D R A F T

FOR DISCUSSION ONLY

[Model/Uniform] State Indian Child Welfare Act

Uniform Law Commission

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May 29, 2026

[Model/Uniform] State Indian Child Welfare Act

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[Model/Uniform] State Indian Child Welfare Act

Table of Contents

[Article] 1

General Provisions

[Article] 2

Inquiry into and Finding of Indian Child and Tribe

[Article] 3

Notice

[Article] 4

Jurisdiction

[Article] 5

[Dependency]

[Article] 6

Termination of Parental Rights

[Article] 7

Guardianship; [[Third-Party Custody]]

[Article] 8

Adoption

[Article] 9

Status Offense Proceeding

[Article] 10

Placement

[Article] 11

Generally Applicable Requirements

[Article] 12

Enforcement

[Article] 13

Miscellaneous Provisions

[Model/Uniform] State Indian Child Welfare Act

Prefatory Note

The purpose of this act is to ensure and facilitate the application of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et. seq. through state law. Specifically, the act provides states with an updated and uniform version of ICWA to address issues that arise from ICWA's original language as it interacts with current child-welfare, or dependency, laws. ICWA establishes "minimum Federal standards" for Indian dependency proceedings in state courts. 25 U.S.C. § 1902. The federal law is applicable in child-removal and placement proceedings across all states. Federal regulations and guidelines supplement ICWA and, together, the federal law and regulations include both procedural and substantive provisions that bind state courts and guide state agencies. These minimum standards currently apply in all state courts around the country. This act maintains those standards and provides additional context and clarity for proceedings involving Indian children and families.

Purpose of ICWA and Existing State ICWA Statutes

Congress passed ICWA in 1978 to protect Indian children from unnecessary removal from their parents and tribal communities. Congress drafted ICWA after an extensive congressional investigation into abusive Indian child-welfare policies and practices. H.R. Rep. No. 95-1386, at 23 (1978). As the Supreme Court explained in the leading case on ICWA, prior to the passage of the Act, those who removed Indian children often had "no basis for intelligently evaluating the cultural and social premises underlying Indian home life"; many were "at best ignorant of [Indian] cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34-35, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989) (quoting *Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 191-92 (1978) (statement of Chief Calvin Isaac, Mississippi Band of Choctaw Indians)). The result was "wholly inappropriate" decisions finding neglect or abandonment where none existed. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 18 (1974) [hereinafter *1974 Hearings*] (statement of William Byler); H.R. Rep. No. 95-1386, at 9-10 (1978). At the time of the hearings, approximately *one-third* of Indian children had been removed from their homes for placement in foster care or adoptive families or institutions and "[a]pproximately 90% of . . . placements were in non-Indian homes." *Holyfield*, 490 U.S. at 33. As a result, Congress adopted ICWA on a non-partisan basis and designed the law to prevent the removal of Indian children from their homes and to provide protections to Indian families outside of Indian Country. Congress intended that ICWA apply uniformly across the several states. *Id*. at 46. The federal regulations that supplement ICWA reiterate that intent. ("This final rule promotes the uniform application of Federal law designed to protect Indian children, their parents, and Indian tribes."). 25 C.F.R. pt. 23; 81 Fed. Reg. 38,779 (June 14, 2016).

In the most recent United States Supreme Court case addressing ICWA, the Court upheld Congress's power to pass the Act. *Haaland v. Brackeen*, 599 U.S. 255, 277-79, (2023). Twentythree states joined a state Attorneys General amicus brief in support of ICWA, and other amici including the American Bar Association, the American Academy of Pediatrics, the American Psychological Association, the National Association of Counsel for Children, and twenty-seven child welfare and adoption organizations, also supported not only the Constitutionality of the law but its application to Indian children.[1]

The Court held that Congress's power to pass ICWA comes from a variety of sources, including the Indian Commerce Clause and the trust responsibility to Indian people and tribes. *See Morton v. Mancari*, 417 U.S. 535 (1974). In concurrence, Justice Gorsuch explained that

> . . . [A]t its core, ICWA restricts how non-Indians (States and private individuals) may engage with Indians. And, as we have seen, that falls in the heartland of Congress's constitutional authority. …The mass removal of Indian children by States and private parties, no less than a pattern of criminal trespasses by States and private parties, directly interferes with tribal intercourse. More than that, it threatens the Tribes' "political existence." *Worcester*, 6 Pet., at 536, 8 L. Ed. 483. And at the risk of stating the obvious, Indian commerce is hard to maintain if there are no Indian communities left to do commerce with.

Haaland, 599 U.S. at 332 (Gorsuch J., concurring). Justice Gorsuch continued, stating that

> In adopting the Indian Child Welfare Act, Congress exercised that lawful authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history.

Id. at 333.

In exercising that lawful authority, Congress preempted conflicting state law, and ICWA's preemptive effect has been well-settled for decades. In *Brackeen,* the Court reaffirmed that preemptive effect stating,

> The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Thus, when Congress enacts a valid statute pursuant to its Article I powers, "state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). End of story. That a federal law modifies a state law cause of action does not limit its preemptive effect.

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[1] *Haaland v. Brackeen*, No. 21-377 (July 17, 2023), docket with amicus briefs *available at* https://www.supremecourt.gov/docket/docketfiles/html/public/21-376.html

Haaland, 599 U.S. at 287.

Congress did not, however, preempt the *field*. ICWA sits, not entirely comfortably, on top of existing state dependency and family law, but, in the absence of a conflict, does not displace it.[2] In fact, in enacting ICWA, Congress provided that states may maintain or heighten ICWA's protections. Any provision enacted by a state legislature that offers protection above the minimum is enacted in an "area of traditional state authority" *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013) (Thomas, J., concurring), and an area where Congress specifically envisioned the possibility of higher state standards. 25 U.S.C. § 1921 ("In any case where State . . . law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent . . . of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State . . . standard."). Congress also delegated power to states and tribes to come to agreements regarding both the care and custody of Indian children and jurisdiction between tribes and states. 25 U.S.C. § 1919.

ICWA's passage has been monumentally important. Since ICWA's passage, removals of Indian children have decreased in some jurisdictions, and placements with relatives or tribal members have increased. Placement of Indian children with kin or tribal members has been of significant benefit to those children. Indian children have the highest rate of kinship placements in foster care, the lowest rate of institutional placements, and one of the lowest rates of aging out of foster care without adoption.[3] However, some courts still routinely order the removal of Indian children without adhering to ICWA's protections, and Indian children remain four times more likely to be placed in foster care at their first encounter with the court system.[4] In 2013, "Native American children [we]re represented in State foster care at a rate 2.5 times their presence in the general population." 81 Fed. Reg. 38,784 (June 14, 2016). Thus, it is imperative that ICWA protections be known, used, enforced, and strengthened where possible.

To that end, and because ICWA's requirements must work in conjunction with state laws that apply to children more generally, and because ICWA expressly permits states to act, seventeen states have enacted state-specific ICWA statutes. While many state statutes mimic the federal law,5 others now include provisions specific to the state, and attempt to clarify portions of the federal law that can create confusion.[6]

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[2] Tribes, of course, are a third category of sovereigns that enact and enforce dependency and family law. ICWA does not apply in tribal courts, but ICWA recognizes and enforces tribal jurisdiction over proceedings involving Indian children. *See* 25 U.S.C. §§ 1903(12), 1911.

[3] Brief of Casey Fam. Programs & 30 Other Orgs. Working with Child., Fams., & Cts. to Support Child.'s Welfare as *Amici Curiae* in Support of Appellants at 21-22, *Brackeen v. Haaland*, 994 F.3d 249 (2021) (No. 18-11479); *see* Brief of the Amicus States of Cal., Alaska, Ariz., Colo., Idaho, Ill., Iowa, Me., Mass., Mich., Minn., Miss., Mont., N.J., N.M., Or., R.I., Utah, Va., Wash., & Wis. in Support of the U.S. & Intervenor Tribes & Reversal at 26-27, *Brackeen v. Haaland*, 994 F.3d 249 (2021) (No. 18-11479).

[4] Robert B. Hill, *An Analysis of Racial/Ethnic Disproportionality & Disparity at the National, State, and County Levels*, Casey-CSSP Alliance for Racial Equity in Child Welfare 10 (2007), https://bit.ly/3PSjzrH.

[5] *See* Oklahoma Indian Child Welfare Act, 10 Okla Stat. §§ 40-40.9.

[6] *See* Minnesota Indian Family Preservation act, Minn. Stat. § 260.751- 260.835; New Mexico Indian Family Protection Act, N.M. Stat. §§ 1-42.

Purpose of this Act

This act is a comprehensive uniform state law that will facilitate the application of ICWA requirements in all state proceedings to which ICWA applies by statute or has been found to apply by case law. It incorporates the best practices from existing state ICWA laws, clarifies areas of confusion that have led to significant litigation, and ensures compliance with ICWA's requirement that state law maintain or increase protections for Indian families. 25 U.S.C. § 1921. While a state act may include provisions that ensure that ICWA works in conjunction with its current child-dependency or other family law requirements, and, to do so, may provide heightened protections for Indian families, such an act may not lower the minimum federal protections set by ICWA. Indeed, no state statute may lower the protections for Indian families prescribed by the federal law.

One of the challenges the drafting committee faced is that there have been many changes in the way state dependency law operates since ICWA was enacted nearly fifty years ago. For instance, ICWA's protections were established two years prior to the passage of Title IV-E of the Social Security Act, the first federal law that made significant changes to state child dependency law. Title IV-E of the Social Security Act was first adopted in 1980 and has been amended multiple times since then. It has created a large and significant body of law that requires states to follow its standards to receive federal funds for their foster care systems. 42 U.S.C. §§ 671-679c. This evolution of state child welfare systems has led to state court and agency confusion as to ICWA's application within modern structures. Not surprisingly, since the passage of ICWA, state appellate courts have been required to interpret ICWA and its regulations and decide how they apply in today's world. The drafting committee faced the challenge of considering and recognizing those decisions, including holdings which deviate from the plain wording of ICWA.[7] The current practice, protections, and structure of state dependency law are different than they were in 1978, and the committee drafted this act to work in conjunction with modern laws.

The challenges the committee faced also presented unique opportunities, however. First, a successful Indian child-welfare act may benefit all children because it raises the bar for dependency law and other areas of family law. The child-dependency system in the United States is complex and requires balancing the constitutional rights of parents with the state's interest in keeping children safe. *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). Child dependency courts frequently operate with a much less formal structure than other courts or courts acting in other areas of law. The lack of formality, paired with law that often grants courts wide discretion, can make it more difficult to ensure a court's judgment does not veer into the type of discrimination with which Congress was deeply concerned. H.R. Rep. No. 95-1386, 10-12 (1978).[8]

On the other hand, a formal system, based on a criminal adversarial model, is difficult for

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[7] *See In re* Morris, 815 N.W.2d 62, 80 (Mich. S. Ct. 2012) (noting the emergency jurisdiction provisions in §1922 must apply to children over whom a tribe does not have exclusive jurisdiction, despite statutory language stating that a child must be domiciled on but temporarily off the reservation for the emergency jurisdiction provision to apply.)

[8] *See also* Amy Sinden, *"Why Won't Mom Cooperate?" A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339 (1999).

any family to navigate and frequently lacks the nuance necessary to reach the best outcomes in complex family matters. Congress has passed a myriad of federal laws, ICWA being one, that attempt to change the system into one that more accurately reflects what families need. *Sowing the Seeds of Hope: Keeping Children Safe with Families*, Casey Family Programs 23-24 (2025), https://bit.ly/4kOFsI8. These laws are designed to both limit judicial discretion and incorporate best practices into state welfare law. ICWA's approach—creating a "structured, transparent, and objective framework" while empowering courts to deviate from it as necessary—is now regarded as the "gold standard . . . for all children and families."[9]

This act is designed to work in synchronicity with actual practice today, and as such is not simply a restatement of the existing federal law that states already are required to follow. Rather, it provides states with a modern, updated ICWA that incorporates the current practice, protections, and structure of state dependency and family law. State courts, agencies, and practitioners are not always aware of ICWA and its implementing administrative rules. By drafting this act in a way that fits with modern dependency law, the act will promote ICWA's uniform enforcement by making existing federal law and federal minimum standards a part of state law in clear terms that will help ensure that minimum federal standards are upheld. Finally, by drafting an act that is updated to meet current needs, the committee has improved the likelihood of its enactment. States are already bound to follow ICWA's provisions and have limited motivation to pass an act that simply restates ICWA's provisions without filling gaps, addressing uncertainties, and strengthening current practices.

Structure of the Act

This act begins, in article 1, with definitions. To provide clarity, it includes significantly more definitions than are found in ICWA. Most importantly, section 103 specifically enumerates the proceedings to which this act applies by using the terms states use to describe their dependency proceedings. Articles 2 and 3 address some of the most litigated areas of ICWA practice—the inquiry and process necessary for determining whether the proceeding involves an Indian child, and the notice requirements once a child is determined to be an Indian child.[10] These articles provide much needed guidance for courts and agencies as to their responsibility and obligation to identify Indian children and notify the appropriate tribes and individuals of the proceedings.

These two articles implement ICWA's requirement that in "any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe . . ." 25 § U.S.C. 1912(a),

[9] Brief of Casey Fam. Programs & 30 Other Orgs. Working with Child., Fams., & Cts. to Support Child.'s Welfare as *Amici Curiae* in Support of Appellants at 3, *Brackeen v. Haaland*, 994 F.3d 249 (2021) (No. 18-11479). Indeed, Congress has imposed similar requirements on States' foster-care systems generally. Congress has conditioned federal funding on changing state-law placement preferences, 42 U.S.C. § 671(a)(19); required "reasonable efforts . . . to preserve and reunify families," 42 U.S.C. § 671(a)(15)(B); and required notice, 42 U.S.C. § 675(5)(G).

[10] *See* Kathryn E. Fort & Adrian T. Smith, *The Indian Child Welfare Act during the* Brackeen *Years*, 74 Juv. Fam. Court J. 9 (2023).

see also 25 C.F.R. §§ 23.107-23.112. As such, the structure of this act is a funnel, applying broadly initially to ensure Indian children are properly identified, then narrowing the applicable provisions as the state court and agency determine whether the child is an Indian child and the proceeding is subject to this act. Therefore, article 2 applies to all children in the proceedings listed, while articles 4-13 *only* apply when an Indian child is involved in the proceeding.

Article 4 of the act addresses the jurisdiction of tribal and state courts, an interplay that reflects the inherent jurisdiction of tribal courts, as recognized by ICWA. Article 4 incorporates ICWA's emergency jurisdiction provision, 25 U.S.C. § 1921, as well as its exclusive jurisdiction provision, 25 U.S.C. § 1915(a). ICWA gives tribes and parents the right to transfer a case to tribal-court jurisdiction from state-court jurisdiction, subject to three limitations,[11] implicitly recognizing that states and tribes exercise concurrent jurisdiction over Indian children off reservation. Section 403 of this act explicitly spells out that concurrent jurisdiction. Sections 404-407 provide specific procedures and standards for that transfer action, and section 408 preserves ICWA's explicit and necessary authority for tribes to enter into agreements with states regarding jurisdiction.

Articles 5 and 6 generally follow the organization of a state child-dependency proceeding, although terminations of parental rights may occur outside the state dependency system. ICWA does not provide explicit guidance to state courts on when or how to apply its standards within the standard state dependency process, and this Act provides those needed provisions.[12] Importantly, for each type of proceeding to which the act applies, this act provides requirements that apply in addition to state law requirements for those proceedings. In doing so, this act follows existing state law precedent addressing state and federal requirements for ICWA proceedings by requiring courts to make both state findings and ICWA findings., *See Interest of A.H.*, __ So.3d __ (Fla. Dist. Ct. App. 2026). This means that, for every hearing described in article 5, for example, states will include a reference to governing provisions of their state codes; those provisions will apply to those hearings. This is equally true in article 7 governing guardianships and third-party custody petitions, article 8 governing adoption, and article 9 governing status offenses.

Because the existing laws that govern the different types of proceedings covered by this act are commonly placed in different sections of state codes, this act separately states the applicable requirements for each type of proceeding and hearing in articles 5-9. While this may read as redundant in this stand-alone act, it is intended to improve clarity for practitioners. Repeated provisions include the burden of proof for both (1) the placement of child in foster care, section 506 in this act, and, in ICWA, 25 U.S.C. § 1912 (d) and (e); and (2) the termination of parental rights, article 6 of this Act, and, in ICWA, 25 U.S.C. § 1912 (d) (f).
Article 10 sets out and clarifies the placement preferences established by ICWA and its implementing regulations as well as what constitutes good cause to deviate from those preferences. The committee here was guided primarily by ICWA and the implementing regulations but also looked to state case law and state statute to help with areas of article 10 that

[11] 25 U.S.C. § 1911(b) (parental objection, tribal court denial, and good cause)

[12] *See* Kathryn E. Fort, *The Challenge of Indian Child Welfare Act Enforcement in the Modern Age of Child Dependency*, 135 YALE L. J. FORUM 789 (2025-2026)

cause the most litigation.

In the proceedings to which ICWA applies, ICWA's requirements include terms of art or general reference for which the committee has provided further definition reflecting federal regulations, provisions in existing state ICWAs, and applicable case law. Those provisions are found in Article 11. They are intended to increase ICWA's protections while accurately reflecting current and best practices, and address topics such as:

- The right to counsel;
- The right to access documents;
- The requirement to ensure "active efforts" to provide remedial services and rehabilitative programs that are designed to prevent the breakup of the Indian family, and to permit removal only when such efforts are unsuccessful;
- The requirement to permit removal only when a "qualified expert witness" testifies, in accordance with the applicable standard of proof;
- The right to information for adults who were subject to the act as children.

Article 12 of this act clarifies and strengthens ICWA's remedies for violations of the act, 25 U.S.C. § 1914 and § 1920. In particular, section 1201 makes ICWA, 25 U.S.C. § 1914, more effective, provides specific guidance to practitioners and courts on how to address violations of the act during the pendency of a proceeding, and articulates specific types of remedies available in a collateral proceeding. Finally, article 13 addresses the record keeping requirements found in both ICWA and the federal regulations and simplifies the language to clarify state agency record-keeping obligations and adults' rights to their own records.

The Unique Role of Tribes and Tribal Representatives in Drafting and Enactment

Before beginning work on this act, the ULC consulted with tribes across the nation to determine whether they believed that the drafting of a uniform state ICWA would be of benefit to tribal children and their families. Many tribes engaged in the ULC study process and ultimately agreed that a uniform or model act could be of benefit. Some also expressed the view that a uniform or model state ICWA could promote ICWA compliance and uniform interpretation. Tribal children and their families may live in states in which tribes are not as present and active as they are in other states, and all tribal children and families, in every state, are entitled to ICWA's protections. The work of drafting a state ICWA is time intensive and difficult. The ability of the ULC to bring experts in the field together and use its thorough process to integrate and synthesize federal and state law is a privilege very few state or tribal practitioners have.

With the benefit of that thinking, the ULC authorized this project but specifically provided that the committee would do its work "with the participation of tribes and tribal leaders." The ULC recognized that the drafting of this act would give it a significant opportunity to work in partnership with tribal representatives and organizations to ensure compliance with federal law, strengthen the relationship between states and tribes, and promote enactment. In states that have adopted laws to implement ICWA, tribes have been active participants in the drafting and enactment of these laws. In fact, to date, no state ICWA has been enacted without significant leadership by and contributions from tribes.

As with every ULC drafting project, the drafting committee relied on the expertise of observers who practice in this highly specialized, complicated, and important area of law that affects every child and family brought into the state child welfare system. But the ULC also recognized that tribal nations are different from all other observers. As pre-constitutional sovereigns with their own laws and governing systems, tribes enjoy a government-to-government relationship with the federal government and with state governments. Tribal leaders and practitioners have been essential to the drafting of this act, and the committee has been fortunate to learn from and work in partnership with them.

The drafting committee would like to specifically thank the representatives from the Native American Rights Fund (NARF), the National Indian Child Welfare Association (NICWA), and the National Congress of American Indians (NCAI) for attending drafting meetings, providing considerable comments, and hosting ULC representatives at their events to explain this process.

The drafting committee has received the following resolutions in support of process of developing this act and for due consideration to be given to experts in the field of federal Indian law, tribal law, and ICWA for the entirety of the drafting process:

United Tribes of Michigan (consisting of the leaders of the twelve federally recognized tribes in Michigan), May 14, 2026.

State Indian Child Welfare Act

[Article] 1

General Provisions

Section 101. Title

This [act] may be cited as the State Indian Child Welfare Act.

Comment

This act does not include a policy and findings section. The federal ICWA includes both, 25 U.S.C. §§ 1901, 1902, and some state laws also include an equivalent. *E.g.,* Iowa Code § 232B.2; Minn. Stat. § 260.753. The policy and findings sections of ICWA have been cited in case law to provide guidance on the goal of Congress when passing ICWA. *See, e.g., Valerie M. v. Ariz. Dept. of Economic Sec.*, 198 P.3d 1203, 1207 (Ariz. 2009); *People in Interest of K.C. v. K.C.*, 487 P.3d 263, 269 (Colo. 2021); *In re* M.H.C., 2016 OK 88, ¶ 8, 381 P.3d 710, 712. States may choose to look at these areas of state and federal law to determine if they would like to include either a policy or findings section.

Section 102. Definitions

In this [act]:

(1) "Adoption" means a proceeding that includes or may culminate in the creation of a new parent-child relationship, including a proceeding under [cite to state statute governing adoption].

(2) "Agency" means an agency, department, state instrumentality, nonprofit organization, or for-profit organization, including its employees, agents, and officials, under other law of this state that:

(A) has placement and care responsibility of a child;

(B) is responsible for investigating reports of child abuse or neglect;

(C) conducts and evaluates child safety and risk assessments;

(D) provides services to parents or foster parents;

(E) conducts the administrative and social work necessary for dependencies; or

(F) conducts the administrative and social work necessary for [preadoptive proceedings], or adoptions.

(3) “Bureau” means the Bureau of Indian Affairs in the United States Department of the Interior, or any successor agency.

(4) “Court” means a court with jurisdiction, under other law of this state, to adjudicate a proceeding subject to this [act].

(5) “Court record” means the records created by the court or filed with the court in a proceeding subject to this [act].

(6) “Custody” means physical custody or legal custody, or both of a child under tribal law or other law of this state.

(7) “[Dependency]” means a proceeding that includes or may culminate in:

(A) court-supervised in-home placement in which a child’s parent or Indian custodian cannot have court supervision terminated upon demand; or

(B) the removal of a child from the child’s parent or Indian custodian for a court-supervised temporary placement in which the parent or Indian custodian cannot have the child returned upon demand.

The term includes a proceeding under [cite to state statute governing dependency].

(8) “Domicile” means:

(A) in relation to an individual who is not an Indian child:

(i) the place at which the individual has been physically present and that the individual regards as home; and

(ii) the individual’s true, fixed, principal, and permanent home, to which the individual intends to return and remain, if the individual resides elsewhere; or

(B) in relation to an Indian child:

(i) if the parents of the Indian child live together, the place or home described in subparagraph (A) of the parents;

(ii) if the parents of the Indian child live separately, the place or home described in subparagraph (A) of the parent who has primary physical custody of the Indian child; or

(iii) if an Indian custodian has custody of the Indian child, the place or home described in subparagraph (A) of the Indian custodian.

(9) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(10) "Extended-family member", in relation to an Indian child, means:

(A) an individual considered to be an extended-family member under the tribal law of the Indian child's tribe; or

(B) in the absence of tribal law of the Indian child's tribe, an individual who is the Indian child's grandparent, aunt or uncle, sibling, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

(11) "Guardianship" means the court-ordered removal of a child from the child's parent or Indian custodian:

(A) that places the child in the home of a guardian or conservator; and

(B) in which the parent or Indian custodian cannot have the child returned upon demand but parental rights have not been terminated.

(12) "Guardianship proceeding" means a proceeding that includes or that may

result in a guardianship.

The term includes a proceeding under [cite to state statute governing guardianships].

(13) "Indian" means an individual who is:

(A) a member of an Indian tribe; or

(B) an Alaska Native and a member of a Regional Corporation under Section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. Section 1606[, as amended].

(14) "Indian child" means an individual who is:

(A) unmarried;

(B) under 18 years of age at the commencement of a proceeding identified in Section 103(a); and

(C) either:

(i) a member of an Indian tribe; or

(ii) eligible for membership in an Indian tribe [and is the biological child of a member].

(15) "Indian custodian" means an Indian:

(A) who has legal custody of an Indian child under tribal law or other law of this state; or

(B) to whom temporary physical care, custody, and control has been transferred by the parent of an Indian child.

The term does not include an Indian who has only physical custody of an Indian child as a result of an out-of-home placement by an agency or court.

(16) "Indian foster home" means an out-of-home placement in which at least one of the licensed or approved foster parents is an Indian.

(17) “Indian tribe” means:

(A) a federally recognized Indian tribe, band, or nation; or

(B) an organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians in an Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. Section 1602(c)[, as amended].

“Tribe” and “tribal” have a corresponding meaning.

(18) “Member” means an individual who is a member or citizen of an Indian tribe as determined by the tribe. “Membership” has a corresponding meaning.

(19) “Parent” means:

(A) a parent of an Indian child under tribal law or other law of this state; or

(B) an individual whose biological parentage of an Indian child has been acknowledged or established under tribal law, or other law of this state or in a proceeding subject to this [act].

(20) “Participant” means an individual who:

(A) is present at a hearing in a proceeding subject to this [act]; and

(B) has an interest in, or a relationship with, the child subject to the proceeding.

(21) “[Preadoptive] proceeding” means a proceeding that includes or may culminate in a child being temporarily placed in an out-of-home placement or institution after termination of parental rights, but before or instead of an adoption. The term includes a proceeding under [cite to state statute governing preadoptive or similar proceedings].

(22) “Petitioner” means an individual or agency that commences a proceeding identified in Section 103(a).

