FEDERAL

FAMILIES FIRST PREVENTION SERVICES ACT (FFPSA)

INDIAN CHILD WELFARE ACT (ICWA)

THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC)

FAMILY FIRST PREVENTION SERVICES ACT (FFPSA)

The Family First Prevention Services Act of 2018 (also referred to as FFPSA) was signed into law as part of the Federal Bipartisan Budget Act of 2018 (H.R. 1892). FFPSA creates opportunities for Title IV-E federal funding reimbursement of services that are aimed at preventing a child's entry into foster care. Services include support for mental health, substance abuse, and other supports for parents. FFPSA has four central provisions aimed at increasing prevention services, support to kinship caregivers, addressing congregate care, and older youth.

A. Prevention Services

FFPSA allows for a 50% matching of federal Title IV-E funds for states who invest in evidence-based prevention services for families with children who are at imminent risk of entering the foster care system. Programs can address mental health, substance abuse, and parenting skills and supports and must meet certain criteria set out in FFPSA for reimbursement eligibility.

B. Kinship Caregivers

Additional support for kinship caregivers is provided through a Kinship Navigator program. The program links kinship caregivers to a range of support and services. At this time, Texas does not have any approved Kinship Navigator programs, but caregivers can receive support through their DFPS kinship caseworker. Please *see* DFPS' Kinship Care page for related resources.

C. Congregate Care

In an effort to reduce the number of children in congregate care, Title IV-E federal fund reimbursement is available to children in foster homes, qualified residential treatment programs (QRTPs), and special settings for pregnant or parenting teens, youth transitioning out of foster care, and youth who are at risk for sex trafficking. QRTPs have a very specific model as defined within FFPSA, including court oversight.

D. Older Youth

FFPSA extends the age for independent living services for young adults formerly in foster care up to age 23 and extends eligibility for Education and Training Vouchers (ETV) for qualifying youth to age 26. For more details about services for transitioning youth, see the Post-Secondary Opportunities section of the *Education* chapter in this Bench Book.

E. Family Preservation Services Pilot Program

Under Tex. Fam. Code § 262.402, the Family Preservation Services pilot program allows DFPS to dispose of an investigation by allowing the child to return home and providing time-limited family preservation services—subject to Family First Prevention Services Act (FFPSA) qualifications—to children who are candidates for foster care or pregnant and parenting foster youth. The pilot program must be implemented in one urban and one rural jurisdiction and at least one jurisdiction where Community Based Care has been implemented. The child's safety must be the primary concern in authorizing services. DFPS must use Title IV-E Funds to pay for legal representation or provide

counties with a matching reimbursement for the costs of legal representation and use the Texas Temporary Assistance for Needy Families (TANF) program or other department funds to provide in-home support services. DFPS must obtain a court order to compel the family of a candidate for foster care to participate in services but need not obtain a court order to provide services to pregnant or parenting foster youth. Tex. Fam. Code § 262.403.

DFPS must file a petition in the jurisdiction where the child is located, and the petition must be accompanied by an affidavit stating sufficient facts for the court to make the required findings. The petition must also include a safety risk assessment that documents the process for the child to remain at home with appropriate family preservation services, the specific reason that DFPS should provide services to the family, and the manner in which the services will mitigate the risk. The court must hold a hearing within 14 days of filing the petition, may grant a 14-day extension for good cause, and may render temporary restraining orders per Tex. Fam. Code § 105.001. Services may be provided to the child or any siblings of the child. Tex. Fam. § Code 262.404.

Attorneys ad litem for parents and children must be appointed when the petition is filed. However, if the parent is not found indigent, the attorney for the parent may be dismissed at the 14-day hearing and the court shall order the parent to pay the attorney's cost. Tex. Fam. Code § 262.405.

The court must deny the petition unless it makes findings under the ordinary prudence and caution standard that abuse and neglect has occurred, or there is substantial risk of abuse or neglect or continuing danger, and that family preservation services are necessary to ensure the physical health or safety of the child and family preservation services are appropriate based on the risk assessment. The court's order for family preservation services must identify and require specific services narrowly tailored to address the issues and include a statement whether the services are appropriate to address the risk factors. The court may order services for a parent whose rights to another child were terminated. If the court finds clear and convincing evidence that aggravated circumstances exist, the court may order that services not be provided. Tex. Fam. Code § 262.406.

