Chapter 7

THE INDIAN CHILD WELFARE ACT

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SYNOPSIS

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3. For more additional discussions of the statute and its application, see Kathryn E. Fort, *American Indian Children and the Law: Cases and Materials* (2019), Barbara Ann Atwood, *Children, Tribes and States* (2010); Kelly Gaines-Stoner et al, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* (3rd ed. 2018); The Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act* (2007), *available at* www.narf.org/icwa.

§ 7.1 • INTRODUCTION

Although the Indian Child Welfare Act ("ICWA" or "the Act") was enacted more than 40 years ago, significant problems remain with the statute's implementation.[4] One major problem facing Indian families is the overrepresentation of Indian children placed in out-of-home care.[5] In 2017, the National Council of Juvenile and Family Court Judges found that nationally American Indian children are overrepresented in foster care; the proportion of American Indian foster children is 2.7 times their representation in the overall population, with far worse disproportionality numbers in individual states.[6] Counsel must be familiar with the detailed provisions of ICWA and take every reasonable step to ensure that its provisions are carefully and faithfully applied.

Regardless of where a child protection lawyer practices, they will likely encounter a case that requires the application of ICWA. ICWA is a federal law enacted in accordance with the federal government's trust obligation to Indian nations that governs child protection proceedings in state court when the child involved meets the definition of an "Indian child."[7] Passed in 1978 in response to the federal, state, and private agencies' wholesale removal of American Indian children from their families, ICWA addresses the jurisdiction between states and

4. General Accounting Office, *Indian Child Welfare Act, Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States* (2005), *available at* www.gao.gov/products/GAO-05-290.

5. *Id.* at 11.

6. Shamini Ganasarajah et al., National Council of Juvenile and Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care, Fiscal Year 2015* (2017), www.ncjfcj.org/wp-content/uploads/2017/09/NCJFCJ-Disproportionality-TAB-2015_0.pdf.

7. 25 U.S.C. § 1902.

tribes, provides minimum federal standards for state court proceedings, requires higher burdens of proof for removal and termination of parental rights, and provides for the rights of tribes to intervene as parties in cases involving their children. As such, the Act provides a host of specialized protections for Indian children and their families.

While the Act applies only to American Indian children and families, it is constitutionally sound because the law was enacted pursuant to the United States' unique relationship with American Indian nations. ICWA is narrowly tailored to apply to children who are members of, or eligible for membership in, federally recognized Indian tribes. While the practices required by ICWA are generally thought of as the "gold standard"[8] for all child protection matters, the law itself only applies to American Indian and Native Alaskan Village children in specific child protection proceedings, including foster care placements, terminations of parental rights, pre-adoptive placements, and adoptions.[9]

In addition to the statute itself, counsel should understand the application of the 2016 federal regulations governing all ICWA cases.[10] The regulations are binding on state courts in ICWA cases. There is also a tremendous amount of information in the front matter to the regulations where the Department of Interior addressed all major comments when adopting the regulations. Also in 2016, the Department adopted new guidelines,[11] the federal government's official interpretation of ICWA. Most states consider the guidelines to be persuasive authority because the Interior Department is the lead federal agency charged with administering the United States' trust obligations to Indian people.[12]

Beyond ICWA, many states have enacted Indian child welfare laws, which may vary slightly from the federal law. Because the federal law provides the

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8. Amicus Brief of Casey Family Programs et al, at 2, 4, 7, *Adoptive Couple v. Baby Girl*, No. 12-399 (March 28, 2013).

9. 25 U.S.C. § 1903(1).

[10] 25 C.F.R. pt. 23 (2016); see also Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. 38,778 (June 14, 2016) (final regulation with additional explanatory material).

11. Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act (Dec. 2016) at www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc20956831.pdf.

[12] *See e.g., In re A.L.D.*, 417 P.3d 342, 346 (Mont. 2018), *In re April S.*, 467 P.3d 1091, 1097 (Alaska 2020), *In re Guardianship of Eliza W.*, 938 N.W.2d 307, 316 (continuing to recognize the 2016 guidelines as persuasive authority replacing the 1979 guidelines).

"federal minimum standards"[13] for child protection cases involving American Indian children, states that have enacted Indian child welfare laws are increasing protections of, and providing clarification for, American Indian families. These state statutes are often a result of work begun as cooperative agreements between states and tribes.[14]

§ 7.2 • HISTORY

ICWA is a statute designed to combat decades, if not centuries, of federal, state, and private interference in the lives of Indian people.[15] After the time of contact and the creation of the United States federal government, the central tenet of child welfare policies in North America for Native children centered around assimilation. By the end of the nineteenth century, assimilation programs involved large-scale removals of Native children from their families to military-style boarding schools.[16] *Cohen's Handbook of Federal Indian Law* describes this military-style, forced "education" program for Native children as

> the single most important tool in nineteenth-century assimilation and "civilization" policy. . . . Schooling was intended to provide Indian children with a substitute for a civilized home life. The full brunt of reeducation was directed toward Indian children, who were shipped away from the reservation or brought together at reservation schools. The philosophy was most simply expressed by [Colonel] Richard Henry Pratt, the founder of Carlisle School: "Kill the Indian and Save the Man."[17]

13. 25 U.S.C. § 1921.

14. 25 U.S.C. §§ 1919, 1921; *see, e.g.*, Or. Indian Child Welfare Act, H.B. 4214, signed into law June 30, 2020 (amending scattered provisions of the Oregon Child Welfare Statutes), Minn. Stat. §§ 260.775, *et seq.* (2013). *See also* Kathryn E. Fort, "Waves of Education: Tribal State Court Cooperation and the Indian Child Welfare Act," 47 *Tulsa L. Rev.* 529, 538-41 (2012) (discussing Michigan's cooperative work leading to the Michigan Family Preservation Act, Mich. Comp Law §§ 712B.1, *et seq.* (2012)).

15. For more substantial discussion of the history and work surrounding the passage of ICWA, see Margaret George, *A Generation Removed* (2013).

16. H.R. Rep. No. 95-1386, at 9 (1978).

17. *Cohen's Handbook of Federal Indian Law* 76 (2012 ed.).