(23) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(24) “[Relinquishment]” means the voluntary consent by a parent to release all parental rights and duties and end the parent-child relationship under [cite to state statute governing voluntary relinquishment, consent, or voluntary termination of parental rights].

(25) “Regional director” means the regional director of the Bureau for Indian Affairs for a specific geographical area and at the office address specified under 25 C.F.R. Section 23.11(b).

(26) “Reservation” means Indian country as defined in 18 U.S.C. Section 1151[, as amended] and any land, not covered under that law, title to which is held by:

(A) the United States in trust for the benefit of an Indian tribe or individual; or

(B) an Indian tribe or individual subject to a restriction by the United States against alienation.

(27) “Residence” means a specific place where an individual lives or dwells. “Resides” has a corresponding meaning.

(28) “Secretary” means the Secretary of the Interior of the United States, the Secretary’s authorized representative acting under delegated authority, or a successor of the Secretary.

(29) "Status offense proceeding" means a proceeding:

(A) to adjudicate or dispose of an offense committed by a minor that would not be considered a criminal offense if committed by an adult under [cite to state statute governing status offenses]; and

(B) that may culminate in the out-of-home placement of the minor.

(30) "Telecommunication technology" means technology that supports communication through electronic means. The term is not limited to regulated technology or technology associated with a regulated industry.

(31) "Termination of parental rights" means a proceeding that includes or may culminate in the termination of a parent-child relationship. The term includes a proceeding under [cite to state statute governing a termination of parental rights or similar proceedings].

[(32)"[Third-party custody] proceeding" means a proceeding that includes or may culminate in the removal of a child from the child's parent or Indian custodian:

(A) that places the child in the home of a non-parent petitioner; and

(B) in which the parent or Indian custodian cannot have the child returned upon demand, but parental rights have not been terminated. The term includes a proceeding under [cite to state statute governing proceedings in which a non-state, non-parent petitioner moves for custody of a child].]

(33) "Tribal court" means:

(A) a Court of Indian Offenses created under 25 C.F.R. Pt. 11;

(B) a court established and operated under tribal law; or

(C) an administrative body of an Indian tribe with decision-making authority over child and family matters.

(34) "Tribal law" means:

(A) the governing laws, ordinances, or resolutions of a tribal government; and

(B) the customs of an Indian tribe as determined by the tribe.

(35) "Tribal representative" means an individual designated by an Indian child's tribe to represent the tribe in a court proceeding under this [act].

(36) "Upon demand" means a request of a child's parent or Indian custodian to have the child returned to the parent or Indian custodian with no condition, formality, contingency, or supervision by a court.

(37) "Voluntary placement" means an out-of-home placement of a child with the participation of an agency after the child's parent, guardian, or Indian custodian has:

(A) requested the assistance of the agency; and

(B) signed a voluntary-placement agreement under [cite state statute governing voluntary-placement agreement].

(38) "Ward of a tribal court" means an Indian child over whom a tribal court has exclusive and continuing jurisdiction as a result of a tribal court order.

Legislative Note: *In paragraph (2), as state should use the term it uses for proceedings that occur after termination of parental rights but before an adoption or may use "preadoptive." The term should be used each time the bracketed term appears.*

In paragraph (7), a state should use the term it uses for proceedings by which a child is placed under the legal custody and control of a state agency. The term should be used each time the bracketed term appears.

It is the intent of this act to incorporate future amendments to the federal statute cited in paragraph (13), (17), and (26) and elsewhere in this act. However, the text "as amended" should be omitted in a state that: (1) does not permit incorporation of future amendments when a federal statute is incorporated into state law; or (2) incorporates future amendments into state law even in the absence of a legislative declaration.

In paragraph (14)(c) a state may choose to include language requiring the biological parent of the Indian child to be a tribal member, which is the original language of the Indian Child

Welfare Act.

In paragraph (24), a state should use the term the state uses for proceedings by which a parent voluntarily surrenders their parental rights. The term should be used each time the bracketed term appears.

In paragraph (31), a state should include this definition and section 703 if the state allows custody petitions from a non-parent in a proceeding that does not involve the state or agency and is not considered a guardianship.

Comment

The adoption of this act may require changes or additions to state court rules. For example, some states have incorporated ICWA requirements into their state court rules. *See* Ariz. Juv. Ct. R. of Proc.; Mich. Ct. R. 3.002; 8.126. States may wish to review their court rules to ensure they are consistent with this act.

(1) Adoption. This act covers state law adoptions and does not create a tribal customary adoption, or "TCA." A state TCA act for states is beyond the scope of this act, but states should be aware of other alternative permanency options for children. Some states provide an option for adoption by and through the customs, laws, and traditions of an Indian child's tribe, called tribal customary adoption. A TCA is a method of adoption that offers the Indian child a permanent placement with an adoptive parent without severing parental rights and thereby maintaining the child's legal and cultural ties to their family of origin and tribe. A TCA can afford all the benefits of permanency through adoption without disrupting the Indian child's ability to be a full member of the tribe or participate fully in tribal life.

(1), (7), (12), (21), (29), (31), (32) May culminate in. The phrase "may culminate in" comes from the federal regulations, 25 C.F.R. § 23.2, the definition of "child custody proceeding," and is intended to capture any proceedings this act or ICWA applies to, but that is not specifically named in the definitions.

(2) Agency. While Indian child welfare cases have three potential agencies involved: (1) the state or county child welfare agency, (2) a tribal social services agency, and (3) private agencies, sometimes known as child-placing agencies (CPAs), only the non-tribal agencies are governed in this act. Tribal agencies may be involved in a state case to assist the state or private agency but ultimately does not have any authority under state law in a state court case.

One way to think about the definition of the state agency, and any contracting agency or organization, that is responsible for administering Title IV-B and Title IV-E programs under a child and family services plan, and is responsible for child abuse and neglect investigations, child safety and risk assessment, providing a range of prevention, family support, preservation, and reunification services, as well as family foster care and kinship care services.

Since the 1990s, public child welfare agencies have increasingly relied upon the private sector, including CPAs. The state agency licensing division (LD) must license CPAs. State agencies may contract with CPAs so long as they continually monitor for compliance (under Titles IV-B and IV-E of the Social Security Act, 42 U.S.C. § 601-687). Some CPAs have primary responsibility for case planning, including placement decisions, while others focus on day-to-day care management. For example, CPAs could manage the immediate shelter care placement, could be the foster agency managing and approving the foster family, or could be a private adoption agency. However, even under a fully privatized state system, the public agency retains ultimate case authority through oversight. States should have clearly defined roles and responsibilities of public versus private agency staff involved in case management decisions.

This definition also includes private adoption agencies, whether or not the adoptions they facilitate are connected with public foster care proceedings, as ICWA does not just govern state-initiated proceedings.

(6) Custody. This act uses "custody" in place of ICWA's term of "continued custody," *see* 25 U.S.C. § 1912(e), (f). As a result of a Supreme Court decision in 2013, there has been considerable confusion in attempts to define the phrase. *Compare Adoptive Couple v. Baby Girl*, 570 U.S. 637, 647-8 (arguing "continued" meant a parent must have had prior physical custody of a child for ICWA's standards to apply) *with* 570 U.S. at 682-3, (arguing agencies regularly provide services to parents who never had physical custody) (Sotomayer, J., dissenting). The federal regulations define "continued custody" as "physical custody or legal custody or both, under any applicable Tribal law or tribal custom or State law, that a parent or custodian already has or had at any point in the past. The biological parent of a child has had custody of a child." 25 C.F.R. § 23.1. This act retains the intent of the definition of the regulations while eliminating the confusion surrounding the term "continued."

(7) [Dependency]. A temporary placement may include but is not limited to a foster home, kinship placement, temporary guardianship, hotel room, group placement, or placement with a non-respondent parent who does not have custodial rights.

(9) Domicile. The domicile of the Indian child's parent determines the government which has jurisdiction over the family, whether it is the state, the tribe or both. Domicile was the subject of *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), where the Court determined Congress intended a uniform definition of domicile that could not be defeated by individual Native people giving birth off reservation while being domiciled on reservation. As a result, the Court found the usual understanding of domicile—physical presence and an intent to remain or return, *id.*at 48—as well as that children take the domicile of their parents. *Id.* At the time of the decision, the Court also found that children usually take the domicile of their mother when the parents are unmarried. However, as custodial arrangements and assumptions have shifted, a child may have two residences, but only one domicile, such as in the situation of a joint custody arrangement. These arrangements may be informal or by court order. If there is a court order governing parental custody arrangements, the domicile of the child should be clear through that order. However, when the arrangement is informal, a court may have to make a finding as to which parent is the primary parent for the purposes of domicile.

(10) Extended-family member. Tribal definitions of extended family often emphasize social and cultural ties that go beyond the traditional western nuclear family model. This may include clan relatives, tribal elders, and close family friends that are considered family. For example, the White Earth Nation defines extended family as those who care about the child, defined according to tribal customs and traditions, while the Yurok Nation includes biological and legal relatives and those recognized by traditional customs and practice. These definitions

are important as extended-family members receive placement priority for foster care and adoption.

When applying the extended-family definition, the court shall use the definition supplied by the Indian child's tribe. If the child is eligible for membership with two or more tribes, only the definition of the tribe that has been designated as the child's tribe shall apply. Pulling from the above analysis, if the child is eligible for enrollment with Yurok and White Earth, but the tribes decide that that Yurok is to be designated as the Indian child's tribe, the definition provided by Yurok shall be applied.

(13), (14) Indian and Indian Child. ICWA defines "Indian child" as "any unmarried person who is under the age of eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). This act allows states to determine whether to include the requirement the child be the biological child of a member of a tribe. In other state ICWA laws, some states have chosen to leave it out, while others have left it in. *Compare* Mich. L. Comp. § 712B.3(k), *with* Colo. Rev. Stat. § 19-1.2-103(10). Both definitions require a political relationship between the tribe and the child, with the former deferring to a tribe's sovereign political determination of membership, while the latter adds an additional layer of required connection between the parent and child.

While this can be a complicated area of law, there are a few foundational principles. The first is that tribes are distinct, political sovereigns, recognized as such by the U.S. Supreme Court in *Worcester v. Georgia,* 31 U.S. 515, 519 (1832). The second is that as sovereign nations, tribes have exclusive authority to determine citizenship and citizenship eligibility. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). This authority has continuously been upheld as a core power of tribal sovereignty. *See, e.g.*, *U.S. v. Cooley,* 593 U.S. 345, 349 (2021). And finally, the third is that the United States has a political relationship with tribes and Native people based on the Constitution, treaty, and trust responsibilities. *See Haaland v. Brackeen*, 599 U.S. 255, 274-275 (2023).

Legal definitions of "Indian" that are grounded in tribal citizenship or membership, such as those in ICWA and in this act, are political classifications. While "Native American" can be considered a racial classification in certain contexts, political classifications of Indians, which are not coextensive with the racial ones, do not trigger a strict scrutiny review. *Morton v. Mancari*, 417 U.S. 535, 553 n. 24, 555 (1974). In addition, a law that grants special status to "Indians" more generally may be a political classification under the relationship between the United States and tribes. *See Morton v. Mancari*, 417 U.S. 535, 555 ("as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians, such legislative judgments will not be disturbed."). ICWA's treatment of Indian children is a result of this political relationship as well as it is grounded in Congress's "responsibility for the protection and preservation of Indian tribes" as well as Congress's recognition "that the United States has a direct interest, as trustee, in protecting Indian children . . .") 25 U.S.C. § 1903(2), (3).

ICWA uses the term "member" rather than "citizen" to refer to a political status conferred by a tribe. Many tribes have moved toward using the term "citizenship" to emphasize that tribal citizenship is a political and legal relationship with a sovereign nation. However, to reduce confusion, this act uses the language from ICWA. However, the federal regulations that govern ICWA used terms, and state that the terms were “synonymous . . . in the context of Tribal government.” 81 Fed. Reg. 38795.

The act does not use the term “enrolled” as a descriptor for tribal membership or citizenship, as that is a specific term of art that not all tribes use in their Constitutions or statutes determining citizenship. To be enrolled generally means the person is listed on a tribe’s roll. But membership criteria and procedures vary between tribes, and enrollment is not the only method tribes use to confer citizenship; someone may be a citizen of a tribe without being “enrolled.”

(15) Indian custodian. The term Indian custodian includes individuals who are both Indian under this act and have an informal custody of an Indian child. The primary example is a grandparent or auntie who has an Indian child in their home but has no formal guardianship or custody determination from a court. Congress, in passing ICWA, was particularly concerned by the fact that agencies misunderstood the dynamics of Indian extended families and failed to respect or protect relationships between Indian children and individuals outside their nuclear families. H.R. Rep. No. 95-1386, 10 (1978) (“An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect . . .”).

The definition also makes clear that though a foster care placement may be an Indian family, foster care placement does not create an Indian custodian. *See e.g., Rosalind M. v Dep’t of Family and Community Serv’s*, 555 P.3d 505, 514 (Alaska 2024) (articulating that when a child is in foster care, the agency has legal custody, and foster parents only have physical custody and are contractually limited regarding decision making for the child.). This is an important distinction to clarify, as Indian custodians have rights and protections under ICWA and this act that are not extended to foster parents under state laws.

(16) Indian foster home. The placement preferences in [article] 10 include the term “Indian foster home.” This is a home that is licensed or approved by a non-Indian agency, such as the state, that includes a parent who is an Indian. In some states, there has been confusion regarding what constitutes an Indian foster home. This act clarifies that the placement of a sibling (or any other child) who is an Indian child in the home is not enough to establish the home as an Indian foster home.

(17) Indian tribe. Both ICWA and this act limit its application to tribes that are “federally recognized.” This means the tribes are recognized by the federal government as sovereigns with certain inherent rights of self-government, as well as a government-to-government relationship with the United States. Federally recognized tribes are entitled to certain federal benefits, services, and protections. U.S. Dep’t of the Interior, *What is a federally recognized tribe?*, Indian Affairs (Oct. 2, 2020 at 14:11 ET), https://www.bia.gov/faqs/what-federally-recognized-tribe. Pursuant to the List Act of 1994, 25 U.S.C. § 5130, the Secretary must publish an annual list of all tribes recognized by the federal government as eligible for special programs and services for Indians.

At the time of ICWA’s passage, there was some confusion as to whether Alaska Native tribes or villages retained their federally-recognized status after passage of the Alaska Native Claims Settlement Act (ANCSA), Pub L. No. 92-203, 85 Stat. 688, codified in 43 U.S.C. §§ 1601-1629h. ANCSA established or recognized several native entities that are not sovereign tribal governments. *See* 43 U.S.C.S. §§ 1602, 1606. In addition, ANSCA defined Alaska Native villages in terms of population rather than land. 43 U.S.C. § 1602. ICWA, which was drafted after ANSCA's passage, but before the clarification provided by the List Act, separately and explicitly incorporated Alaska Native villages in the definition of Indian tribe. Since the passage of the List Act, federally recognized Alaska Native villages are included in the Secretary's annual list of federally recognized tribes. This act maintains the explicit inclusion and protection of the Alaska Native villages, however, given Congress's intent they be included regardless of the List Act.

The modern process for federal recognition requires submitting a detailed petition to the Bureau of Indian Affair's Office of Federal Acknowledgement that includes evidence of criteria such as identification as an Indian entity, political influence or authority, and a governing document. 25 C.F.R. § 83.11. Only after a tribe has achieved federal recognition are its citizens considered "Indians" for the purposes of this act. Some states extend recognition or protections to tribal entities not recognized by the federal government, *e.g.,* Conn. Gen. Stat. § 47-59a. However, those entities that are recognized by states but not the federal government are not included in ICWA or this act.

(19) Parent. ICWA's definition of parent is limited to a biological parent, which in modern life excludes many individuals who are now considered parents of a child under state laws. As such, this act does not limit a parent to a biological parent. One major result of that change is that ICWA's protections now extend to the adoptive parents of an Indian child. Under ICWA, only Indian adoptive parents were included in the definition of parent.

The definition of parent does preserve the biological link requirement for individuals, usually fathers, who may not be on a birth certificate or who may be considered "putative" parents under state law, but have "acknowledged or established" their paternity under tribal law, state law, or during the proceeding. ICWA only addresses a putative father in the negative, stating that parent "does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9).

(21) [Preadoptive] proceeding. This term comes from ICWA and is used in practice today in two separate situations. The first is after termination of parental rights, but before the finalization of a dependency case. The hearings in these proceedings are often called permanency review hearings. The second situation is in private adoptions for any hearings that occur after a relinquishment but before the final decree of adoption.

(24) [Relinquishment]. This term refers birth parent(s)' agreement to place their child for adoption, which is a critical step in the adoption process. Some states use the term "consent" to refer to this same process. However, to reduce confusion between this agreement and the consent of parents to a voluntary placement such as a guardianship or foster care, this act uses the term relinquishment to cover adoptions. This definition and this act do not affect a state's laws governing a post-adoption contact agreement (PACA) that gives birth parents contact after relinquishment, or a post-adoption cultural agreement that gives a tribe or extended family the

ability to ensure a child can participate in important cultural and religious activities with the tribe.

(26) Reservation. The act adopts in its entirety the Congressional definition of reservation from 25 U.S.C. § 1903. In turn, Congress used the definition from the Major Crimes Act at 25 U.S.C. § 1151, with minor additions. Courts have interpreted this to include the reservations in Oklahoma, which were affirmed in *McGirt v. Oklahoma*, 591 U.S. 894 (2020). *See Matter of Guardianship of K.D.B.* 564 P.3d 83 (Okla. 2025).

(27) Residence. ICWA uses the terms "domicile" and "residence" or "resides," indicating these were intended to have different meanings. *See* 25 U.S.C. § 1911(a). In addition, the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield* agreed the terms are "not necessarily synonymous," 490 U.S. at 48, which the commentary to the federal regulations acknowledged. 81 Fed. Reg. 38793 (the federal regulations definition of domicile "acknowledges that a person may reside in one place but be domiciled in another.").

(34) Tribal law. The term "governing laws" includes both written statutory laws and tribal court opinions the tribe considers precedential.

(37) Upon demand. This phrase comes from ICWA and is a term of art explaining the requirement that a child be returned to a requesting parent with no interference from a state agency or third party. *See e.g., Empson-Laviolette v. Crago*, 760 N.W.2d 793 (Mich. Ct. App. 2008). This definition slightly changes the wording in the federal regulations, 25 C.F.R. § 25.1, to keep it in accordance with the style of this act.

(79) Voluntary placement. This term and definition are taken directly from 42 U.S.C. § 672(f), which governs all states that receive funds from the federal government for their foster care systems. This act's definition aligns § 672(f) with 25 U.S.C. § 1913. Requirements for a voluntary placement involving an agency are addressed in Section 502. For the voluntary foster care placement discussed in 25 U.S.C. § 1913, which does not require the presence of an agency, those standards exist under Section 703 or 704.

Section 103. Applicability; Limitations on Applicability

(a) [Article] 2 applies to the following proceedings:

(1) [dependency];

(2) termination of parental rights;

(3) guardianship proceeding;

(4) [[third-party custody] proceeding;

(5)][preadoptive] proceeding;

(6) relinquishment;

(7) adoption; and

(8) status offense proceeding.

(b) If the court knows or has reason to know the child in the proceeding is an Indian child, [Article] 3 applies to:

(1) [dependency];

(2) termination of parental rights;

(3) guardianship; [and]

(4) [third-party custody]; and

(5)] status offense proceeding.

(c) If the court knows or has reason to know the child in a proceeding identified in subsection (a) is an Indian child, [Articles] 4 through 13 apply to the proceeding.

(d) If this [act] applies at the commencement of a proceeding identified in subsection (a), this [act] continues to apply even if the Indian child attains [18] years of age during the proceeding.

(e) This [act] does not apply to:

(1) a tribal-court proceeding; or

(2) a proceeding to determine custody between parents of a child if an agency is not involved.

(f) If a provision of federal law or other law of this state provides a higher standard of protection to an Indian child's parent or Indian custodian than this [act], the provision of federal law or other law of this state that provides the highest standard governs.

Comment

Source: 25 U.S.C. §§1912 (a), 1921; 25 C.F.R. §§ 23.103, 106.

[Article] 2

Inquiry into and Finding of Indian Child and Tribe

Section 201. Inquiry

(a) To determine jurisdiction and whether [Articles] 3 through 13 apply to a proceeding, the court shall find as early as possible in the proceeding whether the court knows under Section 203, or has reason to know under Section 204, that the child in the proceeding is an Indian child.

(b) The petitioner shall:

(1) inquire whether the child has possible membership or eligibility for membership in an Indian tribe;

(2) collect all information regarding possible tribal membership or eligibility for membership from the family before the commencement of the proceeding;

(3) contact each tribe if the inquiry or collection suggest possible membership or eligibility for membership; and

(4) document in a record the efforts made and information collected under this subsection.

(c) If the petitioner is an agency, the petitioner shall commence the duties under subsection (b) on the agency's initial contact with the child's family.

(d) At a hearing in a proceeding identified in Section 103(a), the court shall:

(1) inquire of all parties and participants whether they know or have reason to know whether the child in the proceeding is an Indian child; and

(2) enter in the court record responses to the inquiry.

(e) At the commencement of the proceeding the petitioner shall present to the court for entry in the court record:

(1) the petitioner's efforts to determine whether the child is an Indian child;

(2) the results of the petitioner's inquiry of the following individuals regarding tribal affiliation of:

(A) the child or the child's representative;

(B) the child's parent or parents;

(C) an individual who has custody of the child or with whom the child resides;

(D) the child's extended-family members;

(E) any other individual who may be reasonably expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and

(3) The results of the petitioner's inquiry regarding an Indian tribe, if information from the inquiry of an individual under paragraph (2) suggests there is a reasonable likelihood the tribe may be able to provide additional information regarding the child's membership or eligibility for membership.

(f) When conducting an inquiry under this section, the court shall inform any identified Indian tribe of the confidentiality requirement under Section 802 and other law of this state.

Comment

Source: 25 U.S.C. § 1912(a); 25 C.F.R. §§ 23.107, 108, 109.

Subsection (a). ICWA does not include direction to courts or agencies on how to determine as to whether there is an Indian child in a proceeding. Instead, the law states that a court shall notify the Indian child's tribe if the court "knows or has reason to know" the child involved is an Indian child. 25 U.S.C. § 1912(a).

Subsections (b)-(e). There is a robust body of case law surrounding both inquiry and the determination of whether a court knows or has reason to know a child is an Indian child, including notice to tribes. *See* Kathryn E. Fort & Adrian T. Smith, *The Indian Child Welfare Act during the* Brackeen *Years*, 74 Juv. Fam. Court J. 9, 17-26 (2023) (inquiry and notice comprise the highest number of ICWA appeals from 2017-2021). The federal regulations partially addressed this process in 25 C.F.R. §§ 23.107, 108 and 109. This section synthesizes the regulations, other state ICWA laws, and case law to create an article governing inquiry.

The separation and isolation of Indian people from their families and tribal communities—through federal government assimilationist policies including Indian Boarding Schools, the Indian Adoption Project, and Indian Relocation Programs—created uncertainty surrounding family histories. *See Haaland v. Brackeen*, 599 U.S. 255, 298-303 (2023) (Gorsuch, J. concurring). The federal government, state governments, and state courts have taken this traumatic history into account when developing their inquiry requirements. In an effort to find community, many individuals affiliated with other minority groups and began to lose some of their tribal identification. Many individuals were fearful of identifying openly as a tribal member to state agencies. Given the posture of fractured familial histories, when a participant *indicates* possible tribal affiliation due to tribal heritage, ancestry, or familial political affiliation, courts have reason to know that the child is an Indian child. *Matter of Dependency of Z.J.G.*, 471 P.3d 853, 866 (Wash. 2020).

Early determination of whether a child is an Indian child is important. At least one study demonstrated that children are more likely to achieve permanency through reunification when their tribe intervenes early in their case. *See* Alicia Summers, *Exploring Indian Child Welfare Act implementation and case outcomes*, 74 JUV. F. CT. J. 37 (2024). When tribes are notified early, they can bring additional resources to the search for appropriate placement and can assist in finding a child's relatives. In addition, failure to conduct an early inquire can result in overturned court orders and invalid placements due to jurisdictional errors. *See In re Dezi C.*, 553 P.3d 829, 833 (Cal. 2024) (conditionally reversing an order to terminate parental rights when there was inadequate ICWA inquiry). As such, this act makes explicit the obligation of the agency or petitioner to do the work early in a proceeding to determine whether a child is an Indian child.

Section 202. Tribal Determination of Tribal Affiliation

If an Indian tribe determines a child's membership or eligibility for membership, or a parent's membership, the court may not substitute the court's own finding. The tribe's determination controls the application of [Articles] 4 through 13 from the date of the determination.

Comment

Source: 25 C.F.R. § 23.108(b).

This act becomes applicable once the child becomes an Indian child and is not retroactive. *See In re M.H.C.*, 381 P.3d 710, 714 (Okla. 2016) (protections applied once the mother gained tribal membership during proceedings); *In re Ledee*, __N.W.3d __ (Mich. Ct. App. 2026)(a tribe must be federally recognized at the time of the termination of parental rights proceeding for ICWA/Michigan Indian Family Preservation Act to apply). While the finding of Indian child status should be made based on a determination from the tribe, this act applies if the child's membership status is in question, but the court has reason to know the child is an Indian child. *See* 25 C.F.R. § 23.107(b)(1).

Section 203. Court Finding: Knows Child is Indian Child

(a) The court knows the child is an Indian child if:

(1) a tribe informs the court in a record the child is an Indian child; or

(2) the court makes a finding under subsection (c) the child is an Indian child.

(b) If the court knows under subsection (a) the child is an Indian child, the court shall enter a finding in the court record and proceed under [Articles] 3 through 13, as applicable.

(c) The court may consider facts and records suggesting a tribal finding of membership or eligibility for membership and find the child is an Indian child only if:

(1) the tribe does not inform the court in a record whether the child is an Indian child;

(2) the court finds notice was provided if required under [Article] 3 to the designated tribal agent for service of notice published in the Federal Register and received no response; and

(3) the petitioner has used due diligence to verify whether the child is a member or eligible for membership by identifying and working with all Indian tribes identified as a result of the inquiry under Section 201.