The family preservation plan must be developed with the family and be written in a manner that is clear and understandable to the parent in a language the parent understands. The plan must include a safety risk assessment, the reasons for DFPS involvement, be narrowly tailored to address the concerns, list the specific services the family will receive, state the manner by which the services mitigate the risk factors, specify the tasks the family must complete, and include contact information for DFPS or SSCC staff who will be the point of contact for the family. Tex. Fam. Code § 262.407.

The family must sign the plan, but DFPS may submit the family preservation services plan without the parents' signatures if they refuse to sign. The plan remains in effect for 180 days unless the plan is amended or revoked by the court. A person affected by the plan may make a motion to modify at any time. Tex. Fam. Code § 262.408.

The plan may be amended at any time and if the parents are not willing to participate in amending the plan, DFPS can submit the amended plan without the parents' signatures. The amended plan is then valid for 180 days. Tex. Fam. Code § 262.409.

The court may review the amended plan, render additional orders, and omit any service the court deems inappropriate or not narrowly tailored. Tex. Fam. Code § 262.410.

A parent may obtain services from a qualified provider of their choosing, but the parent is responsible for the cost and the provided services must be similar in scope and duration to the services in the service plan. The parent, managing conservator, guardian, or other member of the household who successfully completes the required services must obtain verification from the service provider. Tex. Fam. Code § 262.411.

Court orders must be reviewed in 90 days and set subsequent reviews every 90 days as needed. Tex. Fam. Code § 262.412.

The court may extend the order for 180 days upon a showing by DFPS of a continuing need for the order. The court may grant an additional 180-day extension if the court finds that the extension is necessary to complete the services ordered, DFPS made a good faith effort to provide services, the parent made a good faith effort to complete services, completing services is necessary to ensure the child's safety, and the extension is requested by the parent or their attorney. Tex. Fam. Code § 262.413.

The case shall be dismissed once the order expires. Tex. Fam. Code § 262.414.

DFPS may contract for services, including contracting with a Single Source Continuum Contractor (SSCC) to provide services in areas with Community-Based Care (CBC). Courts may order services not subject to FFPSA but must identify a method of financing the services and who will pay for them. Tex. Fam. Code § 262.415.

F. Resources

1. American Bar Association

The ABA Center on Children and the Law created the Family First Prevention Services Act of 2018, A Guide for the Legal Community (2018) which helps the legal profession understand the FFPSA, identify opportunities for legal advocacy and judicial decision making, and support the implementation of the FFPSA.[61]

2. Department of Family and Protective Services

DFPS website and DFPS presentation on FFPSA and implementation

Family First Act website

QRTP website

INDIAN CHILD WELFARE ACT (ICWA)

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Please see Checklist Section for ICWA Checklist.

A. Purpose and Background

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). At the time of the law's passage, Congressional testimony documented the significant impact that decades of family separation had on Native children, their families, and their Tribes. 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 non-custodial, biological 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[62] and a binding Final Rule to the regulations implementing ICWA (known as Final Rule or Regulations) to clarify Congressional intent. 81 FR 38864 (June 14, 2016) and codified at 25 CFR Part 23. 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 that 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 and 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.

B. 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 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 that 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.

2. “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 is 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 will likely 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.

Native 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 in the form of a Memorandum of Understanding or an Intergovernmental Agreement.

3. 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).

4. How Are Possible “Indian Children” Identified?

A common reason for failure to comply with ICWA is the failure to identify children subject to 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 identify 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 any of the above 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 that a final order can be invalidated if key ICWA provisions are violated. 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. In either scenario, permanency is delayed.

***Special Issue**: A statement from a non-party family member that the child may have Native American heritage may be sufficient to trigger ICWA protections. If any parent or family member's response suggests an “Indian child” may be involved in a DFPS case, it is critical to 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 also be documented. If there is any information to suggest a tribal association, 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.*

C. Tribal and State Jurisdiction

Whether the state 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. Please see Placement Preferences Section below for more information on when ICWA applies.

