INDIAN CHILD WELFARE ACT (ICWA)

Please see Checklist Section for ICWA Checklist.

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The Indian Child Welfare Act of 1978 (ICWA), 25 U.SC. §§ 1901 – 63 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. To this end, ICWA affords important rights to both families and tribes, including the right to petition a court with competent jurisdiction to invalidate any action for foster care placement or termination of parental rights if key provisions of the Act are violated. 25 U.S.C. § 1914.

In February 2015, the Bureau of Indian Affairs (BIA) released the updated Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (Guidelines).[1] The Guidelines are not legislative and are thus not binding, but they represent the BIA's interpretation of ICWA. (Yavapai-*Apache Tribe v. Mejia*, 906 S.W.2d 152, 164 (Tex. App. —Houston [14th Dist.] 1995, orig. proceeding [leave denied].) The new Guidelines state "these guidelines should be applied in all proceedings and stages of a proceeding in which the Act is or becomes applicable." Also, the BIA has proposed "Regulations for State Courts and Agencies in Indian Child Custody Proceedings."[2] The Proposed Rules include most of the Guidelines, and if passed, would be binding.

The U.S. Supreme Court has only issued two opinions addressing ICWA, the first in 1989, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), and the second, in June, 2013. In the recent opinion, *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013) the Court interpreted ICWA narrowly, restricting the rights of a parent who has never had custody of an Indian child and limiting the circumstances when the placement preferences apply. A summary of the case is provided in the Case Notes below and practice implications are noted in appropriate sections below.

[1] Bureau of Indian Affairs (BIA), Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146 (Feb. 25, 2015). Available online at http://www.indianaffairs.gov/cs/groups/public/documents/text/idc1-029637.pdf. Last visited July 31, 2015.
[2] *Id.*

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).[3]

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 the biological child of a member. 25 U.S.C. § 1903(4). There are more than 500 federally recognized tribes, but tribes from Mexico and Canada, as well as some U.S. tribes, are excluded.[4]

3. How Are Possible Indian Children Identified?

The new Guidelines clarify that agencies and state courts must ask, in every child custody proceeding, whether ICWA applies.[5] The new Guidelines state:

> Agencies and State courts, *in every child custody proceeding*, must ask whether the child is or could be an Indian child and conduct an investigation into whether the child is an Indian child. Even in those cases in which the child is not removed from the home, such as when an agency opens an investigation or the court orders the family to engage in services to keep the child in the home as part of a diversion, differential, alternative response or other program, agencies and courts should follow the verification and notice provisions of these guidelines.[6]

The Guidelines also provide that state courts must ask, as a threshold question at the start of any State court child custody proceeding, whether there is reason to believe the child who is the subject of the proceeding is an Indian child by asking each party to the case, including the guardian ad litem and the agency representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child.[7] Amendments to the Texas Family Code in the 84th Legislative session also mandate that the court ask all parties whether the child or the

[3] 25 U.S.C. §1903(1); BIA Guidelines, *supra* note 1 at Rule A.3.
[4] 25 U.S.C. §1903(8*)* ["Indian tribe" defined]*; In re* A.J., 733 A.2d 36 (Vt. 1999).
[5] BIA Guidelines, *supra* note 1 at Rule A.3., *When does ICWA apply?*
[6] BIA Guidelines, *supra* note 1 at Rule A.3(c), *When does ICWA apply?*
[7] BIA Guidelines, *supra* note 1 at Rule B.2. (b), *What actions must an agency and State court undertake in order to determine whether a child is an Indian child?*

family has Native American heritage and to identify any tribe at the Adversary Hearing, Status Hearing, and Permanency Hearing Before Final Order. Tex. Fam. Code § 262.201(a-4), Tex. Fam. Code § 263.202(f-1), and Tex. Fam. Code § 263.306.

Special Issue: When ICWA notice is sent, DFPS could also send a letter asking the tribe to confirm or deny the child's membership or eligibility for membership status. In every case, DFPS or courts should confirm that all appropriate persons have been asked about possible tribal family history. 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. 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 that 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.