Comment

Source: 25 U.S.C. § 1912(a); 25 C.F.R. § 23.108.

Subsection (c). In some rare situations, a party or participant may provide enough evidence for a court to make a finding under subsection (c) absent communication from the tribe. As an example, a party or participant may provide a tribal membership card for the child. The agency then confirms the tribe is a federally recognized tribe, but despite due diligence and notice under Article 3, the tribe does not respond. The court then may make a finding under subsection (c) that the child is an Indian child for the purposes of this act despite the fact a tribe is the only party that can make that determination for its own tribal membership purposes.

Section 204. Court Finding: Reason to Know Child is Indian Child

(a) The court has reason to know a child is an Indian child if a party or participant in the proceeding, or the child, informs the court that:

(1) the child is an Indian child, even if there is no formal confirmation from an Indian tribe of membership or eligibility for membership;

(2) there is information indicating the child is or may be an Indian child;

(3) the domicile or residence of the child, either parent of the child, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(4) the child is or was a ward of a tribal court; or

(5) the child or parent of the child has identification suggesting:

(A) membership in an Indian tribe; or

(B) shareholder or descendent status in a Regional Corporation or Village Corporation, under Section 7 or 8 of the Native Claims Settlement Act, 43 U.S.C. 1606 or 1607 [, as amended].

(b) In determining whether the court has reason to know the child is an Indian child under subsection (a), the court may not consider:

(1) the lack of participation of the parents or the child in tribal cultural, social, religious, or political activities;

(2) the relationship between the child and the child's parents; or

(3) the child's blood quantum.

(c) If the court has reason to know the child is an Indian child under subsection (a), the court shall:

(1) enter a finding in the court record;

(2) treat the child as an Indian child, unless the court makes a finding under Section 205 that the child is not an Indian child;

(3) require the petitioner to enter into the court record evidence the petitioner used due diligence to verify whether the child is a member or eligible for membership by identifying and working with all the Indian tribes identified as a result of the inquiry under Section 201;

(4) if the court record lacks proof of due diligence, order the petitioner to use due diligence to satisfy paragraph (3);

(5) instruct the participants to inform the court if the participants receive additional information regarding the tribal membership or possible tribal membership of the Indian child; and

(6) send notice if required under [Article] 3.

Comment

Source: 25 U.S.C. § 1912(a); 25 C.F.R. § 23.103, 107.

Subsection (a). Under ICWA and the accompanying federal regulations, state courts have obligations if the court has "reason to know" a child is an Indian child. *See* 25 U.S.C. § 1912(a) (provide notice); 25 C.F.R. § 23.107(b)(2) (apply ICWA's requirements). The federal regulations give some examples of when a court has reason to know, which is included and further clarified here. *See* 25 C.F.R. § 23.107(c).

Congress included the phrase "reason to know" because it intended for ICWA to apply during the time in which there is communication as between the tribe and the court as to the child's membership or eligibility for membership, but before membership status has been conclusively established. A court may have reason to know a child meets the definition of an Indian child even though the evidence is not absolute, or a tribe had not yet responded to notice. Some state courts have held that "reason to know" exists once the court is made aware that the Indian child and/or their parent(s) are eligible for tribal membership. *Matter of Dependency of Z.J.G.*, 471 P.3d 853, 869–70 (Wash. 2020). When a court makes a finding that it has reason to know the child is an Indian child, the agency or petitioner should continue to work to get definitive information from the Indian child's tribe. The federal regulations impose a continuing duty on juvenile courts to inquire whether the child is an Indian child. *See* 25 C.F.R. § 23.107(a). Parents may challenge a finding of ICWA's inapplicability in an appeal from the subsequent order, even if they did not raise such a challenge from the initial order. *See In re Isaiah W.*, 1 Cal. 5th 1, 5–6, 373 P.3d 444, 446, 203 Cal. Rptr. 3d 633, 635 (2016).

Because Indian people receive services that are available to them due to their status as Indians from a variety of entities, court and agency inquiry should include questions regarding the services a family has received. For example, records of individual Indian people seeking services may be found from consulting a Tribal Temporary Assistance for Needy Families (T-TANF) Program, Low Income Heating and Energy Assistance Program (LIHEAP), participation in the Department of Labor's Native American Employment and Training Programs, receipt of food boxes through Food Distribution Programs on Indian Reservations (FDPIR), Tribal HeadStart Programs, Native grants for first-time homeowners, or K-12 tribal-specific programs (i.e. Johnson O'Malley programs). Receipt of these kinds of services requires Indian status of some degree, though that status may be defined differently for different purposes of the programs, thus triggering a court's "reason to know."

Finally, domicile or residence in an Alaska Native village is identified separately from domicile or residence on a reservation because, with one exception, tribes in Alaska do not have reservations. In addition, the federal definition for an Alaska Native village does not refer to land to identify the village. However, many Alaska Native villages occupy non-reservation lands in which most community members are tribal members, and where the local municipality frequently shares a name with the federally recognized tribe. Just one example includes the fifty-six Alaska Native villages in the Yukon-Kuskokwim delta (an area roughly the size of Kansas), where virtually all the villages in that area consist of a majority of Alaska Native people, where the tribal and municipal governments overlap. This act and the federal regulations recognize that domicile or residence in one of these locations gives a court reason to know the child is an Indian child.

Subsection (b). Subsection (b) addresses a judicially created exception to ICWA called the "existing Indian family" exception, or EIF. *See In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), *overruled by In re A.J.S.,* 204 P.3d 543, 551 (Kan. 2009). Since the original *Baby Boy L.* case, a majority of states have considered, rejected, and abandoned the EIF, including states that has previously adopted it. *See e.g., Cherokee Nation v. Nomura*, 160 P.3d 967, 974 (Okla. 2007); *In re the Adoption of T.A.W.*, 383 P.3d 492, 505 (Wash. 2016).

In 2016, the federal regulations included specific language in 25 C.F.R. § 23.103(c) addressing the elements most used by courts regarding EIF, including the term "blood quantum." *See Baby Boy L.*, 643 P.2d at 174 ("Baby Boy L as a member of the Tribe with Kiowa blood degree of 5/16ths"). While it is beyond the scope of this comment to address the full history of blood quantum and tribal membership, *see* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. Rev. 1 (2006), under ICWA and this act, only the tribe's determination of membership governs the application of the act, not any individual's "blood quantum" or "degree of Indian blood." This act does not and cannot restrict a tribe from considering these factors in determining its citizenship criteria, instead it only limits a court's analysis of whether a child is sufficiently "Indian" to be covered by the act. Since the promulgation of the regulations, additional states have also rejected EIF, *see State ex rel. Delaware Tribe of Indians v. Nowicki-Eldridge*, 888 S.E.2d 866, 872 (W. Va. 2023), or questioned its viability, *In re Epik W.*, 2024 WL 4602720 at *8 (Tenn. Ct. App. Oct. 29, 2024).

Subsection (c). This section includes the instructions from the federal regulations, 25 C.F.R. § 23.107(b), which instructs the court on what to do when a court has "reason to know" but does not yet "know" the child is an Indian child. This often occurs in the following scenario: Police and social workers remove Child from the home due to an emergency. At the first hearing after the removal, in some states as soon as 24 hours, the court inquires as to the Indian status of the Child. Parent states they have relatives from Tribe X but do not have evidence of their own tribal membership, or unsure about their own status. This information would trigger an inquiry process under Section 201 and may lead the court to have "reason to know" the child is an Indian child under subsection (a)(2) or (3). At the next hearing, the court must follow up with the agency regarding the outcome of their inquiry under Section 201 and may at that point have enough information to make a finding under Section 203 or 205. However, so long as the court has "reason to know" under this section, it must follow the requirements under subsection (c). In the best-case scenario, an agency has had contact with a family prior to a court date and already began or completed the inquiry as required by Section 201(c).

Section 205. Court Finding: Child Not Indian Child

(a) In a proceeding identified in Section 103(b), and except as provided in subsections (b) and (c), the court may make a finding the child is not an Indian child after:

(1) inquiry is made under Section 201;

(2) notice is sent under [Article] 3; and

(3) the petitioner receives a response in a record from each identified Indian tribe that the child is not an Indian child.

(b) Subsection (a)(3) does not apply if:

(1) no participant has provided additional information suggesting the child is an Indian child;

(2) the petitioner received confirmation through registered mail that the notice was received;

(3) at least 10 days have passed since the date of receipt of the notice;

(4) in a [dependency], the petitioner has resent notice with any additional information after the hearing in Section 506; and

(5) the petitioner has:

(A) requested the assistance of the bureau in contacting each identified

Indian tribe; and

(B) demonstrated due diligence to contact all the identified Indian tribes and there has been adequate time for the tribes to respond.

(c) In an adoption, the court may make a finding the child is not an Indian child after:

(1) inquiry is made under Section 201; and

(2) no participant has provided suggesting indicating the child is an Indian child.

(d) A finding in a proceeding identified in section 103(b) that a child is not an Indian child does not apply to a:

(1) later separate proceeding involving the same child; or

(2) sibling of the child unless there is an individualized inquiry for the sibling under this [article].

Comment

Source: 25 U.S.C. § 1912(a); 25 U.S.C. § 1913; 25 C.F.R. § 23.107(a).

Subsection (a). ICWA and the federal regulations necessarily concern themselves with when there is an Indian child. However, many states have struggled with when they can find a child is not an Indian child and have taken different approaches. This section is a combination of those approaches that takes a middle ground between (1) a narrow interpretation that a court must only wait 10 days after receipt of notice by the parent or tribe, and (2) a broad interpretation which takes any statement of possible tribal membership as "reason to know" which means ICWA must apply until any or all tribes explicitly state the child is not an Indian child.

In many situations, a parent or participant will inform the court the parent has tribal affiliation, or possible tribal membership, by either generically by stating they believe they are Native American, or by specifically by naming a tribe. In both cases, the court would have reason to know the child is an Indian child, and notice must be sent under Article 3. If the notified tribes respond and state the child is not an Indian child, the court may find the child is not an Indian child.

Subsection (b). In ICWA cases, there is a common fact pattern where a petitioner simply and repeatedly does not comply with notice requirements, whether that is sending the notice to the wrong address, sending notice with the wrong information, or simply not sending notice at all. *See e.g. In re Louis S.*, 12 Cal.Rptr.3d 110 (Cal. Ct. App. 2004) (in which the petitioner did all three and did not file any notices with the court). This is such a common mistake the appellate cases addressing them are often unreported. *See In re MacKenzie W.*, 2007 WL 405666 (Cal. Ct.

App. Feb. 7, 2007) (where the court takes the agency to task for utter failure on notice); *In re Matthew D.*, 2013 WL 5316009 (Cal. Ct. App. Sept. 24, 2013) (parent gives specific tribe, information on the notice is all incomplete or incorrect). Sometimes the petitioner determines there is no tribe to send notice to, when there is. *See In re D.J.*, 2016 WL 1403301 (Cal. Ct. App. Apr. 7, 2016). Courts should ensure the proper notice was sent in compliance with the requirements of Article 3 before making a finding under this subsection.

There are also times when a tribe may not respond to a notice or inquiry, or there may be times where the number of tribes involved means the court might not get a timely response from all of them. In one case in Michigan, the court of appeals held the agency must send notice to "the Anishinabee tribe." *In re N.E.G.P.*, 626 N.W.2d 921, 924 (Mich. Ct. App. 2001). Without any further clarification from a parent or relative, this would require notice to be sent to upwards of thirty tribes in at least six states, including all Chippewa, Ojibwe, Ottawa, Odawa, and Potawatomi tribes. In other situations, there may be other reasons why the tribe is unable to respond. *See Interest of Z.K.*, 973 N.W.2d 27 (Iowa) (where deaths from the covid pandemic led to a delay in responding to ICWA notice).

In either situation, because the act applies if a child is subsequently identified as an Indian child, or in a different proceeding, the act requires parties and participants to inform the court of any changes. *See* 25 C.F.R. § 23.107(a). This change may happen due to change in the tribe's membership criteria, a change in the tribe's federally recognized status, subsequent clarification of the information about the family history, or a change in the parent's membership status. *See e.g.,* Lumbee Fairness Act, included in National Defense Authorization Act for Fiscal Year 2026, Pub. L. No. 119-60, § 8803 (2025) (granting federal recognition to the Lumbee Tribe). In practice, it can take some time for the notice process to be completed. This act strikes a balance between requiring diligence and time to determine whether a child is an Indian child and allowing a court to make a finding under this subsection when there is insufficient evidence.

Subsection (c). The provisions governing voluntary relinquishment or what ICWA terms "voluntary termination" does not include a notice provision. However, the definition of "termination of parental rights," includes *any* termination. 25 U.S.C. § 1903(1)(ii). In addition, the placement preferences under 1915(a) are for "adoptive placement." In other words, while 25 U.S.C. § 1912(a) only requires notice for "involuntary proceedings," portions of ICWA apply to voluntary proceedings. To determine if the act should apply, the court must determine if the child is an Indian child. As such, the federal regulations require inquiry regardless of whether the case is a voluntary or involuntary proceeding. 25 C.F.R. § 23.107. A state may choose to develop additional court rules or policy to ensure there is notice and confirmation from a tribe in voluntary proceedings under Article 8. *See, e.g.,* Minn. Stat. § 260.761, subd. 3 (requiring notice to the tribe in any voluntary proceeding where the court knows or. has reason to know the child is an Indian child).

Subsection (d). Since membership status can change over time, and siblings may have different membership statuses, a determination of a child's status as an Indian child must be individualized for each sibling and must be checked at a later, separate proceeding should the child be involved in one under this act again. As an example, a sibling group may be the subject of a dependency proceeding in 2025, and only two siblings qualify as Indian children. If the siblings are subject to a separate, later dependency proceeding in 2028, all the siblings' status as

Indian children must be determined again, and a court cannot rely on a prior determination from the closed 2025 proceeding.

Section 206. Confidentiality of Records; Proceedings

(a) Except as provided in subsections (b), (c), and (d), if confidentiality of proceedings and records are governed by other law of this state.

(b) A parent may request anonymity in the proceeding by filing a record with the court.

(c) If a parent requests anonymity under subsection (b):

(1) the hearing shall be closed to preserve the parent's anonymity; and

(2) the court shall keep the documents relating to an inquiry under this [article] confidential.

(d) The duty of confidentiality under subsection (b) or other law of this state does not affect:

(1) the requirement to make inquiry under Section 201; or

(2) the requirement to make findings under Section 203, 204, or 205; or

(3) the right to information under Section 1107.

(e) When a court makes an inquiry under Section 201, the court shall inform each identified Indian tribe of the confidentiality requirements under subsections (a) and (b).

Comment

Source: 25 U.S.C. § 1915; 25 C.F.R. § 23.107(d).

State law provides comprehensive coverage of what proceedings are confidential and which ones are not. However, ICWA and the federal regulations provide additional confidentiality (or anonymity) protections for parents of Indian children. These are included in the placement preferences, 25 U.S.C. § 1915 (weight given to parental request for anonymity in placement), and in the regulations governing certain voluntary proceedings, 25 C.F.R. § 23.107(d) (confidentiality in voluntary proceedings); *Id* at 124 (b) (tribes to be informed of any confidentiality requirements), *Id.* at 125(d) (confidentiality of relinquishment proceedings). This section works in concert with Section 1004 and Section 802 to preserve those rights regarding both proceedings and records.

Section 207. Finding of Indian Child's Tribe

(a) If the court knows under Section 203, or has reason to know under Section 204, the child is an Indian child, the court find the Indian child's tribe in accordance with this section.

(b) If the Indian child is a member of or eligible for membership in only one Indian tribe, the court shall find the tribe is the Indian child's tribe.

(c) If the Indian child is a member of or eligible for membership in more than one Indian tribe:

(1) The court shall provide an opportunity for the tribes to determine which tribe should be determined the Indian child's tribe.

(2) If the tribes are able to reach an agreement, the court shall determine the agreed-upon tribe as the Indian child's tribe.

(d) If the tribes are unable to reach an agreement under subsection (c) and:

(1) the child is a member of one tribe, the court shall find that tribe is the Indian child's tribe; or

(2) the child is eligible for membership in or is a member of multiple tribes, the court shall find the tribe with which the Indian child has more significant contacts is the Indian child's tribe, after considering:

(A) the preference of the Indian child's parents for membership of the Indian child;

(B) the length of past domicile or residence of the Indian child on or near the reservation of each tribe;

(C) the membership of the Indian child's custodial parent or Indian custodian;

(D) any interest asserted by each tribe in the proceeding;

(E) whether there is a previous adjudication by a tribal court with respect to the Indian child; and

(F) self-identification by the Indian child, if the Indian child is of sufficient age and capacity to meaningfully self-identify.

(e) A finding of the Indian child's tribe for purposes under this [act] is not a finding for any other purpose.

Comment

Source: 25 U.S.C. § 1903(5); 25 C.F.R. § 23.108, 109.

Subsection (a), (b). Tribes have the exclusive authority to determine their own membership and eligibility for membership, which is binding and conclusive in ICWA proceedings. *Adoption of C.D.*, 751 N.W.2d 236, 241 (N.D. 2008). State courts make the legal determination of whether the child is an Indian child, triggering the application of ICWA. *Id.* at 242. The court's finding that a child is an Indian child is a finding of fact and cannot be inconsistent with a tribe's determination of the Indian child's status as a member, eligible for membership, or a non-member, of their tribe. *Id.* The designation of an Indian child's tribe for the purposes of this act does not constitute a determination for any other purpose.

Subsection (c), (d). In part because of the history of tribal-federal relations, including the boarding school era, the removal era, and the political context of federal recognition of Indian tribes, many children are eligible for tribal membership in multiple tribes. Very few tribes allow tribal members to be dual citizens, or have membership in multiple tribal nations, though some do. Additionally, because proceedings covered by this act often involve infants or young children whose parents have not yet completed their tribal membership paperwork, it is possible for a child to be an Indian child to be eligible in multiple tribes while being a member of none.

Given this, in proceedings under this Act for an Indian child it is possible that two or more tribes may be involved for one Indian child, until the point one is designated as the Indian child's tribe for the purposes of application of this act. The child's tribes shall be provided the opportunity to determine which will be designated as the Indian child's tribe. The tribes may consider, for example, which has greater capacity to intervene in the case. Only if the tribes cannot agree on which shall be the Indian child's tribe, should the court make a finding under subsection (d).

When a proceeding under this act involves more than one child, the court must determine for each child individually whether the child is an Indian child and which tribe is to be designated as the Indian child's tribe. In *People ex rel. T.I.*, 707 N.W.2d 826, 834 (S.D. 2005), two Indian children were the subject of proceedings, Child 1 was a member of Tribe X and Child

2 was eligible for membership in Tribe X. Both children were also eligible for membership in Tribe Y. *Id.* The court found that Tribe Y could not exercise jurisdiction over Child 1 since they were an enrolled member in Tribe X. *Id.* at 835.

[Article] 3

Notice

Comment

ICWA requires courts to "notify" to tribes, as well as parents or Indian custodians of the proceeding and the right of intervention when the court "knows or has reason to know" the child involved in the proceeding is an Indian child. 25 U.S.C. § 1912(a). The blackletter law states notice must be sent by "registered mail with return receipt requested." 25 U.S.C. § 1912(a). After ICWA's passage, the department promulgated early regulations to govern what this notice must entail and to whom it must be sent. 25 C.F.R. § 23.11. The 2016 regulations provided additional guidance regarding what the notice must include. 25 C.F.R. §23.111 (d). The regulations have allowed notice to be sent via certified mail return receipt requested. 25 C.F.R. § 23.111(c). Notice may be sent by personal service or electronic methods, but those two methods cannot replace the requirement of registered or certified mail. *Id.*

Because of the black letter law of 25 U.S.C. 1912(a), this act retains the requirement of registered mail, return receipt requested. The Uniform Law Commission promotes updated communication practices in its acts, and encourages states to consider ways of ensuring the goal of ICWA, which was that each parent, Indian custodian, and tribe receive timely and accurate information about the proceeding when a court knows or has reason to know there is an Indian child in the proceeding.

Prior to ICWA's passage, one attorney, and an observer on the drafting committee for this act, testified with his client before Congress, stating that "the original hearing [finding the mother unfit] was one of the grossest violations of due process that I have ever encountered. Unfortunately, I find it is quite commonplace when you're dealing with Indian parents and Indian children." The mother, Cheryl DeCoteau, had not received any notice of the multiple hearings removing her child and finding her unfit. *Probs. that Am. Indian Fams. Face in Raising their Child. and How These Probs. are Affected by Fed. Action or Inaction*, *Before the Subcomm. on Indian Affs. of the Comm. on Interior and Insular Affairs*, 93rd Cong. 67 (1974). Since that time, states have implemented notice requirements to parents in code or court rule that were not in place in 1978. *See e.g.,* Mich. Ct. R. 3.920(D)(2) (requiring notice to parents via personal service, in writing, on the record, or by phone as soon as the hearing is scheduled). Notice to tribes is still governed by ICWA or other state ICWA laws. This act allows tribes and states to enter into notice agreements in section 408 while retaining ICWA's requirements.

Finally, the Department of Interior maintains the information where notice must be sent to both tribes and the federal government. For tribes, this list is updated annually, and this is reflected in this act.

Section 301. Applicability

If the court, after making the inquiry under Section 201, knows the child is an Indian child under Section 203 or has reason to know an Indian child under Section 204 is involved in the proceeding, this [article] applies to:

(1) [dependency];

(2) guardianship proceeding;

(3) termination of parental rights; [and]

(4) [[third-party custody] proceeding; and

(5)] status offense proceeding.

Comment

Source: 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111.

Section 302. Hearing Notice to Parents and Indian Custodian

(a) The court shall order the petitioner to send in a record notice of the proceeding and the information required under Section 305 to the Indian child's parents and Indian custodian.

(b) If the court has reason to know under Section 204 the child is an Indian child under and the identity or location of the Indian child's parents, Indian custodian, or tribe of which the Indian child is a member or eligible for membership cannot be determined, the petitioner shall send notice in a record of the proceeding to the Secretary and appropriate regional director and provide as much information as possible regarding the Indian child's direct lineal ancestors.

(c) The petitioner shall send the record of the notice by registered mail with return receipt requested, and may personally serve the parents or Indian custodian.

Comment

Source: 25 U.S.C. § 1912(a); 25 C.F.R. § 23.11, 111.

Section 303. Hearing Notice to Indian Tribes

(a) The court shall order the petitioner to send in a record notice of the proceeding and information required under Section 305 to each Indian tribe of which the Indian child may be a member or eligible for membership.

(b) Notice under subsection (a) must be sent to:

(1) the designated tribal agent for service of notice published in the Federal Register; or

(2) if a tribe does not have a designated tribal agent for service of notice, the appropriate office or individual of the tribe most likely to have information regarding tribal membership.

(c) If there is no contact information for a tribe available to the petitioner or the tribe contacted by the petitioner fails to respond to inquiry in a record for contact information, the court shall direct the petitioner to seek assistance in contacting the tribe from the appropriate office in the bureau.

(d) The petitioner shall send a record of the notice under subsection (a) by registered mail with return receipt requested and may have the record personally served unless otherwise directed by an agreement under Section 408.

Comment

Source: 25 U.S.C. § 1912(a); 25 C.F.R. § 23.11, 111.

Subsection (b). The list of designated agents for ICWA notice is updated annually in the federal register. The bureau also maintains an interactive map of tribes by region with the designated agents searchable by tribe, state, or tribal affiliation.

Section 304. Filing Notice; Proof of Service; Copy to Regional Director

(a) The petitioner shall file with the court a copy of a notice under Sections 302 and 303 together with the original return receipt or other proof of service.

(b) The petitioner shall send a copy of the notice under Sections 302 and 303 to the appropriate regional director.

Comment

Source: 25 C.F.R. § 23.211(a)(2); 25 C.F.R. § 23.11.

Section 305. Contents of Notice

The notice under Sections 302 and 303 must be in clear and understandable language and include:

(1) the Indian child's name, birthdate, and birthplace;

(2) all known names, including married names, former names and aliases, of an Indian child's parents;

(3) the parents' birthdates and birthplaces;

(4) the parents' tribal membership information;

(5) all known names, birthdates, birthplaces, and membership information of other direct lineal ancestors of the Indian child;

(6) the name of each Indian tribe of which the Indian child is a member or may be eligible for membership;

(7) a copy of the petition, complaint, or other record by which the proceeding under this [act] was commenced;

(8) if a hearing has been scheduled, information on the date, time, and location of the hearing;

(9) the name of the petitioner and the name and address of the petitioner's attorney;

(10) a statement of the right of:

(A) the parent or Indian custodian of the Indian child, if not already a party to the proceeding, to intervene in the proceeding at any time;

(B) the tribe entitled to notice under Section 303 to intervene in the proceeding involving an Indian child at any time;

(C) the parent or Indian custodian to court-appointed counsel [, if the parent or Indian custodian is unable to afford counsel based on a finding of indigency by the court,];

(D) the parent, Indian custodian, and tribe to be granted, on request, up to 20 additional days to prepare for the proceeding; and

(E) the parent or Indian custodian, and tribe to move the court for transfer of the proceeding to tribal court;

(11) the mailing address and telephone number of the court and information related to all parties to the proceeding and tribes notified under this section;

(12) a statement of the potential legal consequences of the proceeding on the future parental and custodial rights of the parent or Indian custodian; and

(13) a statement that all recipients of the notice are required to keep confidential the information contained in the notice.

Legislative Note: *A state that provides counsel to all parents regardless of indigency may omit the requirement the parents to be indigent in paragraph (10)(c) and Section 504(a)(3).*

Comment

Source: 25 C.F.R. § 23.111(d).