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 Band of Choctaw Indians v. Holyfield,* 490 U.S. 30 (1989).

D. 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, Mar. 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. As the party seeking foster care placement of, or termination of parental rights to, an "Indian child," the State is responsible for providing notice.[63] 25 C.F.R. § 23.111(a)(1).

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 that any Suit Affecting the Parent Child Relationship (SAPCR) filed by DFPS 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).[64]

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).[65]

The Regulations 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 the 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 Court reasoned that ICWA was designed to prevent the breakup of an Indian family. Under these specific facts, because the father had never had custody of the child, the family was not being broken up. 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; and
- 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 CPS Policy Handbook § 5232 require that a diligent search be conducted and notice provided to a parent, including an alleged father. This section of the Family Code also requires certain findings be made by the court in its status order concerning whether the Department has exercised due diligence, among other required findings.

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.[66]

"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).[67]

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.[68]

For Tribes without a listing, the Regulations mandate the State must contact the Tribe directly to find out the proper contact person. If the Tribe fails to respond to written communication, a best practice is to seek assistance from the Bureau of Indian Affairs.

For notice to the BIA 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

Bureau of Indian Affairs
P.O. Box 368
Anadarko, Oklahoma 73005
(405) 247-6673 Ext. 217; Fax: (405) 247-2895

For child custody proceedings in *El Paso and Hudspeth counties in Texas, including Ysleta del Sur Pueblo*:

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. As with the original petition, the return receipt should be filed with the court and entered as an exhibit at trial.

E. "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).[69] 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).[70] If the only identified Tribe confirms that a child is neither a member nor eligible for membership, this evidence supports a request that the court find that ICWA does not apply. *In re A.W. and M.W.*, 590 S.W.3d 68 (Tex. App.—Texarkana 2019, pet. denied) (trial court did not err in finding ICWA did not apply where Tribe made determination that neither parent nor the children were eligible for membership, despite parents' proof of ancestors being listed in the Dawes Rolls).

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).[71]

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).[72]

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 then ICWA should not apply. This judicially created doctrine, called the existing Indian family doctrine, is now specifically denounced in the Regulations.

F. 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 no longer 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 is 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).[73]

G. 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.

H. 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.[74] 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).[75]

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.[76] 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.[77] 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. Note that the Texas Family Code provisions concerning admonishment of a right to counsel and appointment of an attorney to an indigent parent are not supplanted by 25 U.S.C. § 1912(b). Courts should abide by both sets of statutes if ICWA applies.

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.[78] 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 the 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

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).

I. 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).[79]
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.

A party seeking to depart from the placement preferences must show by clear and convincing evidence, on the record or in writing, that there is 'good cause' to depart from the placement preferences. The court's determination of good cause must be made 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 welfare cases. 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.

J. 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:

a. Foster Care Placement – Clear and Convincing Evidence

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.. 25 U.S.C. § 1912(e). The state must also show active efforts were made to provide remedial services and rehabilitative programs and that those were unsuccessful in preventing removal. 25 U.S.C. § 1912(d)

b. 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). Note that in most jurisdictions, the findings for termination of parental rights under the Texas Family Code must be made by clear and convincing evidence **and** the ICWA findings are made by evidence beyond a reasonable doubt. Courts under the 14th Court of Appeals (Houston) are the exception to this rule, where only the ICWA findings are to be made in the final order of termination.

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).[80] 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.[81] 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:

- Conducting a comprehensive assessment of the circumstances of the "Indian child's family," with a focus on safe reunification as the most desirable goal;
- Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- 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;
- 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;
- 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;
- Taking steps to keep siblings together whenever possible;
- 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;
- 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;
- Monitoring progress and participation in services;
- 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

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

Special Issue: *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.[82] *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).

Courts have concluded that "active efforts" does not require "absolutely every effort." *In re L.M.B.*, 54 Kan. App.2d 285 (Kan. Ct. App. 2017). However, in *Children, Youth & Families Dep't v. Yodell B.*, the court found merely creating a service plan and referring the father to parenting classes without providing more direct assistance did not constitute active efforts. *State ex rel.* 367 P.3d 881 (N.M. Ct. App., December 21, 2015). See case notes at the end of this chapter for additional examples of what does and does not constitute active efforts.