The updated Guidelines clarify that the Guidelines should be followed for emergency removal or placement regardless of whether the Indian child is a resident of or domiciled on a reservation. The new section B of the Guidelines also explicitly states the standard

for determining whether emergency removal or emergency placement is appropriate and provides examples.[8]

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).

4. Mandatory Transfer to Tribal Court

On motion by a child's parent, Indian custodian[9] or tribe, transfer of a state court child custody case involving an Indian child to the jurisdiction of the child's tribe is mandatory, unless either parent objects, good cause is shown or the tribe declines to accept the case. 25 U.S.C. § 1911(b).

5. Parental Veto of Transfer

A parent's objection (including a non-Indian parent's veto) is an absolute bar to transfer. 25 U.S.C. § 1911(b).

6. Good Cause

Under the new Guidelines, if any party asserts, that good cause not to transfer exists, the reasons for such belief or assertion must be stated on the record or in writing and made available to the parties who are petitioning for transfer. Any party to the proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists. In determining whether good cause exists, the court may not consider:

- Whether the case is at an advanced stage;
- Whether transfer would result in a change in the placement of the child;
- The Indian child's contacts with the tribe or reservation;
- Socio-economic conditions or any perceived inadequacy of tribal or Bureau of Indian Affairs social services or judicial systems; or
- The tribal court's prospective placement for the Indian child.[10]

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[8] BIA Guidelines, *supra* note 1 at Rule B, *Pretrial Requirements*.
[9] "Indian custodian" is defined in ICWA 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).
[10] BIA Guidelines, *supra* note 1 at Rule C.3, *How is a determination of "good cause" made?*

Whenever a parent or tribe seeks to transfer the case it is presumptively in the best interest of the Indian child, consistent with the Act, to transfer the case to the jurisdiction of the Indian tribe. The burden of proving good cause is on the party opposing transfer.[11] The case law is not consistent in construing how "good cause" should be analyzed. The only Texas case addressing what constitutes "good cause" rejects the use of a "best interest" analysis for this purpose because doing so defeats the purpose of ICWA by allowing Anglo cultural bias into the analysis and because best interest is relevant to placement, not to jurisdiction, per *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d at 169. If transfer is granted, the Guidelines require that the state court provide all records of the proceedings to the tribal court expeditiously.[12]

C. Required Notice

Giving notice under ICWA requires close attention to specific requirements governing the type of notice, the proper persons and entities who must be served, the type of service required and how compliance is demonstrated by filing proof of service with the court. *In re R.R.*, 2209 Tex App LEXIS 2038 (Tex. App. — Fort Worth, March 19, 2009, no pet.).

The Notice of Pending Custody Proceeding Involving Indian Child must be sent to:

- Every known parent(s);
- Indian custodian;
- Any identified tribe;
- The Secretary of the Interior; and
- BIA, Area Director. 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.11(a).

In addition, if the identity or location of a parent or Indian custodian is not known or the identity of the tribe cannot be determined, the Notice to Bureau of Indian Affairs: Parent, Custodian or Tribe of Child Cannot be Located or Determined must be sent to:

- The Secretary of Interior; and
- BIA, Area Director. 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.11(b).

The new Guidelines provide that to contact a tribe to provide notice or obtain information or verification under these Guidelines, you should direct the notice or inquiry as follows:

- Many tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of tribes' designated tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its website at www.bia.gov.

[11] BIA Guidelines, *supra* note 1 at Rule C.3(e), *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d at 163.
[12] BIA Guidelines, *supra* note 1 at Rule C.2(b).

- For tribes without a designated tribal agent for service of ICWA notice, contact the tribe(s) to be directed to the appropriate individual or office.
- If you do not have accurate contact information for the tribe(s) or the tribe(s) contacted fail(s) to respond to written inquiries, you may seek assistance in contacting the Indian tribe(s) from the BIA's Regional Office and/or Central Office in Washington D.C.[13]

1. Parent

A parent includes the biological or adoptive parent of an Indian child and a non-Indian parent. 25 U.S.C. § 1903(9). An alleged father, however, must acknowledge paternity or be legally determined to be the father before being recognized as a parent for purposes of ICWA.[14]

2. Indian Custodian

"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).