Section 306. Language Proficiency

If the court or petitioner knows the Indian child's parent or Indian custodian has limited English proficiency and is unlikely to understand the contents of a notice under Section 305, the court or petitioner shall:

(1) provide language access services as required by federal law or other law of this state; and

(2) secure translation or interpretation support by contacting the Indian child's tribe or the regional director for assistance in locating and obtaining the name of a qualified translator or interpreter.

Comment

Source: 25 C.F.R. § 23.111(f).

Section 307. Timing of First Hearing after Notice

(a) Unless the court exercises emergency jurisdiction under Section 402, the court may not hold a hearing until at least 10 days after the latest date on which notice under this [article] was received by the Indian child's parent, Indian custodian, tribe, and, if applicable, the regional director or Secretary.

(b) The court shall grant an additional 20 days from the date a request is made under section 305(10)(D) by the parent, Indian custodian, or Indian tribe to prepare for participation in the hearing.

(c) If required by other law of this state or the court finds cause, the court may extend the period authorized under subsection (b).

Comment

Source: 25 U.S.C. § 1912(a); 25 C.F.R. § 23.112.

[Article] 4

Jurisdiction

Comment

Jurisdictional questions in Indian Country are some of the most difficult to untangle and have led to centuries of case law. *See Cohen's Handbook on Federal Indian Law,* §§ 8 (civil jurisdiction), 11 (criminal jurisdiction) (2024). To understand the provisions in this act, and how ICWA created specific requirements for proceedings under ICWA, there is one important underlying principle, which is the general rule is that the federal government, not states, has any jurisdictional power on reservations. *Worcester v. State of Georgia*, 31 U.S. 515, 560-561 (1832). Despite there being nearly two centuries since that decision, still today there is a considerable portion of reservations where states simply do not have jurisdiction over tribal land or Native people.

Jurisdictional decisions involving Native and non-Native people who live on reservations require courts to consider the subject matter at issue, whether Public Law 83-280, 18 U.S.C. § 1162 (P.L. 280), or other federal law applies, and the status of the individuals involved as "Indians" or not. ICWA addresses these considerations in turn, as does this act. The subject matter is a proceeding defined in section 102, the question of concurrent jurisdiction created by P.L. 280 is addressed section 401(a), and the status of the child as an Indian child drives the application of the act.

ICWA and this act also address when a state simply does not have jurisdiction to act. Based on tribal inherent authority, a tribe's exclusive jurisdiction over its own member children on a reservation remains intact, subject only to an emergency jurisdiction provision. 25 U.S.C. § 1921, Section 402. Exclusive tribal jurisdiction can be based on either the domicile of the Indian child or a tribal court's existing orders over the Indian child, which requires a state court and agency to ensure the state has proper jurisdiction over the subject matter and Indian child. For that reason, this act requires the state court to ensure it has appropriate jurisdiction over a proceeding at each stage of the proceeding.

Section 401. Exclusive Tribal Court Jurisdiction

(a) Subject to Section 402, a tribal court has exclusive jurisdiction over a proceeding identified in Section 103(a) involving an Indian child who resides or is domiciled within the reservation of the tribe, except as otherwise provided by

(1) 18 U.S.C. Section 1162[, as amended];

(2) other federal law affecting an Indian tribe's jurisdiction; or

(3) a tribal-state agreement under Section 408.

(b) If the Indian child is a ward of a tribal court, the tribal court retains exclusive and continuing jurisdiction regardless of the residence or domicile of the Indian child.

(c) The court shall dismiss a proceeding if the court:

(1) knows under Section 203 or has reason to know under Section 204 the child is an Indian child; and

(2) determines the Indian tribe has exclusive jurisdiction under subsection (a) or (b).

(d) If the court dismisses the proceeding under subsection, the court shall:

(1) expeditiously notify the tribal court of the dismissal based on the Indian tribe's exclusive jurisdiction; and

(2) send the court record and agency records related to the family and Indian child, including personal identifying information to the tribal court.

Comment

Source: 25 U.S.C. § 1911(a); 25 C.F.R. § 23.110.

Subsection (a). Tribes have exclusive jurisdiction over matters involving their children on their reservation land. *See Fisher v. Dist. Ct. of Sixteenth Judicial Dist. of Montana*, 424 U.S. 382 (1976). However, there are some caveats to that rule that are addressed in this subsection. 18 U.S.C. 1162 is better known as P.L. 280. When Congress passed this law in 1953, it delegated certain jurisdiction reserved to the federal government to certain states. To quote the Ninth Circuit, "[b]roadly put, Public Law 280 gave certain enumerated states concurrent jurisdiction over criminal and civil matters involving Indians, where jurisdiction had previously vested only in federal and tribal courts." *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, n. 8 (9th Cir. 1991). Courts have since held P.L. 280 is not a divestiture statute but rather creates concurrent jurisdiction as between a state and a tribe. *Id.* at 560-561. Under 25 U.S.C. § 1918, a tribe may request to exercise exclusive jurisdiction as to proceedings defined under ICWA and this act. That request is between the tribe and the federal government, where the tribe's requests is that the federal government accept the retrocession of the state jurisdiction back to the federal government.

In addition to P.L. 280 creating concurrent jurisdiction, some tribes have been re-recognized by the federal government via Congressional act. In those situations, there may be provisions in the federal act that govern the jurisdiction of the tribe over proceedings that fall under this act. Finally, in ICWA the federal government delegated to states the ability to negotiate jurisdictional agreements with tribes. 25 U.S.C. § 1919. This provision is replicated in this act in Section 408 and may adjust the jurisdictional provisions of a given reservation. *See, e.g., In re Guardianship of K.D.B.*, 564 P.3d 83 (Okla. 2025).

Subsection (b). While not a perfect analogy, Congress's use of "ward of the tribal court" in 1978 is not entirely unlike the 1968 Uniform Child Custody Jurisdiction Act's establishment of a home state for jurisdiction. If a tribal court has been exercising jurisdiction over an Indian child and there are orders from that tribal court, it retains jurisdiction over the child and family.

Section 402. Emergency Jurisdiction

(a) A court may exercise emergency jurisdiction to authorize an emergency removal of an Indian child who resides or is domiciled on, but is located off, the reservation to prevent imminent physical damage or harm to the Indian child.

(b) A court exercising emergency jurisdiction under subsection (a) shall hold a hearing under Section 504 not later than 10 days after the removal or earlier if required by other law of this state.

(c) Emergency jurisdiction under subsection (a) ends if the state court finds:

(1) the court has jurisdiction under Section 403 because the child does not reside or is not domiciled on the reservation and is not a ward of the tribal court;

(2) the Indian tribe has exclusive jurisdiction under Section 401 and the court dismisses the proceeding; or

(3) the removal is no longer necessary to prevent imminent physical damage or harm to the Indian child and the child is returned to the parent or Indian custodian.

Comment

Source: 25 U.S.C. § 1921; 25 C.F.R. § 23.113

Subsection (a). This provision allows state courts to act in an emergency when they would otherwise not have jurisdiction over an Indian child, due to the child's domicile on the reservation.

ICWA contains three different standards as to when a court can remove a child from their parents. In the context of an emergency, ICWA requires "imminent physical damage or harm" to a child for a state to remove the child in this circumstance. 25 U.S.C. § 1921. This is different language than that required by 25 U.S.C. § 1912 ("custody of the child by the parent . . . is likely to result in serious emotional or physical damage . . ."), or that of 25 U.S.C. § 1920, ("returning the child to his parent . . . would subject the child to a substantial and immediate danger or threat of such danger."). This act uses those standards when appropriate, and the language difference is intentional to ensure the same protections ICWA provides.

Section 403. Concurrent Jurisdiction

The tribal court and the state court have concurrent jurisdiction over a proceeding involving an Indian child who is domiciled and resides outside the reservation of the tribe, unless an Indian tribe has exclusive jurisdiction under Section 401 or a tribal-state agreement entered into under Section 408.

Comment

Source: 25 U.S.C. 1911(b); 1919.

Tribal civil jurisdiction in domestic relations outside of ICWA often turns on the status of the child as a member or eligible for membership rather than on the physical location of the child. *See Alaska v. Central Council of Tlingit and Haida Indian Tribes of Alaska*, 371 P.3d 255 (2016). Under ICWA, the residence or domicile of the child may determine whether that jurisdiction is exclusive or concurrent. Tribal codes and constitutions can articulate tribal jurisdiction limitations for tribal judges. Under ICWA, tribal-state agreements can also alter the jurisdictional landscape: for example, by creating exclusive tribal jurisdiction when an Indian child lives off-reservation, such as in a tribal service area. *See Watso v. Lourey*, 929 F.3d 1024 (Eighth Cir. 2019). This section makes explicit the concurrent jurisdiction which unsaid in ICWA, which has provisions governing when a tribe has exclusive jurisdiction, 25 U.S.C. § 1911(a), when a state has jurisdiction, 25 U.S.C. §1911(b), and when a state can transfer a case to tribal jurisdiction. *Id.*

Section 404. Motion to Transfer Proceeding to Tribal Court Jurisdiction

(a) In a proceeding identified in Section 103(a), an Indian child, the Indian child's parent, Indian custodian, or tribe may move the court in a record at any stage of the proceeding to transfer the proceeding to the jurisdiction of tribal court of the Indian child's tribe.

(b) On receipt of a motion made under subsection (a), the court shall:

(1) include the motion in the court record; and

(2) notify the tribal court of the motion not later than 10 days after the motion is made.

(c) A court may communicate with the tribal court about the motion.

(d) If the court communicates with a tribal court under subsection (c), the court shall:

(1) make a record of the communication; and

(2) promptly inform the parties of the communication and grant the parties access to the record.

Comment

Source: 25 U.S.C. § 1911(b); 25 C.F.R. § 23.115, 116; UCCJEA § 110; Cal. Welf. & Inst. Code § 305.5.

Subsection (a). This subsection allows all proceedings under this act to be transferred if a parent, tribe, or Indian custodian requests the transfer. While ICWA explicitly states that "foster care placement" or "termination of parental rights" can be subject to a transfer, 25 U.S.C. § 1911(b), some states have amended their state ICWA laws to ensure all proceedings under their act can be transferred, *see, e.g.,* Iowa Code § 23B.5(10); Mich. Comp. L. § 712B.7(3). Some courts have held ICWA's plain language allows for the transfer of all proceedings, *see In re M.S.*, 237 P.3d 161 (Okla. 2010). while some courts have taken a position that *only* the specific proceeding described may be transferred. *In re R.S.*, 805 N.W.2d 44 (Minn. 2011), *but see* Minn. Stat. Ann. § 260.771 (amending state law to allow for transfer of all proceedings).

Section 405. Tribal Jurisdiction Declined by Tribal Court or Parental Objection

A court may not order the transfer of the proceeding to the jurisdiction of the Indian child's tribe if the court receives:

(1) a denial of acceptance of the transfer from the tribal court; or

(2) an objection from either parent whose parental rights have not been terminated.

Comment

Source: 25 U.S.C. § 1911(b).

Paragraph (2). The inclusion of the parental right to object to transfer to tribal court is a result of U.S. Department of Justice commentary on the original act. H.R. Rep. 96-1386 at 36-38. Specifically, the concern was without an ability to stay in state court, the law may violate the Fifth Amendment. *Id.* at 36. In other words, the concern the parental objection was drafted to address was the rights of the individual parents in their state dependency proceeding. A dependency proceeding applies state laws and requirements to individual parents for to have their children reunified with them. Therefore, parents whose dependency cases are originally filed in state court have the option as to whether to stay in state court or request to go to tribal court. *See* H.R. Rep. No. 95-1396 at 21 ("Either parent is given the right to veto such a transfer.").

However, some courts have read these objections as surviving either the death of a parent or the termination of their parental rights. *See People ex rel. K.D.*, 630 N.W.2d 492 (S.D. 2001); *In re Cal E.*, (Ill. Ct. App. 2023). This is arguably contrary to the Congressional intention behind the objection, which was to protect parental due process rights, not preventing tribal jurisdiction when parents no longer have due process rights to protect.

Section 406. Tribal-Court Jurisdiction Denied for Good Cause

(a) A party may oppose, in a record, a motion made under Section 404(a) by asserting good cause to deny transfer.

(b) If a party opposes the motion to transfer, the court shall:

(1) enter the opposition in the court record; and

(2) hold a hearing to determine if there is good cause to deny the transfer.

(c) Good cause under subsection (b)(2) exists if there is clear and convincing evidence that:

(1) the requirement of the parties or witnesses to present evidence necessary to decide the case would cause undue hardship to the parties or witnesses; and

(2) the tribal court is unable to mitigate the hardship.

(d) The court may not deny transfer under this section based on:

(1) travel distance alone;

(2) whether the proceeding is at an advanced stage;

(3) whether transfer was requested in a prior proceeding involving the same Indian child;

(4) whether transfer could affect placement of the Indian child;

(5) the Indian child's lack of connections to the Indian child's tribe or the tribe's reservation;

(6) socioeconomic conditions of the Indian child's tribe; or

(7) negative perceptions of the tribal court or social services or the bureau's social services.

(e) If the court denies a motion under this section, the court shall enter an order and place the order in the court record.

Comment

Source: 25 U.S.C. § 1911(b); 25 C.F.R. § 23.115-119; H.R. Rep. No. 95-1386, 21 (1978).

Subsection (a). This subsection requires a party make the motion to oppose transfer. The federal regulations state that "[i]f the State court believes . . . that good cause to deny transfer exists, the reasons for that belief . . . must be stated orally on the record or provided in writing on the record . . ." 25 C.F.R § 23.118(a), which implies that a state court may *sua sponte* determine that good cause exists to deny transfer. Because the regulations lack clarity, and because allowing a state court to deny transfer when the parent or Indian child's tribe are in favor of transfer and no other party objects, provides parents with less protection than ICWA intended, this act requires that a party oppose transfer before a court may determine whether good cause exists. While a court must always determine if it has jurisdiction over a particular case, this provision assumes the state and tribal court have concurrent jurisdiction and determination that there is good cause not to transfer the case affects the rights of the parties. Courts should consider motions to transfer and deny transfer under the provisions provided but not substitute its own motion if all parties agree to transfer.

Subsection (c). ICWA only states that a transfer shall happen absent "good cause to the contrary." 25 U.S.C. § 1911(b). ICWA does not provide what good cause is and does not provide a burden of proof for determination of good cause. This act follows state case law by adopting a clear and convincing standard for the burden of proof. *See* 81 Fed. Reg. 38827 ("the Department declines to establish a Federal standard of proof at this time, but notes the strong State court approach to this issue is compelling") (collecting cases for clear and convincing burden).

The federal regulations also do not define what good cause is, only what it is not. 25 C.F.R. § 23.118(c). This act remedies this by incorporating the language from the House Report that accompanied the bill where it stated good cause to deny transfer to tribal court should be a "modified doctrine of *forum non conveniens"* analysis. H.R. Rep. No. 95-1386, 21 (1978). Four other states have included language similar to this section in their state laws. *See* Colo. 19-1.2-188(4); Iowa C. Ann. § 232B.5; Mich. Comp. L. § 712B.7(5); Minn. Stat. Ann. § 260.771, subd. 3a(b).

Subsection (d): The federal regulations supply several factors that cannot support a determination that there is good cause to deny transfer to a tribal court. This subsection reiterates those considerations with some additions and modifications. For example, this subsection states that travel distance to the tribal court alone cannot be good cause to deny transfer: this is because most state and many tribal courts use remote video technology for court hearings. In addition, the subsection does not allow a denial of transfer based on the proceeding being at an advanced stage and does not tie that prohibition as to when the parent, Indian custodian, or tribe received notice, as the regulations do in 25 C.F.R. § 23.118(b)(1). This is because there are many legitimate reasons for why a tribe, parent or Indian custodian may not immediately petition to transfer jurisdiction, eve while having notice of—and participating in—the case. For example, a tribe may be content to allow dependency proceedings to develop. in state court, in the hopes that the state's efforts will lead to reunification. Once a case moves away from reunification, a tribe may petition to transfer the case to tribal court to handle the permanency options for the child.

Section 407. Order to Transfer Proceeding to Tribal Court

If the court transfers a proceeding to the jurisdiction of the tribal court, the court shall:

(1) order the transfer and include the order in the court record;

(2) not later than 30 days after the tribal court accepts the transfer, provide the tribal court with the court record and direct the agency to provide agency records relating to the Indian child's family and Indian child, including personal identifying information; and

(3) communicate with the tribal court to assist in transferring the proceeding with minimal disruption of services to the family.

Comment

Source: 25 C.F.R. § 23.119.

This section imposes a deadline of 30 days for clarity. Many state laws use the word "expeditiously" in this context with no explicit deadline. *See* Nev. Rev. Stat. § 125E.290; N.M. Stat. Ann. § 32A-28-7(I)(2); Ore. Rev. Stat. § 419B.633.

Section 408. Tribal-State Agreements

(a) An agency may enter into an agreement with an Indian tribe with respect to the care and custody of Indian children and jurisdiction over proceedings under this [act]. The agreement may provide for:

(1) alternative methods of notice under Section 303;

(2) the orderly transfer of jurisdiction on a case-by-case basis; or

(3) allocation of jurisdiction between the state and the tribe.

(b) An agreement under subsection (a) may be revoked by the state or the tribe after providing 180-days notice in a record to the other party. A revocation does not affect a proceeding over which a court or tribal court already assumed jurisdiction under the agreement, unless the agreement provides otherwise.

[Article] 5

[Dependency]

Comment

While all states have different names for a dependency proceeding ("child in need of care," "child in need of aid," "abuse/neglect"), in all states most dependency proceedings start in the same way. An individual, sometimes a "mandated reporter," will call a state child abuse hotline and report concerns about a child. The agency that receives the report will investigate the claim and either close the complaint without doing anything, engage the family in voluntary pre-petition services, or substantiate the report and file a petition in state court. In some states, an individual may file a petition of their own accord alleging abuse or neglect. *See e.g.,* Penn. R. Juv. Ct. Pro. 1320. That petition may require the emergency removal of a child from the home, or it may establish an in-home dependency, which is court supervision of the family while the child remains in the home. When the agency files the petition in court, the court must find the agency met its evidentiary burden to being the series of hearings identified in this [act].

This process is the same for all children and is not unique to an Indian child. While all states have unique laws, their general dependency procedures are similar, as they are required by federal law to adopt certain requirements to receive funding. *See* 42 U.S.C. §§ 671-679c; Children's Bureau, *Understanding Child Welfare and the Courts*, (Oct. 2022). The dependency proceeding will begin with an initial hearing on the petition, followed by an adjudicatory hearing, a dispositional hearing, review hearings, and permanency hearings. States have different names for these hearings, and this act allows for modification to fit state law. States also have their own standards and evidentiary burdens at those hearings, which in most cases will have to be met in addition to the standards in this law.

Congress passed ICWA prior to the passage of the federal laws that govern these hearings, and one of the major issues this act seeks to address is applying those ICWA minimum protections to the appropriate hearing in state court. *See e.g., In re Dependency of C.J.J.I.*, __ P.3d __ (Wn. 2025); *In re Esther V.*, 248 P.3d 863 (N.M. 2011), *In re T.S.*, 315 P.3d 1030 (Okla. 2013). Neither ICWA nor the federal regulations break down their requirements by hearing, and only a few state laws have managed to accomplish this. *See* Or. Rev. Stat. § 419B.185 (inserting requirements for Indian children into the evidentiary hearing). This article is repetitive, as states may wish to insert each section into the appropriate state law section for the hearing referenced.

ICWA has three separate evidentiary burdens which are used in this act in different sections to ensure the minimum federal protection for families while directing courts when to apply them. The first, a requirement of showing "imminent physical damage or harm" to an Indian child, 25 U.S.C. § 1921, for a court to remove a child in an emergency is used in this article in section 504. The second is clear and convincing evidence that "custody of the child by the parent . . . is likely to result in serious emotional or physical damage . . ." 25 U.S.C. § 1912 (e), which must be supported by testimony of a qualified expert witness, as well as a showing of active efforts to reunify the family. 25 U.S.C. § 1912(d). This is in section 506. Finally, while not in this article, 25 U.S.C. § 1920 requires a finding that "returning the child to his parent . . . would subject the child to a substantial and immediate danger or threat of such danger" to keep a child out of the home who was improperly removed. This standard is in section 1202.

Finally, this act also seeks to encourage the best practice of leaving children in the home when it is safe to do so and provides protections for Native families while also allowing for voluntary services and in-home services. This reflects recent federal law changes encouraging in-home supports, relative placements, and reducing the trauma of emergency removals. The Family First Prevention Services Act (FFSPA), P.L. 115-124 (2018) is a federal law that aims to prevent children from entering foster care by providing prevention services to families, so that the children can remain safely either in the home or in another family placement. The services are available for children who are at imminent risk of entering foster care and their parents or kin caregivers. Because of FFSPA, federal funding for state foster care systems can now be used to prevent children from entering a foster care placement in the first place.

Section 501. Inquiry; Notice; Applicability

(a) At a hearing in a [dependency], the court shall make an inquiry under Section 201.

(b) If the court knows under Section 203 or has reason to know under Section 204, the child subject to the [dependency] is an Indian child:

(1) the court shall give notice in a record under [Article] 3 of each hearing in the [dependency]; and

(2) this [article] applies to the [dependency].

Comment

Source: 25 U.S.C. § 1912(a); 25 C.F.R. § 23.107.

Section 502. Voluntary Placement

(a) The court shall supervise an agency that seeks to effectuate a voluntary placement of an Indian child.

(b) To be valid, consent to the placement must be made in court by the Indian child's parent or Indian custodian who is present in court.

(c) Before accepting consent of a parent or Indian custodian to the placement of the Indian child, the court shall:

(1) orally explain to the parent or Indian custodian in the primary language of the parent or Indian custodian:

(A) the terms and consequences of consent in detail;

(B) that their consent to the placement may be withdrawn for any reason and at any time and, if withdrawn, the Indian child will be returned to the parent or Indian custodian, unless the agency files a petition for [dependency]; and

(C) how to withdraw consent; and

(2) make a finding in the court record that:

(A) the terms and consequences of consent were explained in detail and fully understood by the parent or Indian custodian;

(B) the placement meets the requirements under [Article] 10;

(C) the consent of the parent or Indian custodian to the voluntary placement was made in compliance with subsection (b); and

(D) consent was given of the parent or Indian custodian's own free will, without threat of removal of the Indian child by an agency.

(d) The court may not accept a consent until 10 days after the birth date of the Indian child.

(e) Consent must be entered in the court record and include:

(1) any condition to the consent;

(2) the name and birthdate of the Indian child;

(3) the name of the Indian child's tribe or Indian tribe in which the child may be eligible for membership;

(4) evidence of the membership of the parent and Indian child or of the Indian child's eligibility for membership in the tribe;

(5) the name, address, and other identifying information of the parent or Indian

custodian;

(6) the name, address, and other identifying information of the Indian child's siblings and extended family members;

(7) the name and address of any individual or agency that arranged the prospective placement; and

(8) the name and address of the prospective placement.

(f) If the parent or Indian custodian expresses an intent to withdraw consent, the agency shall:

(1) facilitate entry of the withdrawal in the court record; and

(2) return the Indian child to the parent or Indian custodian, unless the agency files a petition for [dependency] in a record.

(g) If the parent or Indian custodian withdraws consent, and the agency does not file a petition for [dependency] in a record, the court shall order the Indian child returned to the parent or Indian custodian.

Comment

Source: 25 U.S.C. § 1913(a), (b); 25 C.F.R. §§ 23.103(b)(4), 23.124, 126, 127; 42 U.S.C. § 672(f).

This section brings 42 U.S.C. § 672 into accordance with 25 U.S.C. § 1913(a).

While the Supreme Court has held there is no constitutional right to appointed counsel for parents in child dependency cases, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981), a vast majority of states now appoint counsel under state law. See Christina Cullen, *New Title IV-E Dollars for Child and Parent Legal Representation Presents a Tremendous Opportunity to Improve Outcomes for Families*, 40 CHILDREN'S LEGAL RIGHTS J. 45, 46 (2020). In addition, "a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter* at 27 (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

There is an argument the language of 25 U.S.C. § 1912(b) requires counsel for indigent parents in a voluntary foster care placement, though this act does not require an appointment at this stage. A state may consider offering appointed counsel to ensure protection of the parent's interests at this stage of the proceedings.

Subsection (a). Federal law allows states to receive foster care funds when a child is placed in foster care under a voluntary placement agreement with a state agency. This agreement does not not require the judicial findings otherwise required for a foster care placement. 42 U.S.C. § 672(a)(2)(A). However, ICWA requires judicial oversight over voluntary foster care placements. 25 U.S.C. § 1913(a). When it came to parents of Indian children, Congress was concerned with exactly the fact pattern voluntary placement agreements contemplate—unfettered agency action removing children with no judicial standards. There is no exception in ICWA regarding a "voluntary foster care placement," and this consent must be done according to the more specific federal law. *See, e.g, In re JL*, 770 N.W.2d 853, 863 (Mich. 2009) (finding nothing in the federal Adoption and Safe Families Act relieved states from the active efforts requirement of the Indian Child Welfare Act without specific Congressional intent to supersede ICWA)

Section 503. Petition for [Dependency]

(a) In addition to the requirements in [cite to state statute governing dependency petition requirements], a petition for [dependency] or its accompanying records must include:

(1) the name, age, and last known address of the Indian child;

(2) the names and addresses of the Indian child's parent and the Indian custodian, if the child has one;

(3) the efforts taken to provide notice to the parent, Indian custodian, and Indian child's tribe about the proceeding;

(4) if the whereabouts of the parent or Indian custodian are unknown, the petitioner shall include a detailed explanation of the efforts made to locate and contact the parent or Indian custodian, including contacting the appropriate regional director;

(5) the residence and domicile of the Indian child;

(6) if the residence or domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Indian tribe affiliated with the reservation or village;

(7) the tribal affiliation of the Indian child and of the parents or Indian custodian;

(8) if the Indian child has been removed from a parent or Indian custodian:

(A) a detailed account of the circumstances that led to the removal of the Indian child by the agency; and

(B) a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the removal or placement continues to be necessary to prevent imminent damage or harm to the Indian child;

(9) if the Indian child is believed to reside or be domiciled on the reservation where the tribe exercises exclusive jurisdiction over [dependency] matters, the petitioner shall include a statement of efforts that have been and are being made to contact the tribe and to transfer the Indian child to the tribe's jurisdiction;

(10) a statement of the efforts that have been and are being made to locate the Indian child's siblings and keep the Indian child and siblings together;

(11) a statement of evidence as to why custody by the parents or Indian custodian is likely to result in serious emotional or physical damage to the Indian child, including the causal relationship between:

(A) the particular conditions in the home; and

(B) the likely serious emotional or physical damage to the Indian child; and

(12) a statement of the active efforts under Section 1104 that have been and are being made.