K. Who is a Qualified Expert Witness?

The statute does not define what constitutes a qualified expert witness 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 qualified expert witnesses is limited. Courts with capability should allow participation by phone, video conferencing, or other methods. 25 C.F.R. § 23.133.

L. 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 a specific process when an "Indian child" is involved. 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).[83]

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 DFPS 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).

M. Related 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. Federal Appellate Courts

Brackeen v. Haaland, 994 F.3d 249 (5th Cir. Apr. 6, 2021), is a 2017 lawsuit originating in the U.S. District Court for the Northern District of Texas.

On April 6, 2021, the Fifth Circuit issued a 325-page opinion in which no principal opinion nor any other writings in the case garnered an en banc majority on all issues. Therefore, the court provided an issue-by-issue summary of the en banc court's holdings, which does not override or amend the en banc opinions themselves.

Special Issue: *The Fifth Circuit's Brackeen opinion is complex and only applies to Louisiana, Mississippi, and Texas. A key takeaway is that ICWA remains constitutional, and the legal issues addressed in the case remain alive and ripe for decision before any state court in which they are raised. The Supreme Court of the United States granted petitions for a writ of certiorari and will hear oral arguments in the Fall 2022 term. For more details about the Fifth Circuit opinion and case history please see the July 1, 2021 Resource Letter from the Children's Commission. See also the related state case Interest of Y.J., No. 02-19-00235-CV, 2019 WL 6904728 (Tex. App.—Fort Worth, December 19, 2019, pet. denied).*

3. Texas Courts

a. "Indian Child" Status

In re E.A.H., 2018 WL 2451824 (Tex. App.—Austin June 1, 2018, no pet.) (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 Dawes Rolls not required.)

In re C.C. and Z.C., No. 12-17-00114-CV, 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.) (termination reversed where documents in clerk's record indicated Father reported "Indian blood" but trial court failed to make determination of child's status. Case was remanded for determination of child's Indian status.)

In re A.E., No. 05-17-00425-CV, 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.)

C.D.G.D.M., v. Dept. of Family and Protective Servs., No. 03-17-00477-CV, 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; great-grandmother reported no family member was registered with the Choctaw Nation, and her own membership was in a Cherokee Tribe not recognized by Congress.)

In re Z.C., No. 12-15-00279-CV, 2016 WL 1730740 (Tex. App.—Tyler 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 was sufficient to trigger duty to give notice to the Tribe); (*In the Interest of Z.C.*, No. 12-15-00279-CV, 2017 WL 1534050 (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 judgment was then affirmed.)

In re D.D, No.12-15-00192-CV, 2016 WL 7401925 (Tex. App.—Tyler 2016, pet. denied) (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 WL 814195 (Tex. App.—Fort Worth, Feb. 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 WL 6738266 (Tex. App.—Corpus Christi-Edinburg, Dec. 27, 2012, no pet.) (where child's grandmother testified child was half-Indian because she is half Black Foot and the mother is half Cheyenne, but failed to indicate whether parents or children were members or children were eligible for membership, failure to apply ICWA was not considered 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" that "Indian child" was involved.)

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

In re R.M.W., 188 S.W. 3d 831 (Tex. App.—Texarkana 2006, no pet.) (assertion of Indian heritage or blood without evidence of membership or eligibility for membership in an Indian Tribe insufficient to put court on notice of "Indian child;" court distinguishes *Doty-Jabbaar* [below], 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 Servs., 19 S.W.3d 870 (Tex. App.—Dallas 2000, pet. denied) (termination reversed for failure to adhere to ICWA requirements where court concluded "it is apparent [the agency] acknowledged the child's status as an 'Indian child' …" when caseworker notified the Tribe in a prior proceeding for termination of parental rights and again in this case but failed to apply ICWA.)

b. Notice

In the Interest of A.H., No. 04-21-003670-CV, 2022 WL 527661 (Tex. App.—San Antonio Feb. 23, 2022, pet. denied) (mem. op.) (ICWA notice is not required where trial court had no reason to believe A.H. was an "Indian child" under ICWA, whether or not the original trial court asked each participant about the child's Native American ancestry, when Mother was given an opportunity to provide evidence at a de novo trial.)