Federal and state governments removed children from their homes and communities, forced them to speak English and practice Christianity, and forbade them from participating in traditional tribal cultural activities, including religion, dress, language, and food. The atrocities of boarding schools in the United States are well documented.[18]

The continuing legacy of the boarding school harm exists in the form of intergenerational trauma today. Children taken from their parents and raised in non-Native, non-familial environments were not taught the parenting techniques practiced in their communities since time immemorial.[19] Instead, these children only had experience with the western style of abusive discipline that was practiced in the boarding schools. Conditions in the boarding schools were often brutal, and many children suffered physical and sexual abuse.[20] When these children raised in the boarding schools in turn had their own children, they lacked the parenting skills to raise their children into healthy adults.[21]

By the time of ICWA's passage, Congress was attempting to alleviate a terrible crisis of national proportions — the "wholesale separation of Indian children from their families."[22] Hundreds of pages of testimony taken from American Indian leaders and families over the course of four years confirmed for Congress that many state and county social service agencies and workers, with the approval and backing of many state courts and some federal Bureau of Indian Affairs officials, had engaged in the systematic, automatic, and across-the-board removal of Indian children from Indian families and into non-Indian families and

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18. *Boarding School Blues* (Clifford E. Trafzer et al eds., 2006); Brenda J. Child, *Boarding School Seasons: American Indian Families*, 1900-1940 (1998).

19. *See In re* Z.J.G., 471 P.3d 853, 859-864 (Wash. 2020).

20. Carol A. Hand, "An Ojibwe Perspective on the Welfare of Children: Lessons of the Past and Visions for the Future," 28 *Children and Youth Services Rev.* 20, 27 (2006). *See also id.* at n. 3 (noting that children placed in boarding schools "were subjected to military discipline, malnutrition, hard manual labor, and religious and political indoctrination. Harsh physical punishment and abuse, as well as sexual abuse, were not uncommon. Contagious diseases spread easily in these unhealthy conditions leading to many deaths.").

21. Maria Yellow Horse Brave Horse, "The Impact of Historical Trauma: The Example of the Native Community," *Trauma Transformed: An Empowerment Response* 176, 181-84 (Marian Bussey & Judith Bula Wise eds., 2007); *see also* Carol A. Markstrom, *Empowerment of North American Indian Girls* 44 (2008).

22. Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes, H. R. Rep. 95-1386, at 9 (July 24, 1978) ("1978 House Report"); *see also Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

communities.[23] State governmental actors following this practice removed between 25 and 35 percent of all Indian children nationwide from their families, placing about 90 percent of those removed children into non-Indian homes.[24]

In 1978, after decades of advocacy by tribal citizens,[25] Congress enacted ICWA.[26] In doing so, Congress made findings based upon studies of the number of children removed from their families as well as anecdotal reports of removals of Indian children and the impact such removals had on families, children, and tribes.[27] Congress found that:

- "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children. . . . "
- "[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of children are placed in non-Indian foster and adoptive homes and institutions."
- "[T]he States . . . have often failed to recognize the essential tribal relations of Indian people and cultural and social standards prevailing in Indian communities and families."[28]

With this backdrop, Congress enacted ICWA in an attempt to remedy the unwarranted removals of Indian children from their families and tribal communities.[29]

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23. 25 U.S.C. §§ 1901(4)-(5); *see also Holyfield*, 490 U.S. at 32-33.

24. *Holyfield*, 490 U.S. at 32-33 (citing Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong, 2d Sess., at 3 (statement of William Byler)); *see also* American Indian Policy Review Commission Task Force Four, Report on Federal, State, and Tribal Jurisdiction 79 (July 1976).

25. *See generally* Margaret Jacobs, *A Generation Removed* (2013).

26. 25 U.S.C. §§ 1901, *et seq.*

27. *See* H.R. Rep. No. 95-1386 (1978).

28. 25 U.S.C. § 1901.

29. Recently, three foster families and three states sued the federal government claiming ICWA is unconstitutional. The Fifth Circuit found several provisions of ICWA and related regulations to be invalid. *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (en banc). This chapter includes citations to where the decision found certain provisions of ICWA to be unconstitutional. However, the decision is not binding in state courts and should not affect day-to-day practice in this area.

§ 7.3 • THE INDIAN CHILD WELFARE ACT[30]

§ 7.3.A—Definitions; Application

Because of the history of unnecessary and precipitous removals, ICWA establishes minimum federal standards that ensure Indian children are not removed from their homes unnecessarily. ICWA represents the "federal policy that, where possible, an Indian child should remain in the Indian community."[31] It begins this effort by defining several important terms, which establishes from the outset of the proceeding whether the Act applies.[32]

First, the statute defines a "child custody proceeding" as any action involving the placement of a child into foster care; any action resulting in the termination of parental rights; a pre-adoptive placement, which is defined as a placement after the termination of parental rights, but prior to an adoptive placement; and any action resulting in a final decree for adoption.[33] In the case of a "foster care proceeding," the removal of a child from his or her home includes the qualification, "where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated."[34] ICWA specifically includes placement with a guardian in its definition of foster care proceedings, and most state courts have interpreted this to include guardianships.[35] ICWA does not apply to child custody disputes between parents.[36]

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30. For more additional discussions of the statute and its application, see Kathryn E. Fort, *American Indian Children and the Law: Cases and Materials* (2019); Barbara Ann Atwood, *Children, Tribes and States* (2010); Kelly Gaines-Stoner et al, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* (3rd ed. 2018); The Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act* (2007), available at www.narf.org/icwa.

31. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989) (citing H. Rep. 95-1386).

32. 25 U.S.C. § 1903.

33. 25 U.S.C. § 1903(1).

34. *Id.*

35. *E.g.*, *Empson-Laviolette v. Crago*, 760 N.W.2d 793 (Mich. Ct. App. 2008) (this case led directly to the inclusion of guardianships in Michigan's Indian Family Preservation Act codified at Mich. Comp. L. § 712B.13 (2013); *see* Kathryn E. Fort, "Waves of Education: Tribal State Court Cooperation and the Indian Child Welfare Act," 47 *Tulsa L. Rev.* 529, 542 (2012)); *In re Guardianship of* Eliza W., 938 N.W.2d 307 (Neb. 2020); *In re Guardianship of J.C.D.*, 686 N.W.2d 647 (S.D. 2004); *In re Guardianship of Ashley Elizabeth R.*, 863 P.2d 451 (N.M. Ct. App. 1993).