3. More Than One Tribe

If the child has ties to more than one tribe, notice should be given to each tribe identified.

4. Provide Family Information

A child's family history is often key to a tribe's ability to confirm or deny a child's status as an Indian child. The new Guidelines provide that a court may require the agency to provide genograms or ancestry charts for a child's parents, including specific family history information as part of the certification process, as well as the addresses for the child and parents.[15]

5. Mailing

Notice must be sent by registered mail and must include a request for a return receipt.[16]

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[13] BIA Guidelines, *supra* note 1 at Rule A. 4, *How do I contact a tribe under these guidelines?*
[14] 25 C.F.R. §23.2, "Parent means the biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. The term does not include the unwed father where paternity has not been acknowledged or established."
[15] BIA Guidelines, *supra* note 1 at Rule B.2(b)(1).
[16] BIA Guidelines, *supra* note 1 at Rule B.6(a).

6. 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). Pursuant to the Guidelines, notice of each subsequent hearing must be given, at least as to those proceedings involving removal or foster care placement, termination of parental rights or adoption.[17] The updated Guidelines recommend that temporary emergency custody be 30 days or less.[18]

D. Response of Tribe

1. Tribe Confirms Membership

Tribes have differing methods of establishing membership, and enrollment is not required.[19] A tribe's determination regarding the child's membership status is conclusive.[20]

2. Existing Indian Family Doctrine

This is a judicially created exception to ICWA based on the premise that if a child's parent does not have a social, cultural or political connection with an Indian tribe or the child has never lived in an Indian environment, ICWA should not apply. Many state courts have rejected this approach, citing the lack of statutory authority for this interpretation. Texas courts have not addressed the issue.

The new Guidelines state that there is no exception to ICWA based on the existing Indian family doctrine and provide a non-exhaustive list of factors that should not be considered in determining whether ICWA is applicable.[21]

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[17] BIA Guidelines, *supra* note 1 at Rule B.6(a).
[18] BIA Guidelines, *supra* note 1 at Rule B.8.(f).
[19] "Under ICWA, enrollment is not a necessary condition of tribal membership. *Nelson v. Hunter*, 132 Or. App. 361, 364, 888 P.2d 124, 125-26 (Ct. App. 1995). "[M]embership may be established through proof of enrollment[;] enrollment is not the exclusive test of membership." *Id*. "Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date." *Id*., 888 P.2d at 125; *accord In re Junious M*., 144 Cal. App. 3d 786, 791, 193 Cal. Rptr. 40, 42-43 (Dist. Ct. App. 1983). Likewise, ICWA contains no blood quantum requirement; rather, each tribe has its own criteria. *See* Thomas R. Myers & Jonathan J. Siebers, *ICWA: Myths and Mistaken Application*, 83 Mich. Bar. J. 12, 21 (2004)." *In re R.R.*, 294 S.W.3d 213 (Tex. App. 2009).
[20] BIA Guidelines, *supra* note 1 at Rule B.1. *Determination That Child Is an Indian*.
[21] BIA Guidelines, *supra* note 1 at Rule A.3 (b), *When does ICWA apply?*

E. Removal and Hearing

1. Special Removal Affidavit

If the child's Indian status is discovered at the time of removal, an ICWA compliant affidavit should be filed at the earliest possible time (either at the emergency removal or at the 14 day Adversary Hearing).

2. Special Setting Following Emergency Hearing

A significant change made by the new Guidelines is only allowing temporary emergency orders for up to 30 days (unless there are extraordinary circumstances).[22] "Temporary emergency custody should not be continued for more than 30 days. Temporary emergency custody may be continued for more than 30 days only if: (1) A hearing, noticed in accordance with these guidelines, is held and results in a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in imminent physical damage or harm to the child; or (2) Extraordinary circumstances exist." At that hearing, the court must make the necessary findings to warrant a "foster care placement." See Conservatorship or Termination of Parental Rights of an Indian Child, below**.**

F. 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.

1. 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). 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.