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, 2019 WL4784419 (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, 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 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.)

c. 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 witness testimony and all necessary ICWA findings.)

In re J.J.T., 544 S.W. 3d 874 (Tex. App.—El Paso 2017, no pet.) (termination judgment reversed where Tribal intervention denied at trial as untimely and not in writing.)

Villarreal v. Villarreal, No. 04-15-00551-CV, 2016 WL 4124067 (Tex. App.—San Antonio Aug. 3, 2016, no pet.) (mem. op.) (a divorce is not a "child custody proceeding" subject to ICWA.)

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

B.O. v. Tex. Dep't of Family and Protective Servs., No. 03-12-00676-CV, 2013 WL 1567452 (Tex. App.—Austin, Apr. 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.")

d. Burden of Proof

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

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

BUT SEE *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 interest ("an Anglo standard") and on statutory grounds for termination under the Texas Family Code.)

e. Pleadings and Jury Charge

In re G.C., No. 10–15–00128–CV, 2015 WL 4855888 (Tex. App.—Waco, Aug. 13, 2015, no pet.) (mem. op.) (concurrent application of 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 Texas 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.)

f. 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 Texas Family Code, 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)

g. Qualified Expert Witness

N.M. v. Tex. Dep't of Family and Protective Servs., No. 03-19-00240-CV, 2019 WL 4678420 (Tex. App.—Austin Sept. 26, 2019, no pet.) (mem. op.) (termination order reversed where no qualified expert witness testified as required under ICWA.)

In re D.L.N.G., No. 05-19-00206-CV, 2019 WL 3214151 (Tex. App.–Dallas, July 17, 2019, no pet.) (reversed and remanded trial court's final order finding that the trial court failed to comply with 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 that 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., No. 03-17-00698-CV, 2018 WL 1220895 (Tex. App.—Austin, Mar. 9, 2018, no pet.) (mem. op.) (testimony of foster parent and Department caseworker failed 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 necessitated remand.)

In re V.L.R., 507 S.W.3d 788 (Tex. App.—El Paso, Nov. 18, 2015, no pet.) (caseworker without Tribal membership, recognition by Tribe of her substantial experience in the delivery of child and family services to Indians, or knowledge of the prevailing social and cultural standards and childrearing practices within the Tribe, was not a qualified expert witness.)

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, 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.)

h. Jurisdiction/Transfer

In re S.R.P. and C.P., 2021 WL 1881036 (Tex. App.—Amarillo May 10, 2021, pet. denied) (mem. op.) (Appellate court dismissed case on appeal for lack of jurisdiction where the trial court ordered the case transferred to the District Court for the Citizen Potawatomi Nation on motion of the Nation after trial court terminated parental rights. The appellate court noted that there are times when Texas and an Indian Tribe may share jurisdiction over a child but in this case the Tribe has exclusive jurisdiction under 25 U.S.C. § 1911.)

Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152 (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, and 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.")

i. Remedy for ICWA Violation

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

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

In the Interest of P.J.B., No. 10-12-00286-CV, 2013 WL 128667 *(*Tex. App.—Waco Mar. 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 WL 1380123 (Tex. App.—Waco, Apr. 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.)

j. Standard of Review

In re V.L.R., 507 S.W.3d 788, (Tex. App.—El Paso 2015, no pet.) (where burden of proof is beyond a reasonable doubt in ICWA termination case, the Jackson v. Virginia, 99 S.Ct. 2781 (1979) 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.)

N. Resources

Bureau of Indian Affairs, Quick Reference Sheet for State Court Personnel[84]

National Council of Juvenile and Family Court Judges (NCJFCJ), Indian Child Welfare Act Judicial Benchbook[85]

2021 Texas Indian Child Welfare Act Summit Webcast[86]

THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC)

The Interstate Compact on the Placement of Children (ICPC) is a model contract that was drafted in 1960 and is legally binding on all states that adopt it. Texas adopted the ICPC in 1995 and it is codified in Tex. Fam. Code § 162.102. The purpose of the ICPC is to ensure that children placed out of their home state receive the same protections and services that would be provided if they remained in their home state.