36. 25 U.S.C. § 1903(1); however, there is unreported case law regarding third party custody cases involving family members. *See In re Acevedo and Jordan*, 10

However, termination of parental rights in a stepparent adoption proceeding is subject to the Act, as the Act applies to "any action resulting in" the termination of parental rights.[37] If ICWA applies, its provisions and protections pertain to both Native and non-Native parents and family members.[38] The Act applies to status offenses, but not to "an act, if committed by an adult, [that] would be deemed a crime."[39] However, whether the Act applies to delinquency cases is less settled.[40] If the court is terminating parental rights, or a child is being kept out of his or her home because of concerns of the home, rather than due to the delinquency charge, ICWA's protections may apply.[41]

Next, ICWA defines an "Indian child" as "any unmarried person who is under age 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."[42] Each tribe is the sole arbiter of its membership.[43] Tribes establish different criteria for citizenship, usually though their constitutions and tribal administrative procedures. Consequently, the method of establishing citizenship will vary from tribal nation to tribal nation, and therefore requires the involvement of the child's tribal nation to determine if ICWA applies.[44]

Finally, in ICWA, an "Indian tribe" refers to tribal nations and Alaska Native villages that are formally recognized by the Secretary of the Interior as

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Wash.App. 2d 1052, 2019 WL 5400918, at *3 (2019) (unreported) (finding a "nonparental custody petition" by child's grandmother was a "foster care placement" under ICWA).

37. 25 U.S.C. 1903(1)(ii). *E.g.*, *In re N.B.*, 199 P.3d 16 (Colo. Ct. App. 2007); *In re T.A.W.*, 354 P.3d 46 (Wash. Ct. App. 2015).

38. *See In re Adoption of T.A.W.*, 354 P.3d 46 (Wash. Ct. App. 2015) (holding that the active efforts provision of ICWA applied to the termination of parental rights of the non-Indian father); *but see In re S.D.*, 599 N.W.2d 772, 775 (Mich. App. 1999) (holding active efforts was not required because father was non-Indian, fact pattern was particularly egregious, and children were staying with Native mother).

39. 25 U.S.C. § 1903(1).

40. *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).

41. B.J. Jones et al, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* 29 (2d ed. 2008).

42. 25 U.S.C. § 1903(4).

43. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).

44. ICWA uses "membership" in the statutory language, though many tribal nations prefer to use "citizenship" to describe the relationship between the government and its citizens. For the purposes of this chapter, these terms can be used interchangeably.

"eligible for services provided to Indians by the Secretary. . . ."[45] At the time of this writing, there are over 570 federally recognized tribes. Periodically, the Department of Interior publishes a list of tribal entities eligible to receive federal government services.[46] However, tribes from other countries do not fall under this definition, as they do not have the political and treaty relationship with the United States government and are not recognized by the Secretary of the Interior.[47]

§ 7.3.B—Exclusive Tribal Jurisdiction

ICWA is part of the long history of federal Indian law and policy that recognizes established tribal jurisdiction over internal tribal issues and restricts state jurisdiction over Indian affairs. Tribal jurisdiction over Indian child welfare matters is a long-standing presumption.[48] ICWA did not grant jurisdiction over Indian children to tribes, but rather acknowledged the fact of tribal jurisdiction over Indian children.[49]

Accordingly, the statute provides that tribes have exclusive jurisdiction over an Indian child who "resides or is domiciled within the reservation."[50] In addition, if the child is a "ward of a tribal court," the tribe retains "exclusive jurisdiction, notwithstanding the residence or domicile of the child."[51] Under certain "emergency removals," a state court may have jurisdiction in order "to prevent imminent physical damage or harm to the child."[52] However, that authority terminates immediately when it is "no longer necessary to prevent imminent physical damage or harm to the child."[53] Where a state court has issued emergency orders regarding an Indian child who is domiciled on a reservation but temporarily located off the reservation, it must transfer the case to tribal jurisdiction, begin

45. 25 U.S.C. § 1903(8).

46. For the most recent list of federally recognized tribes, see Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5,019 (Jan. 29, 2016).

47. *Id. See also In re Wanomi P.*, 264 Cal.Rptr. 623, 629-30 (Cal. App. Nov. 30, 1989).

48. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989) ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA.").

49. *See Fisher v. District Court*, 424 U.S. 382 (1975); *Wisconsin Potowatomies v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973); *Wakefield v. Little Light*, 347 A.2d 228, 234-5 (Md. 1975); *In re Adoption of Buehl*, 555 P.2d 1334 (Wash. 1976).

50. 25 U.S.C. § 1911(a). *See* note 70 regarding the Public Law 280 exception.

51. *Id.*

52. 25 U.S.C. § 1922, 25 C.F.R. § 23.113.

53. 25 U.S.C. § 1922.

proceedings in the state court that are subject to the ICWA, or release the child to the parent or Indian custodian.[54] Courts cannot use the emergency removal section of ICWA to evade the rest of ICWA's due process protections.[55]

Because exclusive tribal court jurisdiction is determined by the child's domicile and residence, rather than mere presence in a particular place, it is crucial that the agency removing the child investigate the child's domicile. A parent's domicile is their "true, fixed, principal, and permanent home," where they intend to return even if they are residing elsewhere.[56] An Indian child's domicile is that of their parents (or custodial parent if the parents are separated), or Indian custodian.[57] Thus, it is possible for a child to be domiciled in a place where he or she has never in fact been.[58]

Such was the case in *Mississippi Band of Choctaw Indians v Holyfield*,[59] one of two times the U.S. Supreme Court has interpreted ICWA. In this case, the mother, J.B., traveled some 200 miles from her reservation to give birth to twins, whom she wished to place directly for adoption without involving her tribe. The tribe, after learning of the adoption, brought an action arguing that the proper jurisdiction was tribal jurisdiction, and the state had no power to authorize the adoption. The Mississippi Supreme Court ruled that the babies were never domiciled on the reservation and upheld the adoptions. The United States Supreme Court reversed, adopting a federal definition of domicile, holding that although the children had been born off and had never been physically present on the reservation, they were domiciled on the reservation because that was their parents' domicile.[60] The adoption case was transferred to the tribal court of the Mississippi Band of Choctaw Indians. Based on a determination under tribal law of the children's best interests, the tribal judge granted the original adoption petition, while also ordering the children maintain contact with their community.[61]

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54. *Id*., 25 C.F.R. § 23.110, 113.

55. 25 C.F.R. § 23.113(e) (an emergency proceeding cannot last longer than 30 days).

[56] 25 C.F.R. § 23.1.

[57] *Id.*

58. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48-50 (1989).

59. *Id*.

60. *Id.* at 48-49.

