25 U.S.C. § 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 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., 228 Cal.Rptr.3d 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 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** to extended family, whether or not family is associated with a tribe)

In re Enrique P., 709 N.W.2d 676 (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)

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 TO REUNIFY

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 ex rel. Children, Youth & Families Dep't v. Yodell B., 367 P.3d 881 (N.M. Ct. App., December 21, 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 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.")

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 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 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.")

N.A. v. State, 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 effort 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)

REMEDY FOR ICWA VIOLATION

In re S.E., 158 Cal. Rptr. 3d 497 (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 re Adoption of Erin G, 140 P.3d 886 (Alaska 2006), 127 S.Ct. 591 (2006, cert. denied) (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 applied in the absence of explicit congressional intent to impose no time limit on such actions)

M. Resources

Bureau of Indian Affairs, Quick Reference Sheet for State Court Personnel[80]

National Council of Juvenile and Family Court Judges, Indian Child Welfare Act Judicial Benchbook[81]