To see any specific ICPC regulations mentioned throughout this chapter, *see* the ICPC Regulations.[87] *See further*, CPS ICPC policy in the CPS Policy Handbook § 9000.[88]

Some recent efforts to improve the Texas ICPC process include:

- The overall processing of expedited home study requests;
- Regional ICPC coordinators have been tasked to assist Texas caseworkers with the ICPC process;
- Texas ICPC/State office and Regional ICPC coordinators are promoting on-line, easily accessible ICPC training;
- Texas ICPC/State Office created a spreadsheet to use jointly with the ICPC regional coordinators to routinely track and check for the status of outgoing home study requests and DFPS is tracking the timeliness of outgoing requests; and
- Implementation of a National Electronic Interstate Compact Enterprise (NEICE) system for quickly and securely exchanging ICPC data and documents electronically between states to expedite completion of ICPC and placement of the child.

DFPS is tracking the timeliness of outgoing requests.

A. Purpose of the ICPC

The purpose of the ICPC is to protect the child and the participating states in the interstate placement of children so that:

- The child is placed in a suitable environment;
- The receiving state has the opportunity to assess that the proposed placement is not contrary to the interests of the child and that its applicable laws and policies have been followed before it approves the placement;
- The sending state obtains enough information to evaluate the proposed placement;
- The care of the child is promoted through appropriate jurisdictional arrangements; and
- The sending agency or individual guarantees the child legal and financial protection.

B. ICPC Applicability

Generally, the ICPC applies to any interstate placement of a child over whom the court has jurisdiction.

1. **ICPC Applies to the Following Placements:**

   - Placements that are preliminary to an adoption whether public or private adoption;
   - Placements in a licensed or approved foster home, including related and unrelated caregivers;
   - Placements with relatives when a parent or relative is not making the placement (i.e., the parent does not have legal custody/right to make the placement); and
   - Placements in group homes or residential placement, including accused or adjudicated delinquents placed in institutions in other states.

2. **The ICPC Does Not Apply to the Following Placements:**

   - Birth parents placing with a non-custodial birth parent, or a relative as long as no court has assumed jurisdiction of the child to be placed;
   - Relatives placing with birth parents or another relative as long as no court has assumed jurisdiction of the child to be placed;
   - A court with jurisdiction that transfers the child to an out of state parent; (note that the receiving state has no responsibility for supervision or monitoring a placement made under these circumstances)
   - Placements into schools where the primary purpose for the placement is educational;
   - Placements into medical and mental facilities;
   - Tribal Placements (See the *Indian Child Welfare Act* section within this chapter); and
   - Visits, as long as the visit meets the definition under the ICPC Section I.D.3 (See also *Visits vs. Placement* section within this chapter).

3. **Placement of a Child with an Out of State Parent**

State Courts throughout the nation have reached different conclusions on whether ICPC procedures apply when courts place a child with an out of state biological parent. Until 2017, Texas courts had followed the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) Regulations that state ICPC procedures do apply to placement with parents in certain circumstances, but no Texas court had addressed the issue directly.

In March 2016, DFPS updated its policy related to placing children with an out-of-state parent. DFPS will not initiate an ICPC home study request on a non-offending, non-custodial parent residing in another state, unless it is ordered to do so by the court with jurisdiction over the SAPCR. The policy

related to out of state placements with non-offending parents is found in the CPS Policy Handbook § 9300.

In May 2017, the Fourth Court of Appeals ruled that despite Texas's adoption of Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) Regulations, the plain unambiguous wording of ICPC Article III excluded biological parents as placements subject to ICPC procedures. The court ruled the compact does not apply to interstate placement of children with their natural parent and therefore the determination whether to place the child with the out of state parent is left to the court's discretion. In the Interest of C.R.-A.A., 521 S.W.3d 893 (Tex. App.—San Antonio 2017). Note that in the Interest of C.R.-A.A. is still the most recent and prevalent Texas case which discusses the ICPC not applying to children placed out-of-state with a biological parent.