61. Solangel Maldonado, "The Story of the Holyfield Twins: *Mississippi Band of Choctaw Indians v. Holyfield*," *in* FAMILY LAW STORIES 122 (Carol Sanger, ed. 2008).

§ 7.3.C—Concurrent Jurisdiction

For ICWA cases in which the child is an "Indian child" but resides off the reservation, the state and tribal courts have concurrent jurisdiction. For ICWA cases in states subject to Public Law 280, a federal law governing certain jurisdictional issues, states and tribes have concurrent jurisdiction both on and off the reservation.[62] ICWA provides that tribal courts have concurrent and presumptive jurisdiction over Indian child custody cases where the child is domiciled outside of Indian Country.[63] Therefore, ICWA provides that the state court, "in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe."[64] A request to transfer may be made orally or in writing, and at any stage of the proceeding.[65] When a parent objects to the transfer, the state trial court is prohibited from transferring the case to a tribal court.[66]

ICWA does not define what constitutes "good cause" for declining transfer of the case to tribal court. However, the regulations give examples of what state courts should *not* consider when determining good cause–whether a case is at an advanced stage; whether transfer would result in a change in the child's placement; the Indian child's cultural contacts with the tribe or reservation; and perceived inadequacy of a tribal court or tribal social services programs.[67] Even though the state court may be willing to grant a transfer request, the tribal court may decline.[68]

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62. 25 U.S.C. § 1911(b), P.L 83-280, 18 U.S.C. § 1162, 28 U.S.C. § 1360. A full discussion of child welfare jurisdiction in Public Law 280 states is beyond the scope of this chapter. See *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548 (9th Cir. 1991), for discussion.

63. *Id.*; *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

64. 25 U.S.C. § 1911(b) (emphasis in original).

65. 25 C.F.R. § 23.115.

66. *In re Maricopa County Juvenile Action No. JD-6982*, 922 P.2d. 319 (Ariz. Ct. App. 1996), *but see In re the Welfare of R.I.*, 402 N.W.2d 173 (Minn. App. 1987).

67. *Id.* at (5).

68. 25 U.S.C. § 1911(b).

If the state court retains jurisdiction, the child's "Indian custodian"[69] or tribe may move to intervene in the state court proceeding.[70] Both the statute and case law make clear that the child's tribe may intervene in state court proceedings at any point in those proceedings.[71] If the tribe intervenes in the state court proceedings, it becomes a party to the case with the rights and responsibilities of any party, including the right to access all documents regarding the case.[72]

§ 7.3.D—Notice

ICWA's notice provisions[73] are required for the rest of the Act to work. Without proper notice, there is no way for a state court or an Indian nation to know if an Indian child is involved in a proceeding. If a court or agency knows or has reason to know that the child in the child protection proceeding is an Indian child, it must notify the parent, the Indian custodian if applicable, and the child's tribe. [74] In order to give proper notice, the agency and state courts have an ongoing duty to inquire into the child's status, and follow up with the family members.[75] If the child's tribal affiliation is uncertain because he or she may belong to more than one tribe, or because the parent is unsure of the tribal affiliation, then notification must be provided to "each tribe where the child may be a member (or eligible for membership if the biological parent is a member)."[76] In cases in which the agency or court cannot determine the specific tribal affiliation, or the identity or location of a parent cannot be determined, then notice must be sent to the Secretary of the

69. ICWA defines "Indian custodian" as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical case, custody, and control has been transferred by the parent. . .." 42 U.S.C. § 1903(6).

70. 25 U.S.C. § 1911(c).

71. *Id. E.g., In the Matter of Phillip A.C.*, 149 P.3d 51 (Nev. 2006); *In re J.J.*, 454 N.W.2d 317, 331 (S.D. 1990).

72. 25 U.S.C. § 1912(c). *See In the Matter of Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993) (noting that the right to intervene means the right to meaningful intervention).

73. 25 U.S.C. § 1912(a).

74. *See, e.g., In re* Morris, 815 N.W.2d 62, 65 (Mich. 2012) ("sufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the notice requirement"); B.H. v. *People ex rel.* X.H., 138 P.3d 299 (Colo. 2006); *In re* Z.J.G., 471 P.3d 853 (Wash. 2020).

75. 25 C.F.R. § 23.107 ("How should a state court determine if there is reason to know the child is an Indian child"); § 23.111 ("What are the notice requirements for a child-custody proceeding involving an Indian child").

76. 25 C.F.R. § 23.111(b).

Interior.[77] The statute provides for broad application, and the best practice is to provide notice when there is any evidence a child is an Indian child.

Because of years of improper notice, and continued violations of this portion of the Act by agencies and courts, state appellate courts have expressed frustration and dismay with improper notice.[78] In one state, the supreme court provided an appendix of what is required in a notice and must be preserved in the record.[79] The regulations provide detailed instructions for notice, which must include among other things, the child's name and birthdate, the name of the tribe, a copy of the petition, and a statement with details including the tribe's right of intervention and a detailed and correct genogram of the child's family.[80] Notice should be sent to the designated ICWA agent listed in the federal register.[81] This is the agent the tribe designated, which leads to the fastest response, and protects confidentiality.

The statute provides that "the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify" the relevant parties.[82] A number of courts have held that this provision of the law requires that the individual or agency petitioning the court to take protective action regarding the child is responsible for fulfilling the notice requirement.[83] Other courts, however, have held the duty to provide proper notification must be borne by the court as well.[84] The regulations put the burden of inquiry on the court but the duty to inquire and investigate on the petitioner.[85]

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77. 25 U.S.C. § 1912(a) (2006), 25 C.F.R. § 23.111(e). Best practice when tribal affiliation is uncertain is to send notice to any potential tribe and to notify the Secretary of the Interior. The Secretary may be noticed by sending the appropriate paperwork to the regional office of the BIA.

78. *E.g.*, *In re Morris*, 815 N.W.2d 62 (Mich. 2012); *Justin L. v. Superior Court*, 165 Cal.App.4th 1406, 1410 (Cal. Ct. App. 2008) ("We are growing weary of appeals in which the only error is the Department's failure to comply with the ICWA.").

79. *In re Morris*, 815 N.W.2d at 83-85, Appendix.

80. 25 C.F.R. § 23.111(d).

81. *Indian Child Welfare Act; Designated Tribal Agents for Service of Notice*, 85 Fed. Reg. 24,004 (2020). This list is updated in the Federal Register annually.

82. 25 U.S.C. § 1912(a).