2. Right to Review Records

In a proceeding for foster care or termination of parental rights, each party (including the child's tribe and custodian) has the right to review all reports and records filed with the court. 25 U.S.C. § 1912(c).

[22] BIA Guidelines, *supra* note 1 at Rule B.8(f) *What is the process for the emergency removal of an Indian child?*

3. Right to Intervene

The tribe and the Indian custodian have an absolute right to intervene in the state court action *at any time* in the proceedings. 25 U.S.C. § 1911(c). Either may intervene without the other. Intervention may be accomplished informally, by oral statement or formally.

4. 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).

G. Statutory Placement Preferences for Indian Child

ICWA mandates that placements for foster care and adoption be made according to statutory preferences in most circumstances. The updated Guidelines also specify that it is inappropriate to conduct an independent analysis, inconsistent with ICWA's placement preferences, of the ''best interest'' of an Indian child.[23]

The statutory preferences are as follows**:**

- **Foster care or pre-adoptive placement**
  - a member of the child's extended family;
  - a foster home licensed, approved, or specified by child's tribe;
  - an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
  - an institution for children approved by the tribe or operated by an Indian organization which has a program suitable to meet the child's needs.[24] 25 U.S.C. §1915(b)
- **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).

[23] BIA Guidelines, *supra* note 1 at Rule D, *Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Rights.*
[24] BIA Guidelines, *supra* note 1 at Rule F.2*, What placement preferences apply in adoptive placements?*

1. Tribe Can Modify

The tribe can by resolution alter the order of preferences for foster care, pre-adoptive, and adoptive placements.[25] 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. 25 U.S.C. § 1915(c).

2. Good Cause Exception

According to the updated Guidelines, the reasons for a good cause exception must be stated on the record or in writing and made available to the parties to the proceeding and the Indian child's tribe. The party seeking departure from the preferences bears the burden of proving by clear and convincing evidence the existence of ''good cause'' to deviate from the placement preferences.

A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:

- The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference.
- The request of the child, if the child is able to understand and comprehend the decision that is being made.
- The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act. The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act.
- The unavailability of a placement after a showing by the applicable agency in accordance with section F.1. of the BIA Guidelines,[26] and a determination by the court that active efforts have been made to find placements meeting the preference criteria, but none have been located. For purposes of this analysis, a placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

[25] 25 U.S.C. §1915(c) (tribe can alter placement preferences by resolution).
[26] BIA Guidelines, *supra* note 1, at Rule F.1, *When do the placement preferences apply?*

The court should consider only whether a placement in accordance with the preferences meets the physical, mental and emotional needs of the child; and may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.[27]

3. Failure of Eligible Placement to Seek Placement

In the *Baby Girl* case, the U.S. Supreme Court held that the placement preferences do not apply if no party eligible for preference formally seeks placement. *Baby Girl*, 133 S.Ct. 2552. Under the current BIA Guidelines, the lack of a suitable family meeting the preference criteria can be considered good cause for an exception, but only if the court has found that active efforts were made to locate a conforming placement. The Guidelines further provide that a placement cannot be considered "unavailable" if it conforms to the prevailing social and cultural standards of the Indian community of the child's parents or extended family.[28]

H. Conservatorship or Termination of Parental Rights of Indian Child

If ICWA applies, the burden of proof and standards for an order placing a child in foster care (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.

- 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 25 U.S.C. §1912(f).

[27] BIA Guidelines, *supra* note 1 at Rule F.4. *How is a determination for ''good cause'' to depart from the placement preferences made?*
[28] BIA Guidelines, Rule F.4(b)(4).