(b) The petitioner shall:

(1) include the information in subsection (a) when the petition is filed; and

(2) timely file any missing information with the court in an amended petition or

other record.

Comment

Source: 25 U.S.C. §§ 1912(a), (d), (e); 25 C.F.R. § 23.111

ICWA does not specifically require a petition or separate information in a petition. This section provides guidance and requirements to state agencies seeking to file a petition regarding an Indian child to ensure they are prepared to demonstrate to the court they can meet their evidentiary burdens. The requirements included for this petition includes what the federal regulations require a notice to parents, tribes, and Indian custodians, 25 C.F.R. § 23.111, as well as from other state law.

Subsection (a). While this section requires the disclosure of confidential identifying information, this is not unusual for child dependency proceedings. See Child Welfare Information Gateway, *Disclosure of Confidential Child Abuse and Neglect Records*, (current through 2022). The Child Abuse Prevention and Treatment Act (CAPTA) require states that receive federal funds to preserve confidentiality of the reports and records in child dependency cases. 42 U.S.C. § 5106a(b)(2)(B)(viii) -(x) (2019). The requirements of this act fall under the same requirements, and information required in this section would be kept in the same manner as all other information about the family. In addition, child dependency petitions are routinely amended to add information as it is discovered, especially in the context of emergency removals where the petitioner may not have all the required information at the time of the child's removal from the home.

Paragraph (8), (11). Paragraph 8 refers to when a child has been removed from the home due to an emergency, and the petitioner must state what evidence led to the emergency removal and how it met the standard required in Section 504, which comes from 25 U.S.C. § 1921 ("imminent physical damage or harm"). If the child is going to remain out of the home, Paragraph 11 requires what evidence is likely to support the continued removal of the child from the home under the standard required in Section 506, which comes from 25 U.S.C. § 1912(e) ("physical or emotional damage,"). These evidentiary requirements are further discussed in comments to the sections governing the hearings where the court must make those findings. Here the act requires the petitioner to give the court an initial overview of how the petitioner plans to make their case under the required evidentiary burdens of the upcoming hearings.

Subsection (b). Agencies regularly update, or amend, their petitions with the court, especially if they are acting in an emergency. In that case, the state's emergency requirements for a petition for removal would be included in the petition under subsection (a) and the additional information for the family that has not yet been determined can be added in an amended petition under subjection (b). Best practice for state agencies is to work with a family before an emergency removal becomes necessary. This act promotes that goal to avoid the traumatic removal of a child from their home.

Section 504. [Preliminary] Hearing

(a) At the [preliminary] hearing, the court shall:

(1) make an inquiry under Section 201;

(2) if notice has not been sent, order notice under [Article] 3;

(3) acknowledge in the court record whether the Indian child's tribe is present at the hearing;

(4) inform the Indian child's parent or Indian custodian of the right to counsel at no expense if the parent or Indian custodian is unrepresented [and indigent], and if requested, appoint counsel for the parent or Indian custodian under Section 1103; [and]

(5) [appoint counsel for the Indian child under Section 1103, if the Indian child is unrepresented [and representation is in the Indian child's best interest]; and

(6)] inquire whether any party intends to move the court to transfer the proceeding to tribal court under Section 404.

(b) The court may not remove or continue the removal of the Indian child from the parent or Indian custodian unless the court finds:

(1) the court has jurisdiction under Section 402 or 403; and

(2) removal is necessary to prevent imminent physical damage or harm to the Indian child.

(c) In addition to the finding under subsection (b), the court shall make a placement finding under [Article] 10. If the Indian child is not placed under Section 1001, the court shall:

(1) order the petitioner to perform a diligent search under Section 1005(a); and

(2) inform the individual with physical custody of the Indian child that the Indian child may be removed and placed under Section 1001 if a placement is found.

(d) If the court does not dismiss the case, the court shall order:

(1) the petitioner to make active efforts under Section 1104; and

(2) discovery under Section 1102.

(e) If the court orders removal or continued removal of the Indian child under subsection (b), the court shall order family time between the Indian child, and the Indian child's parent, Indian custodian, or sibling unless the court finds family time is likely to result in serious emotional or physical damage to the Indian child.

(f) If a party provides new information at any time to the court or agency suggesting the parent or Indian custodian's situation has changed so that removal is no longer necessary to prevent imminent physical damage or harm to the Indian child, and the petitioner has not yet returned the child to the parent, or Indian custodian, the court shall:

(1) promptly hold a hearing to determine whether removal continues to be necessary under subsection (b); and

(2) if the court determines removal is no longer necessary:

(A) order the return of the Indian child to the parent or Indian custodian; and

(B) dismiss the case or timely set [an] [adjudicatory] hearing.

Legislative Note: *In the title of this section and subsection (a), a state should insert the name of the hearing in accordance with state statute governing initial hearings after a child is removed from the home, or in the case of an in-home dependency or court supervision, after a petition is filed.*

If a state provides counsel for a child considered an "expressed interest" or "stated interest" counsel, the bracketed language in subsection (a)(5) should be omitted. The same treatment should apply each time the bracketed term appears elsewhere in this act.

If a state chose to not require a best interest analysis for appointment of an "expressed interest" or "stated interest" counsel, the internal bracketed language in subsection (a)(5) should be omitted. The same treatment should apply each time the bracketed term appears elsewhere in this act.

A state should use the appropriate term in subsection (f)(2)(B) for the hearing or trial where the state court determines there is appropriate evidence to exercise jurisdiction over a family and *give legal custody to the state agency. The same treatment should apply each time the bracketed term appears.*

Comment

Source: 25 U.S.C. § 1911, 1912, 1922; 25 C.F.R. § 23.113.

Subsection (a). All the hearings in this act begin with similar requirements, which are taken from ICWA's requirements in sections 1911 and 1912. States have various standards for the appointment of counsel for parents and children. All indigent parents in a dependency involving an Indian child must be offered court-appointed counsel. If a state already provides such counsel regardless of indigency, it may remove that bracketed language. If a state allows a stated interest attorney upon request for any child with no best interest analysis, it may remove that bracketed language.

Subsection (b). The preliminary hearing is always the first hearing after either a removal or the filing of a petition, or in many cases, both. If the Indian child is removed from the home at this stage, this act uses the standard of an emergency removal under the federal law. 25 U.S.C. § 1922, which is the "imminent physical damage or harm" to the child. ICWA's emergency language on its face only applies to children who reside or are domiciled on the reservation but are temporarily off. However, state courts have interpreted this emergency jurisdiction section to apply to all emergency removals of Indian children. *See In re Morris*, 815 N.W.2d 62 (Mich. 2012). As a result, the federal regulations provide additional requirements and guidance for emergency proceedings. *See* 25 C.F.R. §§ 23.113-114.

In practice, the reasoning for this evidentiary arrangement is the timing of an emergency hearing after a removal, which in most states occurs between 24 to 72 hours after the child's removal. In that context, the agency cannot meet all the obligations under the federal law including notice, identifying a qualified expert witness, and demonstrating active efforts have been completed. 25 U.S.C. § 1912(a), (d), (e). At least one state has required some of these protections, such as a demonstration of active efforts, at the preliminary hearing. *See* R.C.W. 13.38.130; *In re J.M.W.*, 514 P.3d 186 (Wash. 2022). However, even in the *J.M.W.* reasoning, the Washington court acknowledged there would be instances where prior active efforts would not be possible, and the emergency standard used in this act would be required. *Id.* at 193. Because those heightened protections found in section 1912 of ICWA are to the benefit of parents of Indian children, they cannot be delayed indefinitely. This [act] addresses this by requiring the adjudication hearing with those standards in section 506 within 60 days.

Subsection (d). There may be preliminary hearing where the child remains in the home but the petitioner, often the agency, has filed a petition. In those situations, the court does not have to meet the burden of proof required in (c) because the child has not been removed. Instead, subsection (d) presumes the petitioner has met the burden for the court to continue in-home supervision under other state law because the court did not dismiss the case. In those situations, the only requirements under this act remain subsection (a) and the elements in subsection (d).

Section 505. Timing of [Adjudicatory] Hearing; Postponement

(a) If an Indian child is removed from the Indian child's parent or Indian custodian and placed in an out-of-home placement, the court shall hold [an] [adjudicatory] hearing under Section 506 not later than 60 days after the removal, unless other law of this state requires a shorter time.

(b) If the court fails to hold a timely hearing under subsection (a), the court shall order the Indian child immediately returned to the parent or Indian custodian, unless the restoration of the Indian child to the parent or Indian custodian would subject the Indian child to imminent physical damage or harm.

(c) If the Indian child is not returned to the parent or Indian custodian under subsection (b), the court may postpone the hearing, but for a period of not more than 30 days.

(d) In determining whether to postpone the hearing, the court shall consider:

(1) whether jurisdiction has been determined under [Article] 4;

(2) whether active efforts are being provided under Section 1104;

(3) whether there has been a safety planning meeting [or other agency-led meeting] to identify services and actions to reunify the family;

(4) the amount of family time between the Indian child and parent or Indian custodian; and

(5) whether an opportunity for discovery has been provided to the parties.

Legislative Note: *In subsection (d)(3), a state should refer to state statute or agency policy regarding meetings such as family team decision-making meetings or other encouraged or required meetings the agency conducts with families in the dependency system to identify services and placements to end the dependency as soon as possible.*

Comment

Source: 25 U.S.C. § 1922, 25 C.F.R. § 23.113.

Subsection (a): The federal regulations created standards for emergency proceedings based on the section of ICWA that governs emergency jurisdiction. This act clarifies the difference between proceedings and jurisdiction. Section 402 of this act retains the language and intent of Congress to allow states to act where they would otherwise not have jurisdiction in an emergency. Sections 504 and 505 of this act create the emergency proceedings contemplated in the federal regulations. This confusion is due to state courts treating 25 U.S.C. § 1922 as a standard for emergency proceedings regardless of the domicile of the Indian child. *See e.g. In re* Morris, 815 N.W.2d 62, 80 (Mich. 2012); *Interest of* A.M., 570 S.W.3d 860, 866 (Tex. Ct. App. 2018). This subsection includes the standards of 25 C.F.R. §23.113 with state law governing pre-trial dependency requirements.

Subsection (b). This subsection maintains the emergency standard from Section 402 and 504 which derive from 25 U.S.C. § 1922, "imminent physical damage or harm."

Subsections (b), (d). The regulations gave no time limit on how long a preliminary or "emergency proceeding" can extend, other than allowing courts to make continuous 30-day extensions under 25 C.F.R. § 23.113(e). This section clarifies the status of a proceeding as preliminary should not extend more than three months in total.

Section 506. [Adjudicatory] Hearing

(a) In addition to the requirements of [cite to state statute governing [adjudicatory] hearings], the court shall:

(1) make an inquiry under Section 201;

(2) order notice under [Article] 3, if notice has not been sent;

(3) acknowledge in the court record whether the Indian child's tribe is present at the hearing;

(4) inform the Indian child's parent or Indian custodian of the right to counsel at no expense if the parent or Indian custodian is unrepresented [and indigent], and, if requested, appoint counsel for the parent or Indian custodian under Section 1103;

(5) [appoint counsel for the Indian child under Section 1103, if the Indian child is unrepresented [and representation is in the Indian child's best interest];

(6)] inquire as to whether any party intends to move the court to transfer the proceeding to the jurisdiction of a tribal court under Section 404; and

(7) ensure the parent, Indian custodian, and tribe have had access to the records

described in Section 1102 and, if not:

(A) order discovery to promote compliance with Section 1102 as soon as possible; and

(B) continue the hearing for not more than 30 days to allow the parent, Indian custodian, or tribe to prepare for the hearing.

(b) The court may not find the Indian child is [dependent] unless the court also finds:

(1) the petitioner sent notice under [Article] 3;

(2) the court has jurisdiction under [Article] 4;

(3) by clear and convincing evidence, that active efforts under Section 1104 were made, but were unsuccessful, to prevent court intervention or supervision of the family; and

(4) without court supervision of the family, the Indian child is at risk of serious emotional or physical damage.

(c) The court may order removal of a dependent Indian child only if the court applies the rules of evidence and finds by clear and convincing evidence:

(1) that active efforts under Section 1104 were made but were unsuccessful; and

(2) including the testimony of a qualified expert witness who satisfies Section 1105, that:

(A) custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child; and

(B) a causal relationship exists between:

(i) the current conditions in the home; and

(ii) the likelihood of serious emotional or physical damage to the Indian child.

(d) Absent a finding of a causal relationship described in subsection (c)(2)(B), a finding under subsection (c)(2) may not be supported by evidence of:

(1) community or family poverty;

(2) isolation;

(3) single parenthood;

(4) custodian's age;

(5) crowded or inadequate housing;

(6) substance abuse; or

(7) nonconforming social behavior.

(e) If the court orders removal of the Indian child under subsection, the court shall make a placement finding in accordance with [Article] 10. If the Indian child is not placed in accordance with Section 1001, the court shall order:

(1) the petitioner to perform a diligent search under Section 1005; and

(2) inform the individual with physical custody as a result of the court's order in subsection that the Indian child may be removed and placed under Section 1001 if a placement is found.

(f) In any subsequent change in placement of the Indian child, the court shall proceed under Section 1007.

Comment

Source: 25 U.S.C. §§ 1912 (a), (b), (c), (d), (e), 1915(b), 1916(b); 25 C.F.R. §§ 23.120, 121, 122, 23.132(a)(5).

The adjudication hearing is where a parent has the most due process rights during a dependency. An adjudication "protects the parents' fundamental right to direct the care, custody, and control of their children, while also ensuring that the state can protect the health and safety of the children." *In re Sanders*, 852 N.W.2d 524, 538 (Mich. 2014) (holding that each parent must be adjudicated separately, and that allegations against one parent cannot be imputed to the other). Since this hearing is when a petitioner must prove up all the state law requirements to allow state jurisdiction over a family, this act includes ICWA's protections from 25 U.S.C. § 1912 here.

Subsection (a)(7). 25 U.S.C. § 1912(c) states that each party "shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based." The committee determined the concept of discovery protects this right and is an appropriate standard.

Subsection (b). ICWA applies when a child is removed from their parent. This act includes ICWA's protections when the child remains in the physical custody of a parent but the court orders legal custody to the agency. This is sometimes called an "in-home" dependency, or a family under court supervision. This encourages courts and agencies to provide the best practice of reducing trauma to a child while also ensuring ICWA's protections remain intact. Congress was concerned about the intervention of state agencies into Indian family life. While the in-home dependency is less intrusive than a removal, the parents must still act at the direction of the state agency and court. If the child is left in the home, the agency must demonstrate active efforts are in place and that without the court's supervision, there will be serious emotional or physical damage to the child, which is the standard in 25 U.S.C. § 1912(e).

Subsection (c). The protections of 25 U.S.C. § 1912(d) and (e) are contained in this section of the law, which is when a court both finds a child is dependent and removes them, or continues their removal, from the home.

In most dependency hearings, the rules of evidence are often relaxed or not required at all. *See, e.g.,* Mich. Ct. R. 3.901 (a)(3) ("The Michigan Rules of Evidence, except with regard to privileges, do not apply to proceedings under this subchapter [proceedings involving juveniles], except where a rule in this subchapter specifically so provides."); Mich. Jud. Inst., Appendix C, *Child Protective Proceedings Benchbook—Fourth Edition* (2023) (a table summarizing application of the rules of evidence and when they do and do not apply). For an adjudication, this act requires the rules of evidence apply, which is in line with most state court rules and case law. *See In re Esther V.*, 248 P.3d 863, 870-872 (N.M. 2011).

Subsection (1). The federal standard requires the petitioner to "satisfy the court" that active efforts "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." Different state courts have come to different conclusions regarding the burden of proof for this standard. *See In re B.Y.* 432 P.3d 129 (2018) (finding beyond a reasonable doubt for active efforts in a termination proceeding). The policy choice of the committee is to limit those burdens to match the burden of the proceeding. In other words, the burden for adjudication is clear and convincing, while the burden for a termination of parental rights is beyond a reasonable doubt.

Subsection (2). The requirement to use a "clear and convincing" evidentiary standard is from 25 U.S.C. § 1912(e) for a "foster care placement" in ICWA. An adjudicatory hearing where a child is removed from the home is the equivalent of a "foster care placement" in ICWA, and so that evidentiary standard must remain the same. In addition, the standard of "serious emotional or physical damage" is the standard under 25 U.S.C. § 1912(e) and must remain the same for the same reasons.

Subsection (2)(B). All adjudications require the causal connection between the parent's behavior and harm to the child. *See* 25 C.F.R. § 23. 121(c), (d). This connection is vital to ensure the parent's behavior alone is not enough to remove a child based simply on the parent's behavior. Not every parent behaves or makes choices that a social worker or judge would agree is appropriate. But that behavior alone cannot lead to the removal of a child. To quote Justice Scalia, "We do not inquire whether leaving a child with his parents is 'in the best interest of the child.' It sometimes is not; he would be better off raised by someone else. But parents have their rights, no less than children do." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 668 (2013), Scalia J. dissenting.

Subsection (d). The elements listed in subsection (d) come from the federal regulations, 25 C.F.R. § 23.121(d), and this connection was also required in the federal guidelines that were in effect from 1979 through 2015. While appellate courts have not spent considerable time on this aspect of the law, a few have. As one example, the South Dakota Supreme Court made clear that a father's lack of housing was not alone enough to terminate parental rights, but his continued domestic violence and in ability to care for the children to the point they were left in dangerous situations was. *People in re A.A.*, 967 N.W.2d 801, 823-4 (S.D. 2021).

Subsection (e). ICWA provides preferences for placements of Indian children. Article 10 provides all the substantive provisions. In each hearing involving an Indian child, a court must ensure the petitioner is following the requirements of Article 10.

Section 507. [Disposition] Hearing

(a) In addition to the requirements of [cite to state statute governing disposition hearings], the court shall:

(1) make an inquiry under Section 201;

(2) order notice under [Article] 3, if notice has not been sent;

(3) acknowledge in the court record whether the Indian child's tribe is present at the hearing;

(4) inform the Indian child's parent or Indian custodian of the right to counsel at no expense if the parent or Indian custodian is unrepresented [and indigent] and, if requested, appoint counsel for the parent or Indian custodian under Section 1103;

(5) [appoint counsel for the Indian child under Section 1103, if the Indian child is unrepresented [and representation is in the Indian child's best interest];

(6)] inquire whether any party intends to move the court to transfer the proceeding to the jurisdiction of a tribal court under Section 404; and

(7) ensure the parent, Indian custodian, and tribe have access to the records described in Section 1102 and, if not:

(A) order discovery to promote compliance with Section 1102 as soon as possible; and

(B) continue the hearing for not more than 30 days to allow the parent, Indian custodian, or tribe to prepare for the hearing.

(b) If a case plan is required by other law of this state, the court may not approve the case plan unless the plan includes active efforts under Section 1104.

(c) If the case plan does not include active efforts under Section 1104, the court may not approve the plan and shall:

(1) continue the hearing for not more than 30 days to provide the agency an opportunity to revise and present a plan that includes active efforts; or

(2) order the specific efforts necessary to make active efforts, and order the agency to modify the plan to include the specific efforts.

(d) If the court orders removal of the Indian child at the hearing, the court shall proceed under Section 506(c).

(e) If the court orders the removal of the Indian child at the hearing, the court shall make a placement finding under [Article] 10. If the Indian child is not placed in accordance with Section 1001, the court shall:

(1) order the petitioner to perform a diligent search under Section 1005(a); and

(2) inform the individual with physical custody as a result of the court's order in subsection (d) that the Indian child may be removed to a placement under Section 1001 if a

placement is found.

(f) In any subsequent placement of the Indian child, the court shall proceed under Section 1007.

Legislative Note: *A state should title this section whatever state statute governs the hearing that addresses services provided in the case plan and placement after the adjudication.*

Comment

Source: 25 U.S.C. §§ 1912 (b), (c), (d), 1915(b), 1916(b); 25 C.F.R. §§ 25.1, 23.120, 121, 122, 23.132(a)(5); 42 U.S.C. §§ 675(1), 671(a)(16).

The disposition hearing is when the court reviews the child's placement and determines whether the agency's recommendation is appropriate.

Subsection (b). Under federal law, states that receive funding from Title IV-E must develop a case plan for each child. This case plan is defined in 42 U.S.C. § 675(1) and required in 42 U.S.C. § 671(a)(16) and is defined in other law of this state. The case plan is addressed at the hearing immediately following adjudication and is usually called the disposition hearing. *See e.g.,* Mich. Code Ann. §712A.18f. A case plan, among other elements, is a "plan for assuring that the child receives safe and proper care and services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child and address the needs of the child while in foster care, including a discussion of the appropriateness of the serves that have been provided to the child under the plan." 42 U.S.C. § 675(1)(B). ICWA's requirements of active efforts to reunify the Indian family is federal language that was passed by Congress before this provision requiring a case plan. In this section, this act reconciles 25 U.S.C. § 1912(d) with 42 U.S.C. § 675(1). See also 81 Fed. Reg. 38790-1 (June 14, 2016) (discussing active efforts and its relationship to "reasonable efforts" as required by 42 U.S.C. 670 et seq.). While active efforts must be included in a case plan, providing active efforts may extend past what is required in a case plan, such as a diligent search for family members, as well as notice to and working with the Indian child's tribe. *See* 25 C.F.R. § 23.1 (defining active efforts to include searching for extended-family members).

Section 508. [Review] Hearing

(a) In addition to the requirements of [cite state statute governing review hearing], the court shall:

(1) make an inquiry under Section 201;

(2) order notice under [Article] 3, if notice has not been sent;

(3) acknowledge in the court record whether the Indian child's tribe is present at

the hearing;

(4) inform the parent or Indian custodian of the right to counsel at no expense if a parent or Indian custodian is unrepresented [and indigent] and, if requested, appoint counsel for the parent or Indian custodian under Section 1103;

(5) [appoint counsel for the Indian child under Section 1103, if the child is unrepresented [and representation is in the Indian child's best interest];

(6)] inquire whether any party intends to move the court to transfer the proceeding to the jurisdiction of a tribal court under Section 404; and

(7) ensure the parent, Indian custodian, and the Indian child's tribe have access to the records described in Section 1102 and, if not:

(A) order discovery to promote compliance with Section 1102 as soon as possible; and

(B) continue the hearing for not more than 30 days to allow the parent, Indian custodian, or tribe to prepare for the hearing with full access to discovery.

(b) The court shall determine whether in the period since the most recent [disposition] or [review] hearing the agency or petitioner:

(1) has made active efforts under Section 1104; and

(2) if required by prior order, has performed a diligent search under Section 1005.

(c) The court shall review the case plan and find whether the plan includes active efforts under Section 1104.

(d) If the case plan does not include active efforts under Section 1104, the court may not approve the plan and shall:

(1) continue the hearing for not more than 30 days to provide the agency an

opportunity to revise and present a plan that includes active efforts; or

(2) order the specific efforts necessary to make active efforts and order the agency to modify the plan to include the specific efforts.

(e) If the court orders a removal of the Indian child at the hearing, the court shall proceed under Section 506.

(f) If the court orders removal of the Indian child at the hearing, the court shall make a placement finding in accordance with [Article] 10. If the Indian child is not placed in accordance with Section 1001, the court shall:

(1) order the petitioner to perform a diligent search under Section 1005(a); and

(2) inform the individual with physical custody of the Indian child that the Indian child may be removed and placed under Section 1001 if a placement is found.

(g) If there is a subsequent change in placement of the Indian child, the court shall proceed under Section 1007.

Legislative note: *A state should title this section whatever state statute governs the periodic hearings after an adjudication and before a permanency hearing.*

Comment

Source: 25 U.S.C. §§ 1912 (b), (c), (d), 1915(b), 1916(b); 25 C.F.R. §§ 25.1, 23.120, 121, 122, 23.132(a)(5); 42 U.S.C. §§ 675(1), 671(a)(16), 675(5)(B).

Neither ICWA nor the regulations have specific requirements for review hearings, but this act includes provisions that allows the court to ensure the agency is following the requirements of the law throughout the pendency of the proceeding, specifically the active efforts provision. This means families receive the services legally required, and prevents last minute, unsupported findings required at a termination of parental rights proceeding.

Section 509. [Permanency] Hearing

(a) In addition to the requirements of [cite to state statute governing permanency hearings], in a [permanency] hearing the court shall:

(1) make an inquiry under Section 201;

(2) order notice under [Article] 3, if notice has not been sent;

(3) acknowledge in the court record whether the Indian child's tribe is present at the hearing;

(4) inform the parent or Indian custodian of the right to counsel at no expense if a parent or Indian custodian is unrepresented [and indigent], and, if requested, appoint counsel for the parent or Indian custodian under Section 1103;

(5) [appoint counsel for the Indian child under Section 1103, if the Indian child is unrepresented [and representation is in the Indian child's best interest];

(6)] inquire whether any party intends to move the court to transfer the proceeding to the jurisdiction of a tribal court under Section 404; and

(7) ensure the parent, Indian custodian, and the Indian child's tribe have access to the records described in Section 1102 and, if not:

(A) order discovery to promote compliance with Section 1102 as soon as possible; and

(B) continue the hearing for not more than 30 days to allow the parent, Indian custodian, or the tribe to prepare for the hearing; and

(8) order the petitioner to continue to make active efforts under Section 1104.