83. *E.g.*, *In re Desiree F.*, 99 Cal. Rptr. 2d at 695.

84. *In re J.T.*, 693 A.2d 283 (Vt. 1997); *In re H.A.M.*, 961 P.2d 716 (Kan. Ct. App. 1998); *In re Morris*, 815 N.W.2d 62, 78 (Mich. 2012) (trial court has recordkeeping responsibilities).

85. 25 C.F.R. § 23.107(a), (b)(1).

§ 7.3.E—Appointment Of Counsel

ICWA expands the right to appointment of counsel for a parent or Indian custodian who is responding to a child protection action.[86] Under the Act, whenever a state trial court determines that a parent is indigent, the court must appoint counsel for any "removal, placement, or termination proceeding."[87]

Moreover, if the court believes that appointing counsel for the child would serve the child's best interests, the court may appoint counsel to represent the child.[88] The Child Abuse Prevention and Treatment Act (CAPTA) requires, as a contingency to receiving federal funding, that states provide a guardian *ad litem* to represent a child, [89] ICWA gives court discretion to appoint "counsel" for the child.[90] To ensure compliance with both CAPTA and ICWA, the best practice is for courts to appoint an attorney to represent the child in every child protective proceeding to which ICWA applies.[91] However, in most cases, states appoint either a non-lawyer guardian *ad litem*, or a "best interests" attorney for the child.[92] Whether ICWA requires a stated interests attorney for the child is a question that has not yet been answered by a majority of state courts.[93]

In those states that do not routinely provide counsel to indigent parents in child protection proceedings, the court may seek reimbursement from the Secretary of the Interior for "reasonable fees and expenses" related to the appointment of counsel.[94] Per the regulations, the court must notify the BIA Area Director for the region, and include the name and address of counsel and of the client, the name of the tribe, the petition, certification that state law does not provide for counsel, and certification that the client is indigent. Unfortunately, the request may still be

86. 25 U.S.C. § 1912(b).

87. *Id.*, *see In re I.T.S.*, 490 P.3d 127 (Okla. 2021) (not providing counsel was reversable error and required the court to invalidate the order to terminate parental rights).

88. 25 U.S.C. § 1912(b).

89. 42 U.S.C. § 5106a(b)(2)(A)(xiii).

90. 25 U.S.C. § 1912(b).

91. American Bar Ass'n, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996), *available at* www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf.

92. Children's Advocacy Institute, et al., *A Child's Right to Counsel* (3d ed. 2012), *available at* www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf (surveying the 50 states' laws regarding representation of children in child welfare proceedings).

93. *See People in re C.R.W.*, 962 N.W.2d 730 (S.D. 2021) (when interpreting a state statute requiring the attorney to represent a child's best interests and ICWA's requirement of counsel, the Court found the state law did not conflict with ICWA).

94. 25 U.S.C. § 1912(b).

denied if there is a lack of funds. Denial of payment may be appealed to the Assistant Secretary of the Interior.[95]

§ 7.3.F—Removal

ICWA seeks to preserve Indian families by requiring a high burden of proof to support the removal of an Indian child from his or her home. Before a state court can remove an Indian child from his or her parent, the court must make a finding based upon clear and convincing evidence "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[96] This finding must also be supported by the testimony of a qualified expert witness, and the demonstration to the court that active efforts have been provided to keep the family together (discussed in section 7.3.H, *infra*).

§ 7.3.G—Qualified Expert Witness

To mitigate bias in the removal process, ICWA mandates that the party removing the child must have a "qualified expert witness" (QEW) testify in support of foster care placement and termination of parental rights.[97] The burden is on the party removing the child — the state or agency — to provide a QEW who will testify that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[98] The purpose of the provision is to force the party who is removing the child to provide a witness who has some ties to the tribe to confirm that the removal or termination is proper. ICWA's expert witness requirement is intended "to provide the Court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias."[99] The tribe does not bear the burden of producing the QEW, though the tribe may work with the state to provide one, or the state may be required to contact the tribe for one.[100]

The statute does not define "qualified expert witness," and the regulations provide fairly limited guidance, stating that the witness must be able to provide

95. 25 C.F.R. § 23.13(c).

96. 25 U.S.C. § 1912(e).

97. *Id*.

98. 25 U.S.C. §§ 1912(e) and (f), *but see Brackeen v. Haaland*, 994 F.3d 249, 406 (5th Cir. 2021) (en banc) (finding the qualified expert witness requirement impermissibly commandeers state agencies).

99. *In re N.L.*, 754 P.2d 863, 867 (Okla. 1988) (citing *State ex rel. Juvenile Dept. v Tucker*, 710 P.2d 793, 799 (Or. Ct. App. 1985)).

100. *See e.g.* WASH. REV. CODE 13.38.130(4)

evidence to meet the burden articulated in ICWA and should be qualified to testify as to the social and cultural standards of the child's Tribe.[101] The regulations also make clear a tribe may designate a QEW and that the petitioner may request assistance from the tribe to find a QEW.[102] Finally, the social worker "regularly assigned" to the family cannot be the QEW.[103]

The regulations are a direct response to inconsistencies among state courts in defining the qualifications of QEWs. Generally, a state social worker with no additional training is not a QEW.[104] At least one state court has held that the QEW must also testify as to the extraordinary physical or emotional needs of the child to place outside the ICWA placement preferences (discussed below).[105] However, the QEW requirement still confounds some courts, with at least one finding that the lack of proper expert testimony in support of termination of parental rights in an ICWA case may still not preclude termination under state law.[106]

§ 7.3.H—Active Efforts

Before a state court may order a child removed from his or her home for placement in foster care, the petitioner must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family."[107] A similar showing must be made when the petitioner is seeking termination of parental rights.[108] This is the most substantive requirement for families in ICWA cases, and requires considerably more services and work on the part of state social workers. ICWA does not define "active efforts," but the regulations do.[109] The regulations require the efforts to be timely, affirmative, and thorough, and provide a list of eleven elements that may be considered active efforts.[110] These include tailoring services to the family, engaging with the Indian child's Tribe, and ensuring contact with siblings.[111]

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[101] 25 C.F.R. § 23.122.

[102] *Id*.

[103] *Id*.

104. *See In re M.F.*, 255 P.3d 1177, 1185 (Kan. 2010) (gathering cases).

105. *In re S.E.G.*, 521 N.W.2d 357, 365 (Minn. 1994).

106. *In re D.S.*, 806 N.W.2d 458 (Iowa Ct. App. 2011).

