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The Indian Child Welfare Act.

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Chapter 12: The Indian Child Welfare Act

by Frank E. Vandervort[1]

§ 12.1 Introduction

Few child welfare lawyers routinely confront the application of the Indian Child Welfare Act (ICWA or "the Act"). When the statute applies, however, it is crucial that its provisions be strictly followed. There are at least three reasons why counsel should attempt to ensure that ICWA's provisions are carefully applied. First, ICWA's provisions are jurisdictional. Failure to abide by its requirements invalidates the proceeding from its inception. Indeed, any party or the court may invoke ICWA at any time in the proceeding, including for the first time on appeal.[2] Second, unlike most federal child welfare legislation which provides funding streams to states and therefore may not be enforceable in trial level proceedings, ICWA is substantive law that provides minimum federal standards for addressing any case involving a child who qualifies as an "Indian child."[3] Finally, the failure to adhere to the law's requirements can be disruptive for children, harmful to families, and undermining to tribal authority; it is also burdensome for courts and child welfare agencies.[4] For instance, where the Act's provisions were not properly followed, the United States Supreme Court invalidated an adoption some three years after the completion of the proceedings in the trial court and remanded the case for further proceedings.[5] In addition to the statute itself, counsel should carefully consider the application of the Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings* (BIA Guidelines),[6] which, while they do not have binding effect, are entitled to great weight

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[2] *See In re* S.R.M., 153 P.3d 438 (Colo. App. 2006); *In re* S.M.H., 33 Kan. App. 2d 424, 103 P.3d 976 (2005); *In re* J.T., 166 Vt. 173, 693 A.2d 283, 287–88 (1997).

[3] *See* 25 U.S.C. § 1902. It should be noted that there are many children who are Native American but who would not qualify as an "Indian child" within the meaning of the statute. *See* § 12.3, The Indian Child Welfare Act.

[4] *See, e.g.*, Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[5] *Id.*

[6] *See* Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67584 (Nov. 26, 1979), *available at* www.nicwa.org/policy/regulations/icwa/ICWA_guidelines.pdf.

because they represent the construction of the statute by the administrative agency charged with implementing the Act's provisions.[7]

Courts in a number of jurisdictions have affirmed ICWA's constitutionality in the face of equal protection challenges.[8] These courts have reasoned in part that the treatment of Indian people is unique not because they belong to a discrete racial group but because they are members of a quasi-sovereign tribe.[9]

§ 12.2 History[10]

For many decades the policy of the United States government was to assimilate Native American people into White European-based culture.[11] Among the methods used to accomplish this assimilation were large scale removals of Native children from their families by child welfare authorities.[12] Studies conducted by the Association on American Indian Affairs in 1968 and 1974 found that 25% to 35% of all Indian children were removed from their families for placement in foster homes or institutions or for adoption.[13] Most of these children were adopted into Caucasian families or placed in federally funded Indian Boarding Schools.[14] Conditions in the boarding schools were often brutal, and many children suffered physical and sexual abuse.[15]

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[7] *See* In the Matter of E.S., 92 Wash. App. 762, 964 P.2d 404, 409 (1998) (citing *In re* Junious M., 144 Cal. App. 3d 786, 793 n.7 (1983)).

[8] *See, e.g., In re* Angus, 655 P.2d 208 (Or. App. 1982); Matter of Appeal in Pima County Juvenile Action No. S-903, 130 Ariz. 202, 635 P.2d 187 (1981); Matter of Guardianship of D. L. L., 291 N.W.2d 278 (S.D. 1980).

[9] *See generally* Fisher v. District Court, 424 U.S. 382, 390–91 (1976) (stating that exclusive jurisdiction of the tribal court does not derive from the plaintiff's race but rather from the tribe's quasi-sovereign status under federal law and that, "even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government").

[10] For more detailed discussions of the historical rationales for the statute's enactment, see Marc Mannes, *Factors and Events Leading to the Passage of the Indian Child Welfare Act*, 74 CHILD WELFARE 264 (1995). This chapter will address only Subchapter I of the statute and will do so in a limited fashion. For more detailed discussions of the statute and its application, see B. J. JONES, KELLY GAINES-STONER & MARK TILDEN, THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN (2d ed. 2008); THE NATIVE AMERICAN RIGHTS FUND, A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT (2007), *available at* www.narf.org/icwa.