(b) If the court determines at the [permanency] hearing that the goal of the [dependency] is no longer to return the Indian child to the parent, and active efforts under Section 1104 are being made and have been unsuccessful, the court shall:

(1) take the testimony of a qualified expert witness who satisfies Section 1105 regarding the permanency plan; and

(2) make a placement finding in accordance with [Article] 10.

(c) If the Indian child is not placed in accordance with Section 1001 or 1002, the court shall:

(1) order the petitioner to perform a diligent search under Section 1005(a); and

(2) inform the individual with physical custody of the Indian child that the Indian child may be removed and placed under Section 1002 if a placement is found.

Legislative note: *A state should title this section whatever state statute governs the decision-making hearing for the permanent outcome of the dependency proceeding.*

Comment

Source: 25 U.S.C. §§ 1912 (b), (c), (d), (f), 1915(a), (b), 1916(b); 25 C.F.R. §§ 25.1, 23.120, 121, 122, 23.132(a)(5); 42 U.S.C. § 675(5)(C), 675a.

While neither ICWA nor the regulations discuss the requirements of a permanency hearing, permanency hearings are now required by federal law for all states. As such, this act includes them to ensure the ultimate permanency decision follows ICWA's requirements. Alternate permanency plans to termination of parental rights ought to be considered for Indian children, and often tribes will prefer that outcome to a termination of rights. These options can include kinship guardianships, long-term juvenile guardianships, or long-term foster care. *See* 42 U.S.C. § 675a ("requirements for another planned permanent living arrangement" which is determined at the permanency hearing). In addition, if the permanency plan is no longer return home, a child should be placed in accordance with preferences in section 1002, which includes the requirements of 25 U.S.C. § 1915(a) ("adoptive placements; preferences").

Subsection (b)(1). Taking the testimony of a qualified expert witness regarding the permanency plan allows the court to preview whether there has been discussion of a plan other than termination of parental rights, and if there has not been, if the witness is likely to testify in support of termination of parental rights.

Section 510. [[Pre-Adoptive] Proceeding] Hearing

(a) In addition to the requirements of [cite to statute governing pre-adoptive proceeding hearings] in a [pre-adoptive] proceeding, the court shall:

(1) make an inquiry under Section 201;

(2) order notice under [Article] 3, if notice has not been sent;

(3) acknowledge in the court record whether the Indian child's tribe is present at

the hearing;

(4) [appoint counsel for the Indian child under Section 1103, if the Indian child is unrepresented [and representation is in the Indian child's best interest];

(5)] inquire as to whether any party intends to move the court to transfer the proceeding to the jurisdiction of a tribal court under Section 404; and

(6) ensure the tribe has had access to the records described under Section 1102 and, if not:

(A) order discovery to promote compliance with Section 1102 as soon as possible; and

(B) continue the hearing for not more than 30 days to allow the tribe to prepare for the hearing.

(b) At the hearing, the court shall:

(1) find that appropriate active efforts under Section 1104 are being made for the Indian child, including identifying community and tribal resources for the Indian child, or order the agency to make the efforts; and

(2) ensure the agency has complied with the case plan by making active efforts including any steps necessary to finalize the permanent placement of the Indian child.

(c) The court shall make a placement finding in accordance with [Article] 10. If the Indian child is not placed in accordance with Section 1001 or 1002, the court shall:

(1) order the petitioner to perform a diligent search under Section 1005(a); and

(2) inform the individual with physical custody of the child that the child may be removed and placed under Section 1002 if a placement is found.

Legislative Note: *A state should name this hearing whatever the state calls a post-termination hearing that is not an adoption. Sometimes this is called a "permanency review" hearing.*

Comment

Source: 25 U.S.C. §§ 1903(1)(iii), 1912(d); 1915(a); 42 U.S.C. §§ 675(5)(C), 675a.

While ICWA defines a "pre-adoptive proceeding" there is very little guidance as to what standards apply at that hearing. ICWA only mentions it in the context of the placement preferences of 25 U.S.C. § 1915(b). As noted in the comment to the definitions, this type of hearing occurs both in the dependency context and the adoption context. This section contemplates the requirements of the hearing in dependency context, including requirements to ensure the child continues to receive efforts to connect them to their extended family and tribe, as well as allows for consideration of transfer to tribal court during this hearing.

[Article] 6

Termination of Parental Rights

Comment

A termination of parental rights is the legal severance of a parent-child relationship. It can be a result of a dependency proceeding, required in a stepparent adoption, or brought by a third party. Regardless of how an Indian child and parent arrive at a termination of parental rights proceeding, ICWA's protections apply. 25 U.S.C. § 1912(f).

The severity of a termination of parental rights cannot be overstated. It has been called the "civil death penalty" by courts and is the subject of increasing scrutiny. *See* Andrew C. Brown, *The Civil Death Penalty: Reforming Standards for Termination of Parental Rights in Texas*, Texas Public Policy Foundation (2024); Chris Gottlieb, *The Birth of the Civil Death Penalty and the Expansion of Forced Adoptions: Reassessing the Concept of Termination of Parental Rights in Light of its History, Purposes, and Current Efficacy,* 45 Cardozo L. Rev. 1319 (2024). Concerns around termination include the legal fiction of its application, the disparity in application to children of color, and the creation of legal orphans with no plan for adoption.

Despite this, federal law not only requires states to have termination of parental rights provisions in statute, the same law requires termination petitions within certain federal timeframes. *See* 42 U.S.C. § 675(5)(C), (E). At the time of ICWA's passage, there was concern regarding the vagueness of state termination statutes, where findings of a dirty house could lead to a termination despite Constitutional protections of the family unit and the right to parent. *See* Christopher Church & Vivek Sankaran, *Applying Strict Scrutiny in Termination of Parental Rights Proceedings: Why Alabama's Jurisprudence Should Reshape Child Protection Practice*, 76 Ala. L. Rev. 384, 393-397 (2024). As a result of this milieu as well as the overwhelming testimony regarding the lack of due process and standards for parents of Indian children, Congress adopted the burden of proof for a termination of parental rights to be beyond a reasonable doubt. 25 U.S.C. § 1912(f). The House Report accompanying the bill reveals the introduced bill adopted a beyond a reasonable doubt standard for both a foster care placement as well as termination of parental rights, and amended the standard for a foster care placement to clear and convincing, despite "the committee feel[ing] the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty . . .” H.R. Rep. No. 95-1386 at 22.

Section 601. Inquiry; Notice; Applicability

(a) In a termination of parental rights proceeding, the court shall make an inquiry under Section 201.

(b) If the court knows under Section 203 or has reason to know under Section 204 the child subject to the proceeding to terminate parental rights is an Indian child:

(1) the court shall give notice in a record of the proceeding under [Article] 3; and

(2) this [article] applies to the proceeding.

Comment

Source: 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111.

Section 602. Petition for Termination of Parental Rights

In addition to the requirements in [cite to state statute governing termination of parental rights], a petition for termination of parental rights of an Indian child’s parent or the accompanying records of the petition must contain:

(1) the name, age, and last known address of the Indian child;

(2) the name and address of the parent who is the subject of the petition;

(3) a statement of the actions taken to provide notice to the parent and the Indian child’s tribe about the proceeding;

(4) if the parent’s identity or whereabouts are unknown, a detailed explanation of what actions were taken to locate and contact the parent, including contact with the appropriate regional director;

(5) the residence and domicile of the Indian child;

(6) if the residence or domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with the reservation or

village;

(7) the tribal affiliation of the Indian child and each parent;

(8) a statement of evidence why custody by the parent is likely to result in serious emotional or physical damage to the Indian child, including the causal relationship between:

(A) the particular conditions in the home; and

(B) the likely serious emotional or physical damage to the Indian child; and

(9) a statement of the active efforts under Section 1104 that have been and are being made.

Comment

Source: 25 U.S.C. §§ 1912(d), (f); 25 C.F.R. §§ 23.120, 121, 122; 42 U.S.C. § 675(E).

ICWA does not require a petition for a termination of parental rights, but other federal law does. This section includes what is required for notice of a termination under the federal regulations, as well as other evidentiary requirements in ICWA that will need to be demonstrated without a reasonable doubt.

Section 603. Termination [Trial]

In addition to the requirements of [cite state statute governing termination trials], in a termination [trial], the court shall:

(1) make an inquiry under Section 201;

(2) order notice under [Article] 3, if notice has not been sent;

(3) acknowledge in the court record whether the Indian child's tribe is present at the [trial];

(4) inform the parent or Indian custodian of the right to counsel at no expense if a parent or Indian custodian is unrepresented [and indigent], and, if requested, appoint counsel for the parent or Indian custodian under Section 1103;

(5) [appoint counsel for the Indian child under Section 1103, if the Indian child is unrepresented [and representation is in the Indian child's best interest];

(6)] inquire as to whether any party intends to move the court to transfer the proceeding to tribal court under Section 404; and

(7) ensure the parent and tribe have access to the records described in Section 1102 and, if not:

(A) order discovery to promote compliance with Section 1102 as soon as possible; and

(B) continue the [trial] for not more than 30 days to allow the parent, or tribe to prepare for the [trial].

Comment

Source: 25 U.S.C. §§ 1912(a), (b), (c), (d), (f); 25 C.F.R. §§ 23.120, 121, 122.

Section 604. Termination Order

(a) The court may not terminate parental rights unless the court finds:

(1) the petitioner sent notice under [Article] 3;

(2) the court has jurisdiction under [Article] 4;

(3) there is evidence beyond a reasonable doubt that active efforts under Section 1104 were made, but were unsuccessful; and

(4) subject to subsection (b), there is evidence beyond a reasonable doubt, including the testimony of a qualified expert witness who satisfies Section 1105, that:

(A) custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child; and

(B) a causal relationship exists between:

(i) the particular conditions in the home; and

(ii) the likelihood of serious emotional or physical damage to the Indian child.

(b) Absent a finding of a causal relationship described in subsection (a)(4)(B), a finding under subsection (a)(4) may not be supported by evidence of:

(1) community or family poverty;

(2) isolation;

(3) single parenthood;

(4) custodian's age;

(5) crowded or inadequate housing;

(6) substance abuse; or

(7) nonconforming social behavior.

Comment

Source: 25 U.S.C. §§ 1912 (a), (c), (d), (e), 1911(a); 25 C.F.R. §§ 23.120, 121, 122, 23.132(a)(5).

Subsection (a)(4). ICWA requires a standard of a beyond a reasonable doubt to terminate parental rights, 25 U.S.C. § 1912(f), as well as the testimony of a qualified expert witness.

Subsection (a)(4)(B). All terminations of parental rights require the causal connection between the parent's behavior and harm to the child. *See* 25 C.F.R. § 23. 121(c), (d). This connection is vital to ensure the parent's behavior alone is not enough to remove a child based simply on the parent's behavior. Not every parent behaves or makes choices that a social worker or judge would agree is appropriate. But that behavior alone cannot lead to the removal of a child. To quote Justice Scalia, "We do not inquire whether leaving a child with his parents is 'in the best interest of the child.' It sometimes is not; he would be better off raised by someone else. But parents have their rights, no less than children do." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 668 (2013), Scalia J. dissenting.

Subsection (d). The elements listed in subsection (d) come from the federal regulations, 25 C.F.R. § 23.121(d), and this connection was also required in the federal guidelines that were in effect from 1979-2015. While appellate courts have not spent considerable time on this aspect of the law, a few have. As one example, the South Dakota Supreme Court made clear that a father's lack of housing was not alone enough to terminate parental rights, but his continued domestic violence and in ability to care for the children to the point they were left in dangerous situations was. *People in re A.A.*, 967 N.W.2d 801, 823-4 (S.D. 2021).

[Article] 7

Guardianship; [[Third-Party Custody]]

Comment

Under ICWA, there are only four defined proceedings to which the law applies. However, courts have interpreted the definition of foster care placement to apply to guardianships as well as third-party custody proceedings where the parent is not voluntarily agreeing to the arrangement. Specifically, ICWA states that a foster care placement, is first, "any action removing an Indian child from its parent or Indian custodian," for, "temporary placement in a foster home or institution or home of a guardian or conservator," where, "the parent or Indian custodian cannot have the child back upon demand," and "parental rights have not been terminated." 25 U.S.C. § 1903(1)(i). This necessarily includes proceedings beyond a foster care placement in a dependency. *See Melius v. Songer*, 25 N.W.3d 801 (S.D., 2025); (applying ICWA's protections to a relative third party proceeding); *In re Guardianship of Eliza W.,* 938 N.W.2d 307 (Neb. 2020) (guardianships qualify as a foster care placement under ICWA and the Nebraska state ICWA). The definitions in this act mirror those requirements to ensure application to the proper state equivalent proceedings. Based on the definition mirroring ICWA's definition of a foster care placement, this act provides states with provisions that include the ICWA protections for a guardianship or third-party custody proceeding, using the standards from 25 U.S.C. § 1912. This is the same standard for a dependency, which is addressed in section 506.

As a result, this Article does not include or apply to voluntary proceedings where a parent places a child with a third party where they can have the child back upon demand. This follows from ICWA's definition of foster care placement, as well as the federal regulations, which state ICWA does not apply to "a voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand." 25 C.F.R. § 23.103(a)(4). Based on that guidance, a guardianship or third party placement may begin as a voluntary proceeding not subject to this act, but if at any point a parent cannot regain custody of their child upon demand, whether because of a judicial finding or agency involvement, the proceeding would become a guardianship or third party proceeding under this article. *See Empson-Laviolette v. Crago*, 760 N.W.2d 793, 799-800 (Mich. Ct. App. 2008). When states adopt these provisions, it should consider the nature of the state-defined proceeding to determine if it would fall under a truly voluntary proceeding or one where the parent cannot have the child back upon demand.

Section 701. Inquiry, Notice, and Application of this Article

(a) At a hearing in a guardianship, the court shall make an inquiry under Section 201.

(b) If the court knows under Section 203 or has reason to know under Section 204 the child subject to the proceeding is an Indian child:

(1) the court shall give notice in a record of the proceeding under [Article] 3; and

(2) this [article] applies.

Comment

Source: 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111.

Section 702. Guardianship Petition

In addition to the requirements in [cite state statute governing guardianships], the petition for a guardianship or its accompanying records must contain:

(1) the name, age, and last known address of the Indian child;

(2) the names and addresses of the Indian child's parents and Indian custodian;

(3) the efforts taken to provide notice to the parents, Indian custodian, and the Indian child's tribe about the proceeding;

(4) if the whereabouts of the parents or Indian custodian are unknown, a detailed explanation of what efforts have been and are being made to locate and contact the parents or Indian custodian, including contact with the appropriate regional director;

(5) the residence and domicile of the Indian child;

(6) if the residence or domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with the reservation or village;

(7) the tribal affiliation of the Indian child and of the parents or Indian custodian;

(8) a statement of evidence why custody by the parent with custody or Indian custodian is likely to result in serious emotional or physical damage to the Indian child, including the causal relationship between:

(A) the particular conditions in the home; and

(B) the likely serious emotional or physical damage to the Indian child;

(9) a statement of the active efforts under Section 1104 that have been made and

are being made; and

(10) a description of the potential placement and how the placement meets the requirements of [Article] 10.

Comment

Source: 25 U.S.C. §§ 1912(a), (e); 25 C.F.R. §§ 23.111, 121.

Paragraph (8). This standard is from 25 U.S.C. § 1912(e), which applies to "foster care placements" under ICWA, which includes guardianships. This is the same standard as Section 506.

Section 703. Guardianship Hearing

(a) In addition to the requirements of [cite to state statute governing guardianships], at the guardianship hearing the court shall:

(1) make an inquiry under Section 201;

(2) order notice under [Article] 3, if notice has not been sent;

(3) acknowledge in the court record whether the Indian child's tribe is present at the hearing;

(4) inform the parents or Indian custodian of the right to counsel at no expense if a parent or Indian custodian is unrepresented [and indigent], and, if requested, appoint counsel for the parent or Indian custodian under Section 1103;

(5) [appoint counsel for the Indian child under Section 1103, if the Indian child is unrepresented [and representation is in the Indian child's best interest];

(6)] inquire whether any party intends to move the court to transfer the proceeding to tribal court under Section 404; and

(7) ensure the parents, Indian custodian, and tribe have access to the records described in Section 1102 and, if not:

(A) order discovery to promote compliance with Section 1102 as soon as possible; and

(B) continue the hearing for not more than 30 days to allow the parents, Indian custodian, or tribe to prepare for the hearing.

(b) A court may order a guardianship if the court finds:

(1) the petitioner sent notice under [Article] 3;

(2) the court has jurisdiction under [Article] 4;

(3) the Indian child is placed in accordance with [Article] 10;

(4) by clear and convincing evidence, that active efforts under Section 1104 were made but were unsuccessful; and

(5) by clear and convincing evidence, including the testimony of a qualified expert witness who satisfies Section 1105, that:

(A) custody by the parents or Indian custodian is likely to result in serious emotional or physical damage to the Indian child; and

(B) a causal relationship exists between:

(i) the particular conditions in the home; and

(ii) the likelihood of serious emotional or physical damage to the Indian child.

(c) Absent a finding of a causal relationship described in subsection (b)(5)(B), a finding under subsection (b)(5) may not be supported by:

(1) community or family poverty;

(2) isolation;

(3) single parenthood;

(4) custodian's age;

(5) crowded or inadequate housing;

(6) substance abuse; or

(7) nonconforming social behavior.

(d) The court may consider visitation arrangements as authorized by other law of this state when issuing its order.

Comment

Source: 25 U.S.C. §§ 1912 (a), (b), (c), (d), (e), 1915(b), 1916(b); 25 C.F.R. §§ 23.120, 121, 122, 23.132(a)(5).

Subsections (b), (c). These subsections apply the foster care placement standards from ICWA to a guardianship. However, some state guardianships have burdens that make it difficult, if not impossible, for a parent to ever have their child returned. For those types of guardianships, which may be more accurately perceived as a permanent severance of parental rights, a state may consider whether it would be more appropriate for the state to adopt the standards under Sections 602, 603, and 604 for those types of guardianships.

Subsection (d). While this provision allows courts to consider other law of the state when crafting visitation schedules, courts should also remember that interference in a fit parent's rights can create a constitutional concern. *Troxell v. Granville*, 530 U.S. 57 (2000). The South Dakota Supreme Court discussed this at length in *Melius v. Songer*, 25 N.W.3d 801 (S.D. 2025), where the Court held that bonding "by itself, cannot outweigh [Father]'s fundamental right as a parent to the custody and control of his child." *Id.* at 813.

[Section 704. [Third-Party Custody] Proceeding]

[(a) In addition to the requirements in [cite to state statute governing third-party custody proceeding], the petition or motion for a [third-party custody proceeding] or its accompanying records must contain the following information:

(1) the name, age, and last known address of the Indian child;

(2) the names and addresses of the Indian child's parents and Indian custodian;

(3) the efforts taken to provide notice to the parents, Indian custodian, and Indian tribe about the proceeding;

(4) if the Indian child's parents or Indian custodian are unknown, a detailed

explanation of what efforts have been and are being made to locate and contact the parents or Indian custodian, including contact with the appropriate regional director;

(5) the residence and domicile of the Indian child;

(6) if the residence or domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with the reservation or village;

(7) the tribal affiliation of the Indian child and of the parents or Indian custodian;

(8) a statement of evidence whether custody by the parents or Indian custodian is likely to result in serious emotional or physical damage to the Indian child, including the causal relationship between:

(A) the particular conditions in the home; and

(B) the likely serious emotional or physical damage to the Indian child;

(9) a statement of the active efforts under Section 1104 that have been made and are being made; and

(10) a description of the potential placement and how the placement meets the requirements of [Article] 10.

(b) In addition to the requirements of [cite to state statute governing third-party custody proceedings], the court shall:

(1) make an inquiry under Section 201;

(2) order notice under [Article] 3 if notice has not been sent;

(3) acknowledge in the court record whether the Indian child's tribe is present at the hearing;

(4) inform the parents or Indian custodian of the right to counsel at no expense if a

parent or Indian custodian is unrepresented [and indigent], and, if requested, appoint counsel for the parent or Indian custodian under Section 1103;

(5) [appoint counsel for the Indian child under Section 1103, if the Indian child is unrepresented [and representation is in the Indian child's best interest];

(6)] inquire as to whether any party intends to move the court to transfer the proceeding to tribal court under Section 404; and

(7) ensure the parents, Indian custodian, and tribe have access to records described in Section 1102 and, if necessary:

(A) order discovery to promote compliance with Section 1102 as soon as possible; and

(B) continue the hearing for no more than 30 days to allow the parents, Indian custodian, or the tribe to prepare for the hearing.

(c) The court may not order custody of the child by a third party, unless the court finds:

(1) the petitioner sent notice under [Article] 3;

(2) the court has jurisdiction under [Article] 4;

(3) the Indian child is placed in accordance with [Article] 10;

(4) by clear and convincing evidence, that active efforts under Section 1104 were made, but were unsuccessful; and

(5) by clear and convincing evidence, including the testimony of a qualified expert witness who satisfies Section 1105, that:

(A) custody by the parents or Indian custodian is likely to result in serious emotional or physical damage to the Indian child; and

(B) a causal relationship exists between:

(i) the particular conditions in the home; and

(ii) the likelihood of serious emotional or physical damage to the Indian child.

(d) Absent a finding of a causal relationship described in subsection (5)(B), a finding under subsection (c)(4) may not be supported by evidence of:

(1) community or family poverty;

(2) isolation;

(3) single parenthood;

(4) custodian age;

(5) crowded or inadequate housing;

(6) substance abuse; or

(7) nonconforming social behavior.

(e) The court may consider visitation arrangements as authorized by other law of this state when issuing its order.]

Legislative Note: *A state should enact this section only if the state allows for a private, third-party custody petition and use the appropriate term. If the state does not have an applicable proceeding for this section, it should delete the third-party custody text from the article heading.*

Comment

Source: 25 U.S.C. §§ 1912 (a), (b), (c), (d), (e), 1915(b), 1916(b); 25 C.F.R. §§ 23.120, 121, 122, 23.132(a)(5).

As noted, courts have interpreted ICWA's foster care placement definition to include to third-party custody proceedings, as they meet the requirements listed under 25 U.S.C. § 1903(1). *See Melius v. Songer*, 25 N.W.3d 801, 815, n.4 (S.D. 2025).

Subsection (e). While this provision allows courts to consider other law of the state when crafting visitation schedules, courts should also remember that interference in a fit parent's rights can create a constitutional concern. *Troxell v. Granville*, 530 U.S. 57 (2000). The South Dakota Supreme Court discussed this at length in *Melius v. Songer*, 25 N.W.3d 801 (S.D. 2025), where the Court held that bonding "by itself, cannot outweigh [Father]'s fundamental right as a parent to the custody and control of his child." *Id.* at 813.

[Article] 8

Adoption

Section 801. Inquiry; Applicability

(a) In an adoption, the court shall:

(1) make an inquiry under Section 201; and

(2) either:

(A) make a finding in the court record whether the party seeking placement has taken all reasonable steps to verify the child's status as an Indian child; or

(B) order the party to contact the Indian tribe of which it is believed the child is a member or eligible for membership to verify the child's status as an Indian child and continue the hearing if necessary to gather information regarding the child's membership status.

(b) This [article] applies to an adoption if the court knows under Section 203 or has reason to know under Section 204 the child who is the subject of the adoption is an Indian child.

Comment

Source: 25 C.F.R. § 23.124 (a), (b).

Subsection (a). While the provision of ICWA governing notice limits notice to "involuntary" proceedings, 25 U.S.C. § 1912(a), the regulations require the court determine if a child is an Indian child regardless of the proceeding. 25 C.F.R. § 23.124 (a), (b). In addition, the preferences in Section 1002 apply to all adoptions, and make no carve out or caveat for private versus state adoptions. 25 U.S.C. § 1915(a); 25 C.F.R. § 23.124(c).

Section 802. Confidentiality

(a) Except as provided in subsections (b) and (c), in a proceeding under [Article] 8, confidentiality of proceedings and records is governed by other law of this state.

(b) A parent may request anonymity in the proceeding by filing a record with the court.

(c) If a parent requests anonymity under subsection (b), the court shall:

(1) close the hearing to preserve the parent's anonymity; and

(2) keep confidential any record relating to an inquiry made under Section 201.

(d) The duty of confidentiality under subsection (c) or other law of this state does not affect:

(1) the requirement to make inquiry under Section 201;

(2) the requirement to make finding under Sections 203, 204, or 205;

(3) the right to information under Section 1107.

Section 803. [Relinquishment]

(a) A [relinquishment] must be made in a record by the Indian child's parent.

(b) In addition to the requirements of [cite to state statute governing relinquishment] and before accepting the [relinquishment], the court shall:

(1) orally explain to the Indian child's parent in the primary language of the parent:

(A) the terms and consequences of the [relinquishment] in detail;

(B) that the result of the [relinquishment] is permanent legal severance of the parent-child relationship;

(C) that the [relinquishment] may affect the Indian child's rights to:

(i) tribal membership;

(ii) shareholder status in an Alaska Native Regional Corporation or Village Corporation; and

(iii) land inheritance under the Indian Land Consolidation Act, 25 U.S.C. Section 2201 et seq.[, as amended];

(D) that the [relinquishment] may be withdrawn for any reason and at any time before entry of the final decree severing parental rights or the decree of adoption, and the child will be returned to the parent; and

(E) how to withdraw the [relinquishment]; and

(2) make a finding in the court record that:

(A) the terms and consequences of the [relinquishment] were explained in detail and fully understood by the parent;

(B) the Indian child's placement meets the requirements under [article] 10; and

(C) the parent's [relinquishment] was made in a record by the parent who was present in court.

(c) The court may not accept a [relinquishment] until 10 days after the birth date of the Indian child.