107. 25 U.S.C. § 1912(d) (2006); *but see Brackeen v. Haaland*, 994 F.3d 249, 404-05 (5th Cir. 2021) (en banc) (finding active efforts impermissibly commandeers state agencies).

108. *Id*.

[109] 25 C.F.R. § 23.1.

[110] *Id.*

111. *Id*.

Courts clearly state that "active efforts" is a higher standard than "reasonable efforts," which is required for all families.[112]

While this more demanding standard is generally required in all ICWA cases, several state appellate courts have held that "active efforts" are not required if making such efforts would be futile.[113] Other courts have rejected this futility test.[114]

§ 7.3.I—Foster Care Placement Preferences

When a state agency removes a child and puts him or her in foster care, the statute imposes the general rule applicable to all children that placement be in the least restrictive, most family-like setting that will meet the child's needs and that the placement be a reasonable proximate to the child's home.[115] Further, in the absence of a separate tribal placement preferences ordinance, statute, or resolution, ICWA imposes a descending order of placement preferences when a child is removed from the parent or Indian custodian.[116] The placements, in descending order of preference are (1) member of the extended family,[117] (2) a foster home that has been licensed or otherwise approved by the child's tribe,[118] (3) an Indian foster home licensed by a "non-Indian licensing authority,"[119] For a child to be placed outside of these preferences, the court must find there is good cause to deviate from the placement preferences. When institutional care is needed, the statute limits that care to an institution that is either approved by a tribe or operated by an "Indian organization."[120]

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112. *See, e.g.*, *People ex rel. A.R*, 310 P.3d 1007 (Colo. App. 2012); *People in Interest of P.S.E.*, 816 N.W.2d 110 (S.D. 2012); *In re I.B.*, 255 P.3d 56 (2011); *In re JL*, 770 N.W.2d 853 (Mich. 2009); *Winston J. v. State, Dept. of Health and Social Services, Office of Children's Services*, 134 P.3d 343 (Alaska 2006); *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611 (S.D. 2005).

113. *E.g.*, *Wilson W. v Alaska Office of Children's Services*, 185 P.3d 94 (Alaska 2008); *In re K.D.*, 155 P.3d 634 (Colo. App. 2007); *Letitia v Superior Court of Orange County*, 97 Cal. Rptr. 2d 303 (Cal. App. 2000).

114. *See, e.g.*, *In the matter of G.J.A.*, 197 Wash.2d 868, 489 P.3d 631 (2021); *In re J.L.*, 770 N.W.2d 853, 867 (Mich. 2009).

115. 25 U.S.C. § 1915(b).

116. *Id*.

117. 25 U.S.C. **§** 1915(b)(i). ICWA does not distinguish between Native and non-Native family members in the placement priorities.

118. 25 U.S.C. **§** 1915(b)(ii).

119. 25 U.S.C. **§** 1915(b)(iii).

120. 25 U.S.C. **§** 1915(b)(iv). Note that "Indian organization" as used in the statute is a term of art. *See* 25 U.S.C. § 1903(7).

A state court may deviate from these placement preferences only when the child's tribe has established a different order of placement priorities[121] or for good cause.[122] The regulations require that any party seeking to deviate from the placement preferences bear the burden of proving good cause under a clear and convincing evidentiary standard.[123] The regulations also limit what good cause to deviate from the preferences can be based on, which includes the request of the parents or the child, the presence of a sibling attachment, extraordinary needs of the child, and the unavailability of a suitable placement after a diligent search.[124] Finally, good cause cannot be based on the socioeconomic status of a placement compared to the compliant placement or the ordinary bonding and attachment that comes from being placed in a non-compliant home in violation of the law.[125]

§ 7.3.J—Termination Of Parental Rights

ICWA requires a state court to find beyond a reasonable doubt that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" before the court may terminate the parental rights of an Indian child's parents.[126] As is the case with removal, discussed in § 13.3.6, a proceeding for termination of parental rights must include testimony of at least one "qualified expert witness,"[127] and the court must find, before entering an order terminating the parents' rights, that "active efforts" have been made to preserve or return the child to his or her family.[128]

§ 7.3.K—Adoptions; Placement Preferences

The Indian Child Welfare Act applies to adoptions that are a result of either an involuntary termination or a voluntary relinquishment. In the case of voluntary relinquishments, the law provides additional due process protections to the birth

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121. 25 U.S.C. § 1915(c).

122. 25 U.S.C. § 1915(b).

[123] 25 C.F.R. §§ 23.132(a), (b), *but see Brackeen v. Haaland*, 994 F.3d 249, 429 (5th Cir. 2021) (en banc) (finding § 23.132(b) violated the Administrative Procedures Act).

[124] 25 C.F.R. § 23.132 (c).

[125] 25 C.F.R. §§ 23.132(d), (e).

126. 25 U.S.C. § 1912(f).

127. *Id*.

128. 25 U.S.C. § 1912(d) ("Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."); *but see Brackeen v. Haaland*, 994 F.3d 249, 404-406 (5th Cir. 2021) (en banc).

parents.[129] Before parents can consent to the adoption of their child, they must consent in writing before a judge of a court of competent jurisdiction. The consent must be explained in a language the parents understand, and the consent cannot be given before the birth of the child, or within 10 days of the birth of the child. In addition, a parent may revoke their consent at any time and for any reason prior to the final decree of termination or adoption, and have the child returned to them.[130]

Although the law does not require notice to the tribe in voluntary relinquishments, because other portions of the law apply to voluntary relinquishments and cannot be followed without notifying the tribe, the Regulations require the court to inquire of the participants on the record regarding the child's status and to contact the child's Tribe to determine her membership.[131] Only the tribe can confirm that the child is an Indian child under ICWA, and there may be jurisdictional concerns regarding the authority of the court to approve the adoption if the child is domiciled on the reservation.[132]

ICWA requires courts to comply with placement preferences for *any* adoptive placement.[133] These are, in descending order of preference, placement with: (1) a member of the extended family; (2) another member of the child's tribe; or (3) another Indian family.[134] Note that the first preference, that the child be placed with extended family, does not require that that the child be placed with a Native American person nor that the child be placed with the nearest blood relative.[135]

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129. 25 U.S.C. § 1913.

130. *Id.*

131. 25 U.S.C. § 1915(a); 25 C.F.R § 23.124(a), (b).

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

133. 25 U.S.C. § 1915(a).