C. Jurisdiction vs. Process

When a case comes before a juvenile or family court, the issue of jurisdiction will always precede the question of whether the ICPC applies. Thus, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA), and the Parental Kidnapping Prevention Act (PKPA) must be considered to determine whether the court and child welfare agency have continuing jurisdiction over child custody, which is precedent to the question of authority to place a child out-of-state. The *J.D.S. v. Franks case* differentiates between the jurisdictional components of the UCCJA and the purview of the ICPC. *J.D.S. v. Franks*, 893 P.2d 732 (Ariz. 1995). In *Franks*, the Supreme Court of Arizona explained that the compliance with the ICPC is not a prerequisite for exercising jurisdiction because the ICPC merely establishes a procedure to follow when a placement is made. Thus, the validity of a court's exercise of jurisdiction depends on the UCCJA (or UCCJEA) and PKPA. *Franks* spells out that the ICPC governs procedure, whereas the UCCJA (or UCCJEA) and PKPA govern jurisdiction. Likewise, in *White v. Adoption of Baby Boy D.*, the Supreme Court of Oklahoma held that the ICPC does not negate subject matter jurisdiction. *White v. Adoption of Baby Boy D.*, 2000 OK 44, 10 P.3d 212 (Okla. 2000).

D. Court Leadership

The National Council of Juvenile and Family Court Judges recommends close judicial monitoring to ensure that a case is moving according to the ICPC timeframes.[89] Special hearings may be required to ensure that certain activities are completed in a timely manner. Lack of understanding of the ICPC and its requirements is often cited as a problem that causes delays in an ICPC placement. Other delays are built into the ICPC process itself.

Special Issue: *Many receiving states routinely deny home studies, especially on non-custodial parents, and there is no appeal process – a highly criticized flaw in the ICPC. Texas judges should consider directly contacting the judge in the receiving jurisdiction to ask for assistance in completing the ICPC process in the receiving state and for assistance with home studies that are stalled or denied without sufficient explanation and no recourse for reconsideration.*

E. Expedited Placement Request

Under certain conditions, a court may request an expedited placement review. Cases involving a child who is under the jurisdiction of a court are eligible, if at least one of the following criteria is met:

- There is unexpected dependency due to a sudden or recent incarceration, incapacitation or death of a parent or guardian. Incapacitation means a parent or guardian is unable to care for a child due to a medical, mental or physical condition of a parent or guardian;
- The child sought to be placed is four years of age or younger, and can include older siblings sought to be placed with the same proposed placement resource;
- The court finds that any child in the sibling group sought to be placed has a substantial relationship with the proposed placement resource. Substantial relationship means the proposed placement has a familial or mentoring role with the child, has spent more than cursory time with the child, and has established more than a minimal bond with the child; or
- The child is currently in an emergency placement.

Expedited placement option is not available where:

- The child has already been placed in the receiving state in violation of the ICPC, unless a visit has been approved in writing by the receiving state Compact Administrator and a subsequent order entered by the sending state court authorizing the visit with a fixed return date in accordance with ICPC Regulation 9; or
- The intention of the sending state is to place the child for licensed or approved foster care or adoption.

Expedited placement, like the ICPC, does not apply at all when:

- The court places the child with a parent.

It is not within a judge's discretion to make all orders expedited. The situation must fit those criteria outlined in ICPC Regulation 7 for priority placement to be available; ordering expedited cases is not a matter of discretion for judges. [90]

F. Visits vs. Placement

Although some judges grant "extended visits" for children in other states, these longer times spent in other states may actually be deemed an illegal placement with significant consequences. ICPC Regulation 9 defines a "visit," which is distinguished from a placement on the basis of purpose, duration, and the intention of the person or agency with responsibility for planning for the child as to the child's place of abode. For example, if the purpose of a visit is to provide the child with a social or cultural experience of short duration, such as a camp stay or visit with a friend or relative, and is less than 30 days, it will be presumed to be a visit. A stay of more than 30 days, but not longer than the duration of a school vacation period, can also be considered a visit. A stay that does not have a terminal date will be considered a proposed placement. Once a home study or supervision request has been made by the sending agency, there is a rebuttable presumption that the intent of any stay in the receiving state that exceeds 30 days is for placement and not simply a visit.