(d) If the court accepts the [relinquishment], the court shall enter the [relinquishment] in the court record and include:

(1) any condition to the [relinquishment];

(2) the name and birthdate of the Indian child;

(3) the name of the Indian child's tribe or tribe of which the Indian child may be eligible for membership;

(4) evidence of the tribal membership for the parent and for the Indian child or the Indian child's eligibility for membership in the tribe;

(5) the name, address, and other identifying information of the parent or Indian custodian;

(6) the name, address, and other identifying information of the Indian child's siblings and extended family members;

(7) the name and address of any individual or agency that arranged the placement; and

(8) the name and address of the prospective adoptive parents; and

(9) a certified copy of the birth certificate.

Comment

Source: 25 U.S.C. §§ 1913, 1915(a); 25 C.F.R. §§ 23.107(d), 124, 125, 126, 128.

The terms "relinquishment" and "consent" are interchangeable concepts. Both refer to the birth parent(s) agreement to place their child for adoption. Some of these are simple written statements, sworn statements, notarized statements, or in-court, sworn acknowledgments. They are a critical legal step in the adoption process. The requirements for consent and relinquishment vary by state, including the formalities of the process and when the action becomes irrevocable. This section is based on 25 U.S.C. § 1913 as well as 25 C.F.R. §§ 23.124-128.

Subsection (b). While this act and the federal regulations allow parties to participate in court hearings via telephonic and other methods, the best practice for courts concerned with any fraud, duress, or other issues is to have a parent appear in person in court.

Section 804. Withdrawal of [Relinquishment]

(a) A parent may withdraw the parent's [relinquishment] for any reason at any time before entry of a final decree of [relinquishment] or a final decree of adoption by:

(1) filing a record of the withdrawal with the court; or

(2) testifying before the court.

(b) The court in which the withdrawal of [relinquishment] is made under subsection (a) shall:

(1) promptly notify the individual or agency that arranged the adoption of the withdrawal; and

(2) order the Indian child returned to the parent.

Comment

Source: 25 U.S.C. § 1913; 25 C.F.R. § 23.128.

Section 805. Adoption

(a) In addition to the requirements of [cite to state statute governing adoption], the court may not enter a final decree of adoption unless the court finds:

(1) the Indian child is placed under [Article] 10;

(2) the [relinquishment] was made under Section 803 or termination of parental rights occurred under [Article] 5; and

(3) if the [relinquishment] was made under Section 803, the parent has not withdrawn the [relinquishment] under Section 804(a).

Comment

Source: 25 U.S.C. §§ 1913, 1915(a); 25 C.F.R. § 23.128.

Section 806. Vacating Adoption

(a) Not later than [two] years after a final decree of adoption of an Indian child, the court may vacate the adoption if the court finds the parent's [relinquishment] under Section 803 was obtained by fraud, duress, or grounds provided in other law of this state.

(b) If a parent files a motion to vacate the final decree of adoption of the Indian child, the court shall:

(1) give notice in a record to all parties to the adoption and the Indian child's tribe; and

(2) hold a hearing on the motion.

(c) If the court finds the [relinquishment] was obtained through fraud, duress, or grounds provided in other law of this state, the court shall:

(1) vacate the final decree of adoption;

(2) order the consent revoked; and

(3) order the Indian child returned to the parent.

Legislative Note: *The time frame in subsection (a) may be longer under state law but cannot be shorter than two years as that is required under the Indian Child Welfare Act.*

Comment

Source: 25 U.S.C. § 1913(d); 25 C.F.R. § 23.136.

Subsection (c). While ICWA uses the term "duress," which is what is used here, the definition of "undue influence" may be a more accurate way to address the concern regarding the relationship of a birth mother to an adoption agency. This can be of particular concern when parties to an adoption do not have separate attorneys. The committee determined the act will defer to state grounds if a state so choose to allow for the inclusion of undue influence or other similar provisions. Regardless of the reason, a parent of an Indian child must have the option to bring forward a claim to vacate the adoption for no less than two years, as that is the federal minimum standard. 25 U.S.C. § 1913(d).

[Article] 9

Status Offense Proceeding

Comment

In ICWA's definition of a child custody proceeding, it states that ICWA shall not apply to placements "based upon an act which, if committed by an adult, would be deemed a crime." 25 U.S.C. § 1903(1). This leaves children who are subject to a status offense, or an offence that cannot be committed by an adult, subject to the placement preferences in this act. There are many instances of children who are in a "dual jurisdiction" situation where they are both the subject of a dependency and a status offense. This section clarifies the language in ICWA to ensure there is notice and placement of children in these situations. States have generally failed to include these provisions in their status offense provisions. *See* Thalia González, *Reclaiming the Promise of the Indian Child Welfare Act: A Study of State Incorporation and Adoption of Legal Protections for Indian Status Offenders*, 42 N.M. L. Rev. 131 (2012).

Section 901. Inquiry; Notice; Applicability

(a) In a status offense proceeding, the court shall make an inquiry under Section 201.

(b) If the court knows under Section 203 or has reason to know under Section 204 the child is an Indian child:

(1) the court shall give notice in a record under [Article] 3; and

(2) this [article] applies.

Section 902. Placement Requirements

If an Indian child is subject to an out-of-home placement in a status offense proceeding, the court shall place the Indian child under [Article] 10.

Comment

Source: 25 U.S.C. 1903(1).

[Article] 10

Placement

Comment

Despite ICWA's focus on burdens of proof and reunification and preservation of Indian families, its placement preferences are usually the provision most people have heard of. Even cases that are ostensibly about other issues, such as jurisdiction, can bring up discussion of a child's placement, *see Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), even if ultimately the placement never changes. *See* Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 Colum. J. Gender & L. 1, 17 (2008).

At the time of ICWA's passage 25-35% of all Indian children were removed from their homes and many of them (85-90%) were placed outside their communities. H.R. Rep. No. 95-1386 at 9 (1978). Families were often disregarded as potential placements, and children were permanently removed from their communities. *Id.* More recently, in discussing the placement preferences and federal regulations, the Department of Interior wrote:

> The preferences in ICWA and the final rule codify the best practice in child welfare of favoring extended-family placements, including placement within a child's broader kinship community. If a child is removed from her parents, the first choice in child welfare practice for an alternative placement—for all children, not just Indian children—is the child's extended-family. (citing publications from the National Council of Juvenile and Family Court Judges, the Child Welfare League of America, as well as scholarship). Placing children with their extended-family benefits children (citations omitted). This is true for children as who are placed in foster care as well as those who are adopted.

81 Fed. Reg. 38838 (June 14, 2016)

Research conducted since ICWA's passage confirms that family placements are better than non-relative foster placements for *all* children. These benefits are particularly salient for Indian children, for whom extended family relationships are frequently as close and supportive as nuclear family relationships, and for whom the process of enculturation—which is more likely to happen in family placements—can be a protective factor against both historical and personal trauma. In contrast, the importance of preserving a child's bond with a foster family is far less clear.

As the *amicus* briefs of dozens of medical organizations, psychological organizations, and child advocacy organizations—including the American Academy of Pediatrics, the largest professional association of pediatricians in the world—in *Haaland v. Brackeen* made clear, family placements are correlated with improved physical and mental health for foster youth. *See* American Academy of Pediatrics Br. at 1, 15–17; Br. of the American Psychological Ass'n et al., *Brackeen*, 599 U.S. 255, 2022 WL 3682219, at *5, 10–24; Br. of Casey Family Programs and Twenty-Six Other Child Welfare and Adoption Organizations, *Brackeen*, 599 U.S. 255, 2022 WL 3648364, at *23. Children placed with relatives experience greater stability, fewer disruptions, stronger mental health, and sturdier cultural identity, as compared to children placed with non-relatives. American Academy of Pediatrics Br., 2022 WL 3701711, at *16–17 (citing, among other research, a meta-analysis of studies covering over 600,000 children finding that children placed with family experienced better outcomes across a number of behavioral health axes); Heidi R. Epstein, *Kinship Care is Better for Children and Families*, Am. Bar Ass'n (2017); Amanda Robert, *Family Members Who Step in to Care for Children Can Get Extra Support with ABA Guidance*, ABA J. (Nov. 8, 2023); Tiffany Conway & Rutledge Hutson, *Is Kinship Care Good for Kids?*, Center for Law and Social Policy 2 (Mar. 3, 2007); Marc A. Winokur, et al., *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 Families in Soc'y: J. Contemp. Soc. Sciences 338, 344–45 (2008).

Studies show that Indian adoptees raised outside their cultures suffer lifelong grief and identity loss, and as a result, higher rates of physical and mental health problems, addiction, self-injury, and suicidality. *See* Ashley L. Landers et al., *American Indian and White Adoptees: Are There Mental Health Differences?*, 24 Am. Indian & Alaska Native Mental Health Res. 54, 56–57, 65–71 (2017); Jessica E. Simpson et al., *Longing to Belong: The Ambiguous Loss of Indigenous Fostered/Adopted Individuals*, 148 Child Abuse & Neglect 1 (2024); Joaquin R. Gallegos & Kathryn E Fort, *Protecting the Public Health of Indian Tribes: the Indian Child Welfare Act*, 12 Harvard Public Health Review 1, 2–3 (Winter 2017–2018). The symptoms of culture loss are comparable to those of post-traumatic stress disorder and include anxiety, affective disorders, and substance dependence. American Academy of Pediatrics Br., 2022 WL 3701711, at *14. Many Indian adoptees continue to struggle with identity and report feelings of loneliness and isolation into adulthood. *See* Gallegos & Fort., *supra*.

Indian children placed with family, on the other hand, benefit in numerous ways. One is that in many Native American cultures, "family" denotes an extensive multi-generational kinship network that reaches far beyond Western concepts of the nuclear family. American Academy of Pediatrics Br., 2022 WL 3701711, at *5, 19–20; APA Br., 2022 WL 3682219 at *19; *see* H.R. Rep. No. 95-1386, at 10 (1978) ("An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family."). A placement with extended family therefore can preserve the type of family relationships that a child had in their family of origin. Indian children placed with family are also "more likely to have contact with their parents, to be placed with siblings, and maintain family connections." Annie M. Francis, *Implementation and Effectiveness of the Indian Child Welfare Act: A Systematic Review*, 146 Child and Youth Serv. Rev. 1, 13 (2023). Maintaining these family relationships has been shown to contribute to the health and wellbeing of Indian children. American Academy of Pediatrics Br., 2022 WL 3701711, at *5.

Strong identification with one's culture is linked to significant mental health benefits including “positive self-concept, internal motivation and optimism, and social connectedness, which all contribute to success in adulthood.” American Academy of Pediatrics Br., 2022 WL 370711, at *6. Substantial data shows that a child raised in his culture has a greater chance of developing a healthy sense of independence, self-reliance, and resilience. American Academy of Pediatrics Br., 2022 WL 3701711, at *25; APA Br., 2022 WL 3682219, at *13–15. One 2006 study concluded that the *strongest* predictor of higher levels of resilience in Indian children was enculturation. APA Br., 2022 WL 3682219, at *14.

These provisions protect these relationships, while leaving room for flexibility when necessary. *See, e.g., Petra J. v. Dep’t of Fam. & Comm. Serv’s*, __P.3d __ (Alaska, 2026) (upholding a trial judge’s decision to move a child from a “first tier” preference to a “second tier” one based on evidence introduced at a six-day placement review hearing.)

Section 1001. Placement Preferences for [Dependency]; Voluntary Placement

(a) If the court knows under Section 203 or has reason to know under Section 204 the child who is the subject of the proceeding is an Indian child, this section applies to:

(1) [dependency];

(2) [[third-party custody] proceeding;

(3)] guardianship proceeding;

(4) status offense proceeding; and

(5) voluntary placement.

(b) If an Indian child is removed from the Indian child’s parent or Indian custodian in a proceeding identified in subsection (a), the court shall order placement of the Indian child:

(1) in the least-restrictive setting that:

(A) most approximates a family, taking into consideration sibling attachment;

(B) allows any special needs of the Indian child to be met; and

(C) is in reasonable proximity to the Indian child’s home, siblings, or extended-family members; and

(2) except as provided in Section 1003 and subject to the rights of a non-custodial

parent, in the following order of preference with:

(A) an extended-family member who is at least 18 years of age;

(B) a foster home the Indian child's tribe licenses, approves, or specifies;

(C) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(D) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

(c) When ordering a placement, the court shall apply the prevailing social and cultural standards:

(1) of the Indian tribe;

(2) of the Indian community of which the parent or extended-family members reside; or

(3) maintained by extended-family members.

Comment

Source: 25 U.S.C. §§ 1915(b), (c), (d); 42 U.S.C. § 671(a)(15)(F); 25 C.F.R. §§ 23.129, 131, 132.

Subsection (a). In this act a voluntary placement involves the participation of the agency, so the foster care placement preferences apply. However, a court may find that a parent's preference in section 1006 provides good cause to deviate from the preferences.

Subsection (b). This section of the law follows the federal requirements regarding the temporary placement of Indian children. *See* 25 U.S.C. § 1915(b). During a dependency, reunification with parent is the overarching goal for at least the first year of the proceeding, absent aggravating circumstances. To encourage reunification with family and to keep siblings together when appropriate, this section considers those additional issues under paragraph (b) in addition to the preferences under paragraph (c). All children under federal law must now be placed in a "least restrictive (most family like)" setting. 25 U.S.C. § 1915(b); 42 U.S.C. § 675(5). This alignment was done at the time of passage of ICWA, anticipating the passage of Title IV-E of the social security act. *See* H.R. Rep. No. 95-1386 at 23 (1978).

In addition, during a dependency, state agencies that receive federal funds are required to engage in "concurrent planning" to find a permanent placement if the goal of the proceeding changes from reunification to another permanent arrangement. 42 U.S.C. § 671(a)(15)(F). A permanent placement in this act is governed by section 1002, but agencies should be considering those preferences during the reunification period.

Subsection (b)(2). When a child has a fit non-custodial parent available for placement, the court should order placement with the non-custodial parent, as they have intact Constitutional rights to the care, custody, and control of their child. *See In re Sanders,* 852 N.W.2d 524 (Mich. 2014); *Melius v. Songer*, 25 N.W.3d 801 (S.D. 2025).

Section 1002. Placement Preferences for Permanent Placements

(a) If the court knows under Section 203 or has reason to know under Section 204 the child who is the subject of the proceeding is an Indian child, this section applies to [:

(1)] an adoption [; and

(2) a placement under [(cite state statute governing regarding durable or permanent guardianships or alternative permanency placements that may occur after termination or suspension of parental rights)]].

(b) Except as provided in Section 1003, the court shall order placement of an Indian child in the following order of preference with:

(1) an extended-family member who is at least 18 years of age;

(2) a member of the Indian child's tribe;

(3) a family approved or specified by the Indian child's tribe;

(4) a member of an Indian tribe in which the Indian child is eligible for membership but which is not the Indian child's tribe as determined by the court under Section 207;

(5) an Indian who is not a member of the Indian child's tribe with whom the Indian child has a relationship;

(6) an Indian from a tribe that is culturally similar or linguistically connected to the Indian child's tribe; or

(7) another Indian family.

(c) When ordering the placement, the court shall apply the prevailing social and cultural standards:

(1) of the Indian tribe;

(2) of the Indian community in which the parent or extended-family reside; or

(3) maintained by the parent or extended-family members.

Comment

Source: 25 U.S.C. §§ 1915(a), (c), (d); 25 C.F.R. § 23.129, 130, 132

Subsection (a). The section follows ICWA's placement preferences for an "adoption" under 25 U.S.C. § 1915(a). States may choose to include other options if they determine the placement is occurring after a proceeding that is akin to a termination of parental rights.

Subsection (b). This subsection does not include the preference for a non-custodial parent, because if the court is making a permanent placement after either a termination of parental rights or equivalent, the parent's constitutional rights regarding the child should have been addressed in earlier proceedings under Article 6.

The federal placement preference for the third-tier placement is simply "another Indian family." Some states have refined this section to provide additional guidance to courts regarding the intention of Congress to "protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." H.R. Rep. No. 95-1386 at 23. The language of this subsection comes from Maine's state ICWA, Me. Rev. Stat. tit. 22 § 3948, and is similar to North Dakota's law, N.D. Cent. C. Ann. § 27-19.1-05. Other states give more deference to tribal preferences and direction. *See* Minn. Stat. Ann. § 260.771 ("the county shall defer to the judgment of the Indian child's Tribe as to the suitability of a placement").

Subsection (d). The prevailing social and cultural standards of an Indian community may include an urban Indian community that is not defined by a specific tribe but rather the community in which many tribal members find themselves, such as in urban settings. While this community is not the same as a federally recognized tribe, for children whose tribe does not participate in the case, an urban Indian organization may be able to provide context as to the family's social and cultural standards.

Section 1003. Tribal Preference Order

(a) If the tribal law of the Indian child's tribe establishes a different order of placement than under Section 1001(b)(2) or 1002(b)**,** the court ordering the placement, or an agency conducting a diligent search under Section 1005(a), shall apply.

(b) For the purposes of this section, tribal law does not include tribal customs.

Comment

Source: 25 U.S.C. § 1915; 25 C.F.R. § 23.131.

Subsection (a). Federal law uses the term "resolution" in 25 U.S.C. § 1915. However, that is no longer an accurate term for the ways in which tribes govern themselves. Instead, this act uses the first subsection of the definition of tribal law, which can include resolutions, as well as codes, ordinances, and precedential tribal court opinions.

Subsection (b). State courts have generally held that the tribe's order of preferences does not include letters regarding individual children, or unwritten tribal custom that has not otherwise been memorialized in a resolution, ordinance, policy, or statute. *See In re* A.F., 226 Cal.Rptr.3d 890 (Cal. Ct. App. 2017).

Section 1004. Parent and Child Preference and Parental Confidentiality

(a) In a proceeding identified in Section 103(a), the court shall**,** when appropriate, consider the preference of the Indian child or parent regarding placement.

(b) In a proceeding subject to [Article] 8, if a consenting parent requests confidentiality under Section 802, the court or agency shall give weight to the request in applying the preferences.

Comment

Source: 25 U.S.C. § 1915; 25 C.F.R. § 23.129.

Subsection (a). Courts should also be aware that a parent's preference, after having reviewed the placement options, can be a good cause reason to deviate from the placement preferences in Section 1006.

Subsection (b). In setting the placement preference section of federal law, Congress attempted to balance the rights and needs of parents with that of the tribes. This provision, which requires the court to consider parental preference when appropriate and allow a consenting parent to request anonymity, mirrors that federal law. However, Congress was also clear that this provision "is not meant to outweigh the basic right of the child as an Indian." H.R. Rep. No. 95-1386 at 24.

Because this provision can be considered protective for the parent, any state law must at least preserve these. There is some concern that in very small Indian tribes, it is difficult for a parent to have a confidential placement for adoption. However, there is an equal concern regarding the child's right to their identity and community, as well as a tribal concern regarding the obligation and responsibilities of the tribe to their children and families.

States may consider the standards created in the Uniform Judicial Interview of Children Act, which aids judges in interviewing children outside of open court while also protecting the due process rights of other parties.

Section 1005. Agency Diligent Search for Placement

(a) An agency shall conduct a diligent search that is periodic and ongoing for a placement in a proceeding identified in section 103(a) by making and identifying efforts for a placement that aligns with the preferences under this article at the commencement of the proceeding, which must include:

(1) contacting the Indian child's tribe;

(2) contacting the local urban Indian organization;

(3) searching for and identifying extended-family members;

(4) interviewing extended-family members; and

(5) providing the tribe with all information regarding extended-family members.

(b) If a placement is identified but does not satisfy requirements for placement, the agency shall:

(1) offer extended-family members an expedited foster-care license;

(2) assist extended-family members with practical supports through the licensing process and support relatives in overcoming barriers for licensure;

(3) conduct timely home studies for a placement that follows the preferences; and

(4) timely complete requirements under [cite to the state statute adopting the Interstate Compact on the Placement of Children] and request court orders as needed.

Comment

Source: 25 C.F.R. § 23.132(5); 42 U.S.C. § 671(a)(25); N.M. Stat. Ann. § 32A-28-21.

Subsection (a). Federal regulations allow for a court to find good cause to deviate from the placement preferences if there has been a "diligent search" and no "suitable placement" was found. 25 C.F.R. § 132(5). Courts and agencies have asked for direction on what is considered a "diligent search" for a placement This section is based on the New Mexico state ICWA that provided specific instruction for the diligent search. There is no diligent search provision in ICWA, only the requirement in the regulations with no additional guidance.

Subsection (b). All fifty states, the District of Columbia and the Virgin Islands have entered into the Interstate Compact on the Placement of Children. *See* National Center for Interstate Compacts, *Interstate Compact on the Placement of Children*, https://compacts.csg.org/compact/interstate-compact-on-the-placement-of-children/

Section 1006. Good Cause to Deviate from Preferences

(a) A party to a proceeding may move the court in a record to deviate from the preferences in Section 1001, 1002, or 1003 for good cause.

(b) On receipt of a motion made under subsection (a), the court shall make the motion a part of the court record.

(c) The party making a motion under subsection (a) has the burden of proving good cause by clear and convincing evidence.

(d) The court may order deviation from the preferences for good cause. The court shall enter the order in the court record. The order must be based on:

(1) the request of the Indian child's parent, if:

(A) the request is brought to the court by the parent or the parent's legal representative; and

(B) the parent states in a record that the parent reviewed any placement options that comply with the order of preference;

(2) the request of the Indian child, if the Indian child is of sufficient age and has the capacity to understand the decision being made;

(3) the request of the Indian child's tribe;

(4) the presence of a sibling attachment that can be maintained only through a

particular placement;

(5) the extraordinary physical, mental, or emotional needs of the Indian child, including specialized treatment services, that may be unavailable in the community where families who meet the placement preferences live; or

(6) the unavailability of a suitable placement after a finding by the court that a diligent search under Section 1005 is being or was conducted to find suitable placements meeting the preference criteria, but none has been located.

(e) The court may not order a deviation from the placement preferences based:

(1) on the socioeconomic status of one placement compared to another; or

(2) solely on the ordinary bonding or attachment from time spent in a non-preferred placement.

Comment

Source: 25 U.S.C. §§ 1915(a), (b); 25 C.F.R. § 23.132.

ICWA provides that courts shall follow the placement preferences absent "good cause to the contrary," with no additional guidance as to what that good cause might be. The federal regulations have provided some additional provisions, which are included in this section of the act. In addition, courts should be encouraged to consider post-placement change contact or visitation if it is in the best interest of the child.

Subsection (a). This section requires a party to bring the good cause claim, which follows the requirements of the federal regulations. 25 C.F.R. §23.132. The requirement of a party is intentional in contrast to other parts of the act that seek information from participants. This is to ensure only those with legal standing can object to a placement. This is in line with the other "good cause" section of this act, Section 406.

Subsection (c). The clear and convincing evidence standard, as well as the burden on the party making the good cause motion, comes from the federal regulations, 25 C.F.R. § 23.132(b) as well as state court opinions. *See* 81 Fed. Reg. 38843.

Subsection (d). The federal law does not provide any guidance on "good cause" to deviate from the placement preferences, other than a court shall follow the preferences absent good cause to the contrary. This lack of guidance lead to decades of inconsistent state court cases regarding what good cause can be. *See* Barbara Atwood, *Children, Tribes, and States*, 217-229 (2010). The good cause language in this act comes from those regulations with minor changes.

Subsection (e)(2). One common issue that arises in placement preference cases is the role of bonding and attachment. A recent Arizona Court of Appeals case where two placements—one unrelated foster family, and one family placement were weighed against each other, and the trial court based its decision to leave the child in the unrelated foster family based on the child's attachment to the foster family. *In re Dependency of M.K.*, __ P.3d __ (Ariz. Ct. App. 2026). However, the appellate court described this case as "precisely the type of case that ICWA was enacted to address." *Id.* at *9. The language of the federal regulations states a good cause determination "solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." 25 C.F.R. § 23.132. Because the state did not follow ICWA's requirements in an early hearing by not hearing the testimony of a qualified expert witness, the appellate court held the trial court could not base its decision "solely" on bonding and attachment because there were violations of ICWA. The appellate court reversed the trial court and found the child should be placed with their relative placement. The committee spent countless hours discussing this provision and heard from a range of expert observers. Ultimately, the committee chose to remove the language requiring the placement also be in violation of ICWA. That language that is unrelated to the concern of a court denying an appropriate family placement based on the bonding or attachment that occurs in an average foster care proceeding, "precisely the type of case that ICWA was enacted to address."

In addition, the bureau recognized that bonding and attachment arguments "have serious limitations" and "may mislead courts." 81 Fed. Reg. at 38846 (citing Comments of Casey Family Programs, et al., and literature including David E. Arredondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness*, 2 J. Ctr. For Fam. Child. & Cts. 109, 110–111 (2000)). One article, describing how formal attachment theory has been misused in child custody proceedings, explains that "[a]ttachment appeals as an intuitive, almost romantic theory" but that it has arisen "more from intuition than science. Attachment research is evolving and complex, and its findings can be contradictory[]." Pamela S. Ludolph & Milfred D. Dale, *Attachment in Child Custody: An Additive Factor, not a Determinative One*, 46 Fam. L.Q 1, 2, 3 (2012). When attachment theory is wielded in child custody cases, the arguments sometimes fail to account for rapidly evolving understandings of the social and emotional lives of young children and specifically fail to account for young children's resilience. *See id.* at 5–6. Importantly, research has not shown "a long-term link between attachment status and social and emotional outcome variables . . .." *Id.* at 7.

"Bonding" is an even murkier concept. Bonding is "a term that is bandied about regularly but has no consensual definition within psychology." *Id.* at 17. Early theories about the importance of bonding have been debunked and "[t]here is currently no commonly used assessment tool for 'bonding' or even a common understanding of the meaning of the term." *Id.* But because bonding, like attachment, feels intuitively meaningful, the concepts of bonding and attachment can be misleading to courts or be given undue weight. *See* Arredondo & Edwards, *supra*, at 110–11.