134. *Id.* In the Supreme Court decision, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), the Court held that the placement preferences in adoptions did not apply if "no alternative party has formally sought to adopt the child," *id.* at 655. This has been extended to placements in involuntary adoption placements in *Native Village of Tununak v. Alaska*, 334 P.3d 165 (Alaska 2013). The Governor of Alaska implemented emergency regulations to limit the effect of this holding, which became permanent in July 2015. Filed Emergency Regulations: Petition of Adoption of children in state custody, 7 AAC 54.600 (April 15, 2015); Emergency Regulations made permanent – Petition of Adoption of children in state custody, 7 AAC 54.600 (July 2015).

135. For instance, in *In re Adoption of Bernard A.*, 77 P.3d 4 (Alaska 2003), the Supreme Court of Alaska held that the trial court did not commit error by placing the child for adoption with a second cousin once removed rather than with the maternal grandparents. The grandparents argued that they were the closer blood relatives and should have received

In 2013, the U.S. Supreme Court decided *Adoptive Couple v. Baby Girl,*[136] which narrowly modified some of the requirements in a voluntary relinquishment for the non-custodial parent who has abandoned the child and "never had custody of the child."[137] In that scenario, the non-custodial parent is not due active efforts to prevent the breakup of the Indian family or to the heightened standard of evidence required to terminate parental rights.[138] In addition, the Court held that the placement preferences of the statute do not apply if "no alternative party has formally sought to adopt the child."[139]

§ 7.3.L—Miscellaneous Provisions

The statute contains several additional provisions of which counsel should be aware. First, because ICWA's provisions are jurisdictional, the child's parent, Indian custodian, or Tribe can bring a petition to invalidate a state court action that violates 25 U.S.C. § 1911, 1912, or 1913.[140] The law does not define what the petition should look like, or what a "court of competent jurisdiction" is.[141] Some federal courts have held they have jurisdiction to hear a case, though others have found that abstention and issue preclusion prevents them from hearing a petition.[142]

Next, state courts and child protection agencies must give full faith and credit to the "public acts, records, and judicial proceedings of any Indian tribe . . .

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placement under the ICWA's adoption placement preferences. The court rejected this argument and deferred to the tribe's determination that the cousin was part of the child's extended family. *Id.* at 9-10 (citing *C.L. & C.L. v. P.C.S.*, 17 P.3d 769 (Alaska 2001)).

136. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

137. *Id.*at 648.

138. *Id.* at 651-52; 25 U.S.C. § 1912 (d), (f).

139. *Adoptive Couple*. at 655.

140. 25 U.S.C. § 1914. *See generally Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (petition brought by tribe after state adoption proceedings were complete in the trial court; adoption ultimately set aside three years after adoption complete).

141. 25 U.S.C. § 1914.

142. *Doe v. Mann*, 415 F.3d 1038, 1044-47 (9th Cir. 2005) (holding § 1914 is an exception to the *Rooker-Feldman* abstention doctrine); *Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587, 590 (10th Cir. 1996) (holding *res judicata* prevented the court from hearing the case). *Cf. Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 610-14 (8th Cir 2018) (applying *Younger* abstention to § 1983 claims);

to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity."[143]

Finally, ICWA makes clear that where state and federal laws are inconsistent, state courts must apply the law that provides "a higher standard of protection to the rights of the parent or Indian custodian of an Indian child."[144] For instance, where state law provides a higher notice standard that ICWA, the higher state standard must be applied.[145] The higher standard rule applies not just to individual litigants but also to Indian tribes.[146]

§ 13.4 • STATE ICWA LAWS

A number of states have passed their own ICWA laws that vary in their extent and breadth.[147][148] Nine states have passed comprehensive state ICWA laws, including California, Iowa, Michigan, Minnesota, Nebraska, Oklahoma, Oregon, Washington, and Wisconsin. In those states, the state ICWA law applies, and often provides higher protections and addresses gaps in the federal law.[149] For example, Iowa's law contains stricter definitions of "qualified expert witness" and clarifies that a professional person who is not recognized by the child's tribe and who lacks extensive knowledge of and experience with the child's particular tribe may only be used after the petitioner has satisfied the court a more appropriate "qualified expert witness" is not available.[150]

143. 25 U.S.C. § 1911(d); *see also Native Village of Stevens v. Smith*, 770 F.2d 1486 (9th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986).

144. 25 U.S.C. § 1921.

145. *See In re Elliott*, 554 N.W.2d 32 (Mich. App. 1996).

146. *E.g.*, *Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007).

147. *See* National Council of State Legislatures, *State Statutes Related to Indian Child Welfare*, *available at* www.ncsl.org/research/human-services/state-statutes-related-to-indian-child-welfare.aspx.

148. *Compare* Mich. Comp. L. §§ 712b.1-41 (Michigan Indian Family Preservation Act, comprehensive state ICWA law), *with* Mo. Rev. Stat. § 452.715 (stating federal law governs child welfare cases involving Indian children).

149. *Comprehensive State Laws*, Turtle Talk blog, https://turtletalk.blog/icwa/comprehensive-state-icwa-laws/.

150. Iowa Code § 232B.10(3)(e).

In Michigan, the law defines active efforts with considerable specificity,[151] and explicitly extends the protections of the law to guardianships.[152] Wisconsin clarifies the burden of proof to demonstrate active efforts occurred.[153] Washington defines the best interest of the Indian child to include "the value to the Indian child of establishing, developing, or maintaining a political, cultural, social, and spiritual relationship with the Indian child's tribe and tribal community."[154] Other state laws explicitly extend the notice provisions to voluntary adoptions.[155] At least nine states waive *pro hac vice* fees for tribal attorneys from other states representing the tribe in child protection cases.[156]

§ 7.5 • A NOTE ON THE TRUST RESPONSIBILITY AND THE CONSTITUTION

Tribes have long been recognized as "distinct, independent political communities,"[157] with the inherent sovereignty to govern their own members, "to make their own laws and be ruled by them."[158] Tribal powers of self-governance are not granted by the federal government, but rather arise from the tribal sovereignty that preexisted the United States.[159] Tribes have a unique government-to-government relationship with the federal government based on agreements, treaties, and the Constitution.[160] Because of this relationship, the United States has the unique authority to regulate the relationship between Indian tribes and the federal government.[161]

151. Mich. Code Ann. § 712b.3(a).

152. Mich. Code Ann. § 712b.13.

153. Wisc. Stat. § 48.028 (4)(d)(2).

154. Rev. Code Wash. § 13.38.040(2); *see also* Mich. Code Ann. § 712B.5.

155. *See* Minn. Stat. § 260.761(3); Okla. Stat. tit. 10 § 40.4.