G. ICPC and Victims of Commercial Sexual Exploitation

The ICPC may be implicated in trying to place victims in the few facilities that can provide the extensive services needed for child trafficking survivors. As the needs of this population can be complex, only a limited number of residential institutions can provide this high level of care. Services for victims often require multi-systemic and long-term care, and the cost of housing a child in a residential facility can be expensive. Additionally, the operation of residential facilities is legally and practically complicated, and unfeasible for many counties. Thus, child sex trafficking victims may not have a variety of placements which fit their needs, forcing placing agencies to look outside the home state. There are various organizations that also recommend victims be removed from the original geographic area of exploitation during restorative services. There are only a handful of facilities throughout the country that specifically provide placement and services for victims of commercial sexual exploitation.

H. The Indian Child Welfare Act and the ICPC

Because the ICPC is a compact adopted by states as state law, the federal ICWA law preempts conflicting state law. Thus, the ICPC does not apply to interstate placements of an "Indian child" if the placement is being made within an Indian reservation unless:

- The tribal government requests ICPC services;
- The Tribe has adopted the ICPC; or
- The Tribe has an existing Title IV-E agreement with the state requiring ICPC compliance.

If an "Indian child" is being placed interstate but not within a reservation, the ICPC applies to that placement. However, the placement requirements of ICWA preempt any ICPC requirements that interfere with or impede the implementation of the placement required by ICWA. See the Bench Book chapter entitled *Indian Child Welfare Act* for information about placement preferences and requirements when ICWA is involved.

I. Additional Resources

American Public Human Services Association (APHSA) website for ICPC Regulations and additional information[91]

National Council of Juvenile and Family Court Judges, ICPC: A Manual and Instructional Guide for Juvenile and Family Court Judges[92]

Vivek Sankaran, Foster Kids in Limbo: The Effects of the Interstate Compact on the Placement of Children on the Permanency of Children in Foster Care (2014)[93]

Child Welfare Information Gateway, Legal and Court Issues Regarding Interjurisdictional Placements[94]

1. **Leading Cases:**

In the Interest of C.R.-A.A., 521 S.W.3d 893 (Tex. App.—San Antonio 2017) established that the ICPC does not apply to an interstate child placement with that child's natural parent. The court held 225

that the ICPC does not apply to placement with a child's non-offending parent in another state. Article III of the ICPC prohibits a state from sending to another state "any child for placement in foster care or as a preliminary to adoption." The court held that a biological parent is excluded from Article III, by both the plain, ordinary, unambiguous meaning of the term and an analysis of the ICPS's legislative history that indicates the drafters did not intend for it to apply to natural parents. Furthermore, the court reasoned that even Texas's adoption of the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) Regulations that state ICPC procedures do apply to placement with parents in certain circumstances cannot override the plain meaning of Article III. The court concluded that it is inappropriate to resort to rules of construction or extrinsic aids when there is no ambiguity in the language and that when Texas adopted the AAICPC, it did so within the limits of state law which specify that rules or regulations that contravene statutory language or impose additional, excessive, or contrary burdens on the statutory provision are invalid.

Prospective adoptive parents who were Colorado residents with whom a child had been placed by the child's Texas managing conservator argued that the Colorado court where the petition for adoption was pending had jurisdiction over the child. Rejecting this argument, a Texas Court of Appeals in *Unger v. Baker*, 01-89-00803-CV (Tex. App.—Houston 1st Dist. Aug. 18, 1989)(unpublished) held that under Article V(a) of the ICPC, the managing conservator, as the sending agency, retained jurisdiction over the child because the child had not yet been adopted. Therefore, the child was subject to the jurisdiction of the Texas trial court in which the managing conservator had filed a motion to remove the child from the temporary placement with the prospective adoptive parents and overruled the prospective adoptive parents' motion for leave to file mandamus seeking rescission of the Texas trial court's order overruling their special appearance to contest the Texas court's jurisdiction.