Scholars caution that if bonding and attachment are to be used in court, the theories should be advanced by experts who "should be able to explain how they are measuring relationship constructs, the psychometric properties of any formal measure, what the empirical support is for the approach, why the evaluator or clinician is using it in this case, and what its limitations are in this case." Ludolph & Dale, *supra,* at 39. They caution that credence should not be given to "extremely casual approaches" that lack this rigor. *Id.*

Section 1007. Placement Changes

(a) A court may order a change in placement for an Indian child from an out-of-home placement if the court:

(1) finds the petitioner sent notice under [Article] 3; and

(2) orders the Indian child:

(A) returned to the Indian child's parent or Indian custodian;

(B) placed with a non-custodial parent; or

(C) moved from a non-preferred placement to a preferred placement under this [article].

(b) A court may not order a change in placement for an Indian child from an out-of-home placement to a placement not included in subsection (a)(2) unless the court finds:

(1) the petitioner sent notice under [Article] 3;

(2) by clear and convincing evidence, that active efforts under Section 1104 were made, but were unsuccessful; and

(3) by clear and convincing evidence, including the testimony of a qualified expert witness who satisfies Section 1105, that:

(A) custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child; and

(B) a causal relationship exists between:

(i) the particular conditions in the home; and

(ii) the likelihood of serious emotional or physical damage to the child.

(c) Absent a a finding of a causal relationship under subsection (b)(3)(B), a finding under subsection (b)(3) may not be supported by evidence of:

(1) community or family poverty;

(2) isolation;

(3) single parenthood;

(4) custodian's age;

(5) crowded or inadequate housing;

(6) substance abuse; or

(7) nonconforming social behavior.

Comment

Source: 25 U.S.C. § 1916.

This section addresses 25 U.S.C. § 1916, which simply requires a court to follow the "provisions of this chapter" when moving a child from one placement to another that is not a return to the parents. If the court is returning the child to their parent, placing the child with the non-custodial parent who retains Constitutional rights to parent, or is moving a child to comply with Section 1001 or 1002, the court need not do any additional work. However, if the placement is something other than that, the court must follow the "provisions of this chapter," which are ICWA's substantive and procedural protections. This is the standard that exists in Section 506.

[Article] 11

Generally Applicable Requirements

Section 1101. Right to Intervene

(a) In a proceeding identified in Section 103(a), the Indian child's Indian custodian and Indian tribe have a right to intervene at any time. The tribe may designate a tribal representative to intervene on the tribe's behalf.

(b) The tribal representative in the proceeding:

(1) need not be licensed to practice law; and

(2) has all the rights of a party in the proceeding.

(c) An Indian custodian or Indian tribe must notify the court in a record if the Indian custodian or tribe intends to withdraw as a party to the proceeding.

[(d) An attorney who is not otherwise barred from practicing law in this state may appear in the proceeding without associating with an attorney licensed to practice in this state if the attorney establishes to the satisfaction of the [State Bar] that the attorney:

(1) will appear in state court for the limited purpose of participating in the proceeding under this [act]; and

(2) the attorney represents the Indian child's parent, Indian custodian, or tribe.]

Legislative Note*: A state should omit subsection (d) should be omitted if pro hac vice appearances are governed by court rules.*

Comment

Source: 25 U.S.C. § 1911(c); Neb. Rev. St. § 43-1504.

Subsection (a). ICWA provides an absolute right of intervention to the Indian child's tribe and Indian custodian. 25 U.S.C. 1911.

Subsection (b). State courts have held a tribe's right to intervene preempts state court rules requiring attorneys. *See State ex rel. Juv. Dep't of Lane Co. v. Shuey*, 850 P.2d 378 (Ore. Ct. App. 1993), *In re Elias L.*, 767 N.W.2d 98 (Neb. 2009). Because it is still rare for tribes to have attorneys in all of their ICWA cases to this day, state laws have mirrored this allowance. *See* Cal. Welf. & Inst. C. § 224.2; Mich. Comp. L. § 712B.3(r).

Subsection (c). Multiple state ICWA laws have incorporated this provision into their black letter, while others have used court rule. *Compare* Colo. Rev. Stat. Ann. § 19-1.2-113; Neb. Rev. Stat. § 43-1504(3); *with* Mich. Ct. R. 8.126; Utah Sup. Ct. R. 4-806(r).

Section 1102. Right to Access and Examine Records

(a) A party has the right to conduct discovery in a proceeding identified in Section 103(b) and to access the agency's records relating to the Indian child. The court in the proceeding may not order discovery of tribal records.

(b) In a [dependency], guardianship proceeding, [[third-party custody] proceeding,] or termination of parental rights proceeding subject to this [act], a party has the right to examine the records in the court record upon which a decision with respect to the proceeding may be based.

Comment

Source: 25 U.S.C. § 1912(c)

ICWA's language in 25 U.S.C. 1912(c) is similar to subsection (b). The committee decided that subsection (a) further clarified the intention of the law by using updated language including discovery.

Section 1103. Right to Representation

(a) In a proceeding identified in Section 103(b), [if the court determines an Indian child's parent or Indian custodian is indigent] the court shall appoint an attorney for the parent or Indian custodian.

[(b) [If a court determines it is in the best interest of the Indian child,] the court may appoint a stated-interest attorney for the Indian child.]

(c) If other law of this state does not authorize payment for the appointment of an attorney in the proceeding, the court shall itself or order the [court administrative agency] to follow the requirements of the federal regulation regarding payment for appointed counsel in state courts, 25 C.F.R. Section 23.13.

Legislative note*: Subsection (a) bracketed language should be omitted if the state does not require indigency for any parent in the listed proceedings.*

Subsection (b) can only be omitted if state law already provides a stated interest attorney for every child without request. The internal brackets in subsection (b) may be omitted if a state appoints a stated interest attorney upon request, with no best interest requirement.

Comment

Source: 25 U.S.C. § 1912(b).

Subsection (a). Nearly all states also provide counsel for indigent parents, but a reminder of that right under both this act and state law is appropriate given the purpose of the law.

Subsection (b). Federal law now provides a floor for the representation of children in child dependency matters. The Child Abuse Prevention and Treatment Act (CAPTA) require states that receive federal money to provide at least a guardian ad litem (GAL) to children in dependency proceedings, though the type of representation is up the individual state.

In practice, children receive one, or both, of the following types of representation: One is a “best interest” representative, and another is a “stated interest” representative.

A best interest representative does exactly that—represents to the court what they consider to be in the child’s best interest. A child may or may not agree with this individual’s position, but the child does not have any ability to change the best interest representative’s position. A GAL is always a best interest representative, regardless of whether they are law trained or not. States vary as to whether they require a lawyer GAL or allow non-lawyer, volunteer GALS, which are sometimes called a court appointed special advocate (CASA).

A stated interest representative is a lawyer and establishes an attorney-client relationship with the child. Their job is to provide the court with the child’s stated interests in the dependency case. The question of child representation is the subject of advocacy from many groups, including the American Bar Association, which has developed standards of practice for lawyers who represent children, as well as the National Association of Counsel for Children, in their *Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings* (2021).

States vary as to whether children are immediately appointed a stated interest attorney, or if the child must tell the court they do not agree with the GAL’s positions and request a stated interest attorney. For children in states such as New York, children already receive a stated interest counsel at the commencement of the proceeding. However, in other states such as Oregon, a non-law trained volunteer CASA may be appointed as the best interest attorney. Both are considered to have met the federal minimum standard for all children. *See* Child Welfare Information Gateway, *Representation of Children in Abuse and Neglect Proceedings*, (2019).

For Indian children, ICWA provides a federal right to counsel if a court determines it is in their best interest. States that provide stated interest attorneys to all children may chose to eliminate this provision. States that only provide them upon request may chose to have the court automatically appoint an attorney upon request, in which case, the state should eliminate the “best interest” bracketed language.

Section 1104. Active Efforts

(a) The court shall enter in the court record a detailed statement of active efforts that have been and are being made for the Indian child and Indian child’s parent.

(b) Active efforts must be:

(1) made to prevent the breakup or promote the reunification of the Indian child’s family;

(2) affirmative, thorough, and timely;

(3) intended primarily to maintain or reunify the Indian child with their family;

(4) tailored to the facts and circumstances of the case;

(5) provided to the maximum extent possible in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe;

(6) conducted in partnership with the Indian child and the parent, extended-family members, Indian custodian, and tribe; and

(7) responsive to the case plan.

(c) If an agency is involved in the proceeding, the agency shall assist a parent or Indian custodian:

(1) through the steps of a case plan; and

(2) access and develop the resources necessary to satisfy the plan.

(d) Active efforts may include:

(1) conducting a comprehensive assessment of the circumstances of the family, with a focus on safe reunification as the most desirable goal;

(2) identifying appropriate services that are accessible to the parent and Indian child;

(3) helping the parent to overcome obstacles preventing a parent from accessing services, including assisting a parent in obtaining the services;

(4) creating an appropriate safety plan to keep the Indian child in the home during the proceeding;

(5) taking steps to keep siblings safely together;

(6) identifying, notifying, and inviting representatives of the tribe to participate in providing support and services to the family and in family team meetings, permanency planning, and resolution of placement issues;

(7) conducting a diligent search for the Indian child's extended-family members and contacting;

(8) consulting with extended-family members to provide family structure and support for the Indian child and the parent;

(9) offering and employing all available and culturally appropriate family-preservation strategies and facilitating the use of remedial and rehabilitative services provided by the tribe;

(10) supporting regular visits with the parent or Indian custodian in the most natural setting possible and supporting 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 Indian child;

(11) identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and assisting the parent and, if appropriate, family, in accessing and using the resources;

(12) monitoring progress and participation in services;

(13) considering alternative ways to address the needs of the parent and family if the preferred services do not exist or are unavailable; and

(14) providing post-reunification services and monitoring.

Comment

Source: 25 U.S.C. § 1912(d); 25 C.F.R. § 23.1.

Title IV-E requires reasonable efforts to keep or reunify children with their families. 42 U.S.C. § 671(a)(15). However, under ICWA, the state and agency must make *active efforts* to keep Indian families intact. Active efforts are affirmative, thorough, and timely efforts under Section 1104 and 25 C.F.R. § 23.1. There is no formula for active efforts; it must be provided on a case-by-case basis. *In re Adoption of Micah H.*, 301 Neb. 437, 438 (2018). While Title IV-E does not address active efforts for Indian children, ICWA requires that culturally competent active efforts are provided. The active efforts requirement applies, as if an Indian child is "at risk" of entering the foster care system, this triggers both the application of ICWA and eligibility for early state services. Tribes should be consulted to provide culturally appropriate services that provide access to culture and affirm the family's tribal identity. It may be appropriate for the tribe to implement services.

Subsection (b). Active efforts prior to the adoption of the federal regulations varied considerably by state. *See* State *ex rel.* C.D. v. State, 200 P.3d 194 (Utah Ct. App. 2008). This lack of uniformity drove, in part, the federal regulations on this topic, including the expanded definition. 81 Fed. Reb. 38782 (June 14, 2016). The Department of Interior explained, ". . . Congress intended this requirement to provide vital protections to Indian children and their families by requiring that support be provided to keep them together, whenever possible . . . The 'active efforts' requirement is one of the primary tools provided in ICWA to address [the failure of state agencies] and should thus be interpreted in a way that requires substantial and meaningful actions by agencies to reunite Indian children with their families." 81 Fed. Reg. 38790 (June 14, 2016).

Subsection (d). Because ICWA did not define the term "active efforts," the federal regulations and other state ICWA laws provide a somewhat granular detail of this provision. This section of the law is directed at agencies, which often prefer a specific articulation of active efforts, rather than guessing and trying to prove it up on appeal. However, while uniformity is the goal, case plans that provide active efforts should also be tailored and individualized for the family. There will be some fact patterns where not every element listed in subsection (d) would be appropriate for the family. Agencies are encouraged to do as many of them as possible, but this also provides some flexibility in certain situations, such as cases involving physical or sexual abuse by a parent.

Section 1105. Qualified Expert Witness

(a) To satisfy the requirements of Section 506(c)(2), 509(b)(1), 604(a)(4), 703(b)(5), [704(c)(5),] or 1007(b)(3), at least one qualified expert witness must be:

(1) able to provide testimony regarding:

(A) whether custody by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child; and

(B) the prevailing social and cultural standards of the Indian child's tribe; and

(2) one of the following:

(A) an individual designated by the Indian child's tribe as the expert witness;

(B) a member of the Indian child's tribe recognized by the tribe as knowledgeable in tribal customs pertaining to family organization and childrearing practices;

(C) a member of another tribe recognized by the Indian child's tribe as knowledgeable in the customs of the Indian child's tribe based on the member's knowledge of the delivery of culturally appropriate services to Indians and the Indian child's tribe;

(D) an individual recognized by the Indian child's tribe as:

(i) having substantial experience in the delivery of culturally appropriate child and family services to Indians; and

(ii) knowledgeable in prevailing social and cultural standards and childrearing practices within the Indian child's tribe; or

(E) if the court finds the petitioner is unable, after making a diligent effort, to proffer an individual who satisfies subparagraph (A), (B), (C), or (D), an individual otherwise qualified to testify as an expert witness under paragraph (1).

(b) If the petitioner is unable to proffer a single qualified expert witness who satisfies subsection (a)(1), the petitioner must proffer:

(1) a qualified expert witness who satisfies subsection (a)(1)(A); and

(2) another qualified expert witness who satisfies subsection (a)(1)(B).

(c) A non-tribal agency caseworker regularly assigned to the Indian child may not serve as a qualified expert expert providing the testimony required by subsection (a)(1) but may provide other testimony if otherwise admissible under applicable law.

(d) Nothing in this section precludes a party from proffering other expert witnesses and seeking the court's qualification for them to testify.

Comment

Source: 25 U.S.C. §§ 1912(e), (f); 25 C.F.R. § 23.122.

This section discusses who can be a qualified expert witness (QEW) for the purposes of the burden of proof required for a removal or a termination of parental rights. In each section of this act where the QEW appears, the hearing must be held with all the requirements of other law of this state, which governs all other witnesses. This section does not limit the court from hearing from other experts, witnesses, and expert witnesses the court qualifies. Indeed, in practice courts hear from all sorts of witnesses and experts in dependency proceedings. This includes a wide variety of medical practitioners, educational development experts, and social scientists. For a discussion of witnesses and weight in the context of ICWA, *see In re Dependency of M.K.*, __P.3d__ (Ariz. Ct. App. 2026) (where the trial court heard from a pediatrician, an early intervention specialist, a Native health professional, as well as a QEW as required by ICWA)

Subsection (a). In promulgating the federal regulations, the Department of Interior stated ". . . expert testimony presented to State courts should reflect and be informed by . . . cultural and social standards [of the Indian child's tribe]. This ensures that relevant cultural information is provided to the court and that the expert testimony is contextualized within the tribe's social and cultural standards." 81 Fed. Reg. 38829 (June 14, 2016). However, the regulations stated a qualified expert witness (QEW) "must" testify to the evidentiary burden (the likelihood of serious emotional or physical damage), and "should" be able to testify as to the prevailing standards of the Indian child's tribe. The committee has interpreted "should" as "must" rather than "may." While Congress provided limited information on what was intended by the requirement of a QEW, in the House Report accompanying ICWA, it wrote "the abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life *and* required a sharper definition of the standards of child abuse and neglect." H.R. Rep. 95-1386 at 11 (1978) (emphasis added). Congress was concerned with courts removing children with no objective basis.

Because ICWA and the regulations do not articulate who should or can be a QEW, many state laws identify and prioritize who can be a qualified expert witness based on their knowledge of the Indian child's tribe. *See* Iowa Code Ann. § 232B.10, MCL §712B.17, Minn. Stat. Ann. §260.771, Nevada AB No. 444, N.M. Stat. Ann. § 32A-28-17. The language of paragraph two act mimics those laws, many of which are based on the language of the original 1979 BIA ICWA Guidelines.

There are times when an Indian child's tribe does not participate in the proceeding. This does not relieve the petitioner of their obligation to obtain QEW testimony. In those situations, the petitioner often contacts other local tribes or the state social workers to determine how to identify a witness that meets the requirements of the law. Some states and tribes have developed approved lists of potential QEWs, which others prefer to work together in other ways.

Subsection (b). While subsection (a) requires QEW testimony to address both the burden of proof and the cultural context of the Indian child's tribe, this subsection allows for the court to hear from two different QEW to address the two different prongs of the burden. While some state courts have held this to be an appropriate way to address the QEW testimony, states should be careful to not subordinate the testimony regarding the Indian child's tribe. Indeed, Congress specifically addressed times when issues that seem non-cultural are in fact times when a court should be hearing from a Native QEW. Congress used the issue of alcohol abuse as an example of when courts *should* hear from experts who are Native. H.R. Rep. 95-1386 at 10 (1978) (mentioning Dr. Edward P. Dozier of Santa Clara Pueblo on this topic).

Subsection (c). Congress stated the qualified expert witness "is meant to apply to expertise beyond the normal social worker qualifications." H.R. Rep. No. 95-1386 at 22. This language from the regulations also makes clear that the social worker cannot be the one who is handling the case for the state agency.

Subsection (d). In practice, courts hear from all kinds of experts in a child dependency proceeding. This section makes clear a court may qualify other witnesses without limit. To meet the evidentiary burdens under Section 506 and 604, however, the court *must* hear from at least one qualified expert witness who can meet the requirements of subsection (a). The court may hear from as many other qualified experts as it wishes.

[Section 1106. Extended-Foster-Care Program]

[(a) In this section "extended-foster-care program" means the program under [cite to state statute governing a program that allows an individual to remain in or re-enter foster care after the individual attains 18 years of age].

(b) The requirements of [Article 5] apply to the extended-foster-care program for children if:

(1) the proceeding involves an Indian child;

(2) the Indian child has attained the of 18 years of age and is under [21] years of age; and

(3) the Indian child consents to the application of this [act] to the proceeding.]

Legislative Note: *A state that allows for extended foster care may choose to enact this section as well as the definition of Indian child to allow for application of this act beyond 18 years of age for a child under court supervision. The state should substitute a higher age in subsection (b)(3) to align with state law.*

Comment

Source: 42 U.S.C. § 675(8)(B)(iv).

In 2008, Congress allowed states to expand their foster care to children until they are 21 years old. P.L. 110-351. This allows states to continue drawing down funds from the federal government until that time. States may also us their own state money to fund foster care beyond 21 years.

Section 1107. Right to Information

If requested by an individual who was the subject of an adoption, is at least 18 years of age, and was an Indian child at the time of the adoption, the court that entered the final decree of adoption shall inform the individual of:

(1) any tribal affiliation of the individual's biological parents; and

(2) other information necessary to protect any right or benefit, including tribal membership, resulting from the individual's relationship to the tribe.

Comment

Source: 25 U.S.C. § 1917.

[Article] 12

Enforcement

Section 1201. Vacated Orders or Dismissal of Proceeding

Alternative A

(a) A motion to vacate an order or judgment or dismiss a proceeding identified in Section 103(a) due to a violation of [Articles] 3, 4, 5, 6, 7, 8, 9, 10, or 11 may be filed in the proceeding, or in another court of competent jurisdiction, by:

Alternative B

(a) A motion to vacate an order or judgment or dismiss a proceeding identified in Section 103(a) due to a violation of Articles 3, 4, 5, 6, 7, 8, 9, or 11 may be filed in the proceeding or in another court of competent jurisdiction, and a violation of Article 10 may be filed in the proceeding, by:

End of Alternatives

Comment

Alternative A includes violations of Article 10. Alternative B excludes Article 10.

(1) an Indian child who is the subject of the proceeding;

(2) the Indian child's parent or Indian custodian from whose custody the Indian child was removed or whose rights were terminated; or

(3) the Indian child's tribe.

(b) If the court determines the order or judgment violated this [act], the court may vacate the order or judgment, dismiss the proceeding, or order an appropriate remedy.

(c) If the court vacates the order or judgment, the court shall order:

(1) additional time for reunification if the vacated order or judgment did not comply with Section 1104;

(2) the Indian child immediately returned to the Indian child's parent or Indian custodian if the vacated order or judgment resulted in removal or placement of the Indian child;

(3) restoration of parental rights if the vacated order or judgment terminated parental rights;

(4) the case transferred to tribal jurisdiction if the vacated order or judgment improperly denied tribal court jurisdiction.

(d) An order returning the Indian child or restoring parental rights under this section may include a transition plan without unnecessary delay for the physical custody of the Indian child and temporary court-supervised custody.

(e) Nothing in this section limits a party's right to pursue an interlocutory appeal under other law of this state.

Comment

Source: 25 U.S.C. § 1914; 25 C.F.R. § 23.137.

Subsection (a). Alternative A is the language of 25 U.S.C. § 1914, Alternative B includes the Article 10, which is not included in § 1914, but states may choose to include it. In practice, violations of other articles are likely to affect decisions made under Article 10.

The parties with the right to vacate an order or dismiss a proceeding also have the right to do so on behalf of other parties. For example, courts have held parents have the right to appeal lack of notice to a tribe, *In re A.W.*, 251 Cal.Rptr.3d 50 (Cal. Ct. App. 2019). or that a tribe had standing to appeal a termination of parental rights. *See In re P.R.*, 186 Cal.Rptr.3d 883 (Cal. Ct. App. 2015).

Subsections (c), (d). Federal law and regulations do not provide any guidance to courts on how to what to do with a petition to invalidate an action made in violation of ICWA. This provision provides courts with guidance in those situations.

Subsection (e). Courts have held that the protections of 25 U.S.C. § 1914 include a preemption of state court rules requiring preservation of an issue for appeal. *See Dep't of Human Serv's v. J.G.*, 317 P.3d 936, 944 (Ore. Ct. App. 2014).

Section 1202. Improper Removal

(a) If a petitioner does not comply with this [act] when removing an Indian child from the custody of the Indian child's parents or Indian custodian, or retains custody in violation of this [act], the Indian child's parent, Indian custodian, or tribe may move the court in a record to return the Indian child to the parent or Indian custodian.

(b) If the court finds the Indian child was removed or retained in violation of this [act] or other law of this state, the court shall:

(1) decline jurisdiction and return the Indian child to the parent or Indian custodian; or

(2) make a finding that returning the Indian child to the parent or Indian custodian would subject the Indian child to substantial and immediate danger or threat of danger.

(c) If the court makes a finding under subsection (b)(2), the court shall:

(1) order the agency to initiate a proceeding under [Article] 5; and

(2) hold a hearing under Section 504 not later than the period specified in [cite to state statute governing limitations period for preliminary hearings].

Comment

Source: 25 U.S.C. § 1920; 25 C.F.R. § 23.114.

Subsection (b)(2). This is the third and final burden standard from ICWA. 25 U.S.C. § 1920. It is only used in this section. While § 1920 is rarely litigated, it is notable the Washington court systems have used this section when parents have appealed that without active efforts, a removal is improper. *See Matter of Dependency of A.T.*, 541 P.3d 1079 (Wash. Ct. App. 2024).

[Article] 13

Miscellaneous Provisions

Section 1301. Full Faith and Credit to Tribal Court Orders

This state gives full faith and credit to the public acts, records, and judicial proceedings of an Indian tribe applicable to proceedings subject to this [act] to the same extent that this state gives full faith and credit to the public acts, records, and judicial proceedings of another state.

Comment

Source 25 U.S.C. §1911(d).

Section 1302. Recordkeeping

(a) The [designated agency] shall carry out the record keeping duties under this [article].

(b) The [designated agency] shall notify the appropriate official at the bureau that the [designated agency] is the designated repository for the records identified in this section.

(c) The [designated agency] shall maintain a record of each placement of an Indian child under this [act]. The record must contain, at a minimum:

(1) the petition or complaint;

(2) all substantive orders entered in the proceeding;

(3) the complete record of the placement determination including:

(A) the findings in the court record; and

(B) the home study; and

(4) if the placement deviates from the placement preferences, detailed records of the efforts to comply with the preferences.

(d) The [designated agency] shall maintain a record in a confidential format of a final adoption decree or order in an adoption of an Indian child including:

(1) the Indian child's birth name and birthdate, tribal affiliation, and name after adoption;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents;

(4) the name and contact information of any agency with records or information relating to the adoption;

(5) any affidavit signed by a biological parent asking that the parent's identity remain confidential; and

(6) any record relating to membership or eligibility for membership of the Indian child.

(e) The [designated agency] shall send the record to the chief of the Division of Human Services, or a successor office of the bureau not later than 30 days after entry of the record in the court record.

(f) The [designated agency] shall send the record in subsection not later than 14 days after receipt of a request from the Indian child's tribe or the Secretary.

(g) On request by an individual who has attained 18 years of age and was the subject of an adoption subject to this [act], the [designated agency] shall inform the individual of:

(1) any tribal affiliation of the individual's biological parents; and

(2) other information necessary to protect any right or benefit, including tribal membership, resulting from the individual's relationship to the tribe.

(h) On request by the adoptive parent, foster parent, or the Indian child's tribe, the [designated agency] shall inform the requester of the tribal affiliation of the Indian child's biological parents and other information necessary to protect any right or benefit, including tribal membership, resulting from the Indian child's relationship to the tribe.

Legislative Note: *A state should specify in the brackets each time they appear which department, agency, or court is tasked with maintaining these records under the federal regulations and law.*

Comment

Source: 25 U.S.C. § 1915(d), 1951; 25 C.F.R. §§ 23.140, 141.

Section 1303. Presence and Appearance in Court

To satisfy a requirement of this [act] for presence or appearance in court, at a hearing, or otherwise, a party may appear, regardless of whether authorized under other law of this state, before a court in person or through any alternative method available to the court, including synchronous telecommunication technology, as permitted by the court.

Comment

Source: 25 C.F.R. § 23.133.

Section 1304. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among states that enact it.

Section 1305. Relation to Electronic Signatures in Global and National Commerce Act

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq. [, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

[Section 1306. Severability]

[If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state stating a general rule of severability.*

[Section 1307. Repeals; Conforming Amendments]

[(a) . . .

(b) . . .]

Legislative Note: *A state should examine its statutes to determine whether conforming revisions are required by provisions of this act.*

Section 1308. Effective Date

This [act] takes effect […].