156. *State and Tribal Pro Hac Vice Rules for ICWA Cases*, Turtle Talk blog, https://turtletalk.blog/icwa/state-pro-hac-vice-rules-for-icwa-cases/.

157. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

158. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

159. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *United States v. Wheeler*, 435 U.S. 313, 323-324 (1978).

160. *Cohen's Handbook of Federal Indian Law* 1 (2012 ed.).

161. U.S. Const. Art. I, § 8, cl. 3; 25 U.S.C. § 1901.

Because the application of ICWA is based on the status of an Indian child as a member of, or eligible to be, a member of a federally recognized tribe, the law does not implicate equal protection concerns.[162] The relationship between tribes and the federal government is a political one, and so long as the law is rationally related to Congress's "unique obligation toward the Indians,"[163] it does not violate equal protection.[164]

Some state courts have expressed concern with the constitutionality of ICWA as it applies to children who have little or no contact with their tribe, regardless of their political citizenship.[165] To address this concern, some state courts held that the law only applies if the child or the family has sufficient ties to the tribe or Indian culture so as to constitute an "existing Indian family."[166] However, since the first articulation of that exception, most state courts have rejected it,[167] including the state that originated the exception.[168] ICWA itself contains no requirement that the child have particular ties to the tribe beyond his or her citizenship. In some jurisdictions where appellate courts have held the existing Indian family exception to apply, the state legislature has rejected it by statute. For instance, in both California and Oklahoma the legislatures overrode the courts' adoption of the exception by enacting statutes that explicitly invalidate this exception.[169]

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162. *See In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981); *In re Armell*, 550 N.E.2d 1060, 1068 (Ill. Ct. App. 1990); *In re Adoption of Child of Indian Heritage*, 529 A.2d 1009, 1010 (N.J. Super. Ct. App. Div. 1987); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980).

163. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

164. For a detailed discussion, see Restatement of the Law of American Indians, Proposed Final Draft, § 9 (March 30, 2021).

165. *In re Bridget R.*, 49 Cal.Rptr.2d 507 (Cal. App. 1996) (superseded by statute).

166. *E.g.*, *In re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (2001); *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 2d Cir. 1995), *writ denied*, 662 So. 2d 478 (La. 1995).

167. *E.g.*, *In re Riffle (Riffle II)*, 922 P.2d 510 (Mont. 1996); *In re Elliot*, 554 N.W.2d 32 (Mich. App. 1996); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000); *In re Vincent M.*, 150 Cal. App. 4th 1247, 59 Cal. Rptr. 3d 321 (2007), *review denied*, (2007); *In re Welfare of S.N.R.*, 617 N.W.2d 77 (Minn. Ct. App. 2000); *In re Baby Boy C.*, 27 A.D.3d 34, 805 N.Y.S.2d 313 (2005); *In re A.B.*, 663 N.W.2d 625 (N.D. 2003); *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004).

168. *In re A.J.S.*, 204 P.3d 543 (Kan. 2009), *overruling In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982).

169. *See* Cal. Welf. & Inst. Code § 224(a)(1) (2006); Okla. Stat. tit. 10 §§ 40.1-10.3 (1994) (upheld in *In the Matter of Baby Boy L.*, 103 P.3d 1099 (Okla. 2004)).

Few state courts have ruled on the constitutionality of state Indian child welfare laws.[170] However, generally, if the state Indian child welfare law is equivalent to the federal one, there are no constitutional problems.[171] In narrow circumstances, some constitutional challenges have been successful, particularly when the state attempts to define "Indian child" beyond that of the federal definition, or when the state puts limits on placement in voluntary relinquishments.[172]

§ 7.6 • CONCLUSION

To better serve Indian children and their parents, counsel must be familiar with the detailed provisions of ICWA and take every reasonable step to ensure that its provisions are carefully and faithfully applied. The historical and contemporary governmental and private agency intrusions into Native family life have left intergenerational scars and trauma that demand attention. To this day, Native children are the most vulnerable children in the United States. ICWA comprehensively sets minimum governing rules in Indian child welfare matters and establishes the powerful presumption that Indian tribes must serve as the guardians of their children

[170] *Cf.* Caroline M. Turner, *Implementing and Defending the Indian Child Welfare Act through Revised State Requirements*, 49 Colum. J.L. & Soc. Probs. 501, 517-18 n. 78 (2016) (collecting state court cases affirming the validity of ICWA).

[171] *See Washington v. Wash. St. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (holding that state law consistent with the fulfillment of the federal trust responsibility to Indians is valid under the Fourteenth Amendment).

172. *E.g.*, *In re N.N.E.*, 752 N.W. 2d 1 (Iowa 2009) (holding the voluntary placement preferences in the Iowa ICWA law violated due process); *In re A.W.*, 741 N.W. 2d 793 (Iowa 2007) (holding that a slightly more expansive definition of Indian child, a child "that an Indian tribe identifies as a child of the tribe's community" violated equal protection.); *but see Cherokee Nation v. Nomura*, 160 P.3d 119 (Okla. 2007) (holding notice to the tribe in voluntary adoptions to be constitutional).

Attorney Practice Tips

- Attorneys should do their own inquiry to determine if their client is or may be American Indian or Alaska Native
- Attorneys should notify the court and the agency if there is any indication a parent or child may be American Indian or Alaska Native and provide as much information as possible regarding the child or parent's ancestral information.
- Attorneys should ensure when the agency does notice, the attorney gets a copy and that it is filed with the court.
- Attorneys should review the definition of active efforts and ensure the agency is meeting its burden throughout the case for both parents and children.
- Attorneys should reach out to the child's tribe directly to work with them on finding a qualified expert witness, family placement, and active efforts.
- Attorneys should ensure the state has found an appropriate qualified expert witness. Parent attorneys may wish to have their own witness who is qualified on issues of culture and tradition.
- Attorneys should notify the child's tribe of any appeal on behalf of the parent or state.

Additional Resources

Kathryn E. Fort, *American Indian Children and the Law: Cases and Materials* (2019).

Barbara Ann Atwood, *Children, Tribes and States* (2010).

Kelly Gaines-Stoner et al, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* (3rd ed. 2018).

The Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act* (2007), *available at* www.narf.org/icwa.