1. Serious Emotional or Physical Damage

Evidence of poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior alone is not sufficient to show serious emotional or physical damage. There must be evidence of particular conditions in the home that are likely to result in serious emotional or physical damage to a specific child. The Guidelines add: "Clear and convincing evidence must show a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding."[29]

2. 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). 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 not defined by ICWA, but the new Guidelines offer a non-exhaustive list of examples:

- Engaging the Indian child, the Indian child's parents, the Indian child's extended family members, and the Indian child's custodian(s);
- Taking steps necessary to keep siblings together;
- 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;
- Conducting or causing to be conducted a diligent search for the Indian child's extended family members for assistance and possible placement;
- Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting the assistance of representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards;
- Offering and employing all available and culturally appropriate family preservation strategies;
- Completing a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

[29] BIA Guidelines, *supra* note 1 at Rule D.3.(c). *What are the applicable standards of evidence?*

- Notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;
- Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal;
- Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources;
- Monitoring progress and participation in services;
- Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available;
- Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and
- Providing post-reunification services and monitoring.[30]

The Guidelines further state that active efforts begin from the moment the possibility arises that the Indian child may be removed, and during the time Indian status is being verified.[31]

3. Parent Without Prior Custody

If a parent in a case subject to ICWA has never had custody of a child, an action for foster care or termination of parental rights could proceed without meeting the higher burden of proof or standards in 25 U.S.C. §1912(d) and (f). *Baby Girl*, 133 S.Ct. 2552. However, the *Baby Girl* decision does not impact other substantive rights under ICWA, including the right to notice and appointment of counsel for indigent parents.

I. Who is a Qualified Expert Witness?

The new Guidelines suggest that a qualified expert will most likely be persons with the following characteristics, in descending order:

- A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

[30] BIA Guidelines, *supra* note 1 at Rule A. 2. *What terms do I need to know?*
[31] *Id*. at B.1, *When does the requirement for active efforts begin?*

- A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.
- A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
- A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.[32]

J. 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 new BIA Guidelines[33] also state that notice of voluntary proceedings should be provided to the Indian tribe, while the statutory notice provision is limited to involuntary proceedings. 25 U.S.C. §1912(a).

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 preadoptive 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).

[32] BIA Guidelines, *supra* note 1 at Rule D.4. *Who may serve as a qualified expert witness?*
[33] BIA Guidelines, *supra* note 1 at Rule E.1(b).

K. 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 D.N., 2014 LEXIS 7374 (Tex. App. – Tyler, 2014, no pet.) (Status Hearing report showing father reported possible Choctaw Nation descent triggered requirement for notice and determination of Indian status)

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 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 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).

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.)

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.")

PLEADINGS AND JURY CHARGE

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)

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

REMEDY FOR ICWA VIOLATION

In re 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)

3. Other State Courts

INDIAN CHILD STATUS

In re N.S., 837 N.W. 2d 680, 2013 LEXIS 723 (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. (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

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 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)

In re C.L.J., 946 So.2d 880 (Ala. Civ. App. 2006) (order transferring case to tribal court reversed and remanded with directions to trial court to take evidence and to balance interests of witnesses, parent, child and the Chickasaw Nation before deciding whether to retain or transfer jurisdiction)

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

Navajo Nation v. Arizona Dep't of Economic Security, Z., 284 P.3d 29 (Ariz. Ct. App. 2012)

(good cause to deviate from placement preferences where infant placed in foster home at one month of age, removal would create severe distress, and family agreed to expose child to tribal culture; original placement was with extended family of alleged father later excluded as father)

ACTIVE EFFORTS TO REUNIFY

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.")

N.A. v. Alaska, 19 P.3d 597 (Alaska 2001) (citing long list of efforts by child welfare agency as well as Dept. of Corrections to address parent's substance abuse and reunify family, court concludes state's 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. (Cal. Ct. App. 2013) (failure to investigate child's Indian heritage and provide information to the tribe requires reversal of guardianship order and remand)

In the Matter of Erin G., 140 P.3d 886 (Alaska 2006), 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 congresional intent to impose no time limit on such actions)

L. RESOURCES

Indian Child Welfare Act Checklists, National Council of Juvenile and Family Court Judges, www.ncjfcj.org