[11] *See, e.g.*, Carol A. Hand, *An Ojibwe Perspective on the Welfare of Children: Lessons of the Past and Visions for the Future*, 28/1 CHILD. YOUTH SERV. REV. 20, 27 (2006).

[12] *See, e.g.*, H.R. Rep. No. 95-1386, at 9 (1978).

[13] *Id.*

[14] *See* Carol A. Hand, *An Ojibwe Perspective on the Welfare of Children: Lessons of the Past and Visions for the Future*, 28/1 CHILD. YOUTH SERV. REV. 20, n. 3 (2006).

[15] *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.").

Moreover, the separation from family and culture left many Native American children, now adults, with psychological scars that persist even today.[16]

Congress has unique authority to regulate the relationship between Indian tribes and the federal government.[17] In 1832 the Supreme Court reaffirmed this authority in *Worcester v. Georgia.*[18] The special relationship between the United States government and Indian tribes and their members provides Congress plenary power over Indian affairs.[19] Thus it was that in the late 1960s American Indian advocacy groups began to press Congress to redress long-standing grievances regarding unnecessary removals.[20]

In 1978, after a decade of advocacy and numerous efforts by federal agencies to provide appropriate child welfare services to Indian children and families, Congress enacted the Indian Child Welfare Act.[21] In doing so, Congress made a number of findings based on studies of the number of children removed from their families as well as emotional antidotal reports of removals of Indian children and the impact such removals had on families, children, and tribes.[22] Congress found:

- "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"
- "that an 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"
- "that the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families"[23]

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

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[16] *Id.* at 26.

[17] *See* U.S. CONST. art. I, § 8, cl. 3; 25 U.S.C. § 1901.

[18] 31 U.S. 515 (1832) (overruled on other grounds). *See also* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (noting that the Supreme Court has repeatedly stated that state laws cannot be applied on Indian reservations if the laws would impair a right guaranteed or reserved by federal law).

[19] Morton v. Mancari, 417 U.S. 535, 551–52 (1974).

[20] *See* Marc Mannes, *Factors and Events Leading to the Passage of the Indian Child Welfare Act*, 74 CHILD WELFARE 264 (1995).

[21] 25 U.S.C. §§ 1901 *et seq.*; *see* Marc Mannes, *Factors and Events Leading to the Passage of the Indian Child Welfare Act*, 74 CHILD WELFARE 264 (1995).

[22] *See* H.R. Rep. No. 95-1386 (1978); Marc Mannes, *Factors and Events Leading to the Passage of the Indian Child Welfare Act*, 74 CHILD WELFARE 264, 274–78 (1995). *But see* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 489–99 (2003) (questioning the soundness of the evidence on which Congress based the ICWA).

[23] 25 U.S.C. § 1901.

Following the lead of the federal government, at least two states have enacted their own versions of ICWA.[24]

§ 12.3 The Indian Child Welfare Act

§ 12.3.1 Overview

Because of the history of unnecessary and precipitous removals, in enacting ICWA Congress put in place procedural protections to make it more difficult to remove an Indian child from home than is typically the case with non-Indian children. As is explained in the BIA Guidelines, "[p]roceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements."[25] It is clear that the intent of the Act is to preserve Indian families by making it difficult to remove an Indian child from the home. It begins this effort by defining several important terms.[26] For our purposes, it will suffice to begin with the three essential terms that define the cases to which the Act applies.

First, the statute defines a "child custody proceeding" as any action involving the placement of a child into foster care, into a pre-adoptive home, for adoption, or a proceeding to terminate parental rights.[27] By its terms, ICWA does not apply to child custody disputes between parents.[28]

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."[29]

Third, an "Indian tribe" refers to any organization of Native Americans or Alaska Native village that is formally recognized by the Secretary of the Interior.[30] Accordingly, ICWA's mandate does not apply to tribes or bands that are not so recognized.[31] Each tribe is the sole arbiter of its membership.[32] Tribes may have different methods of keeping track of their membership because ICWA imposes no

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[24] *See, e.g.*, Iowa Indian Child Welfare Act, IOWA CODE §§ 232B.1 *et seq.*; Minnesota Indian Family Preservation Act, MINN. STAT. §§ 260.751 *et seq.*

[25] 44 Fed. Reg. 67586 (Nov. 26, 1979).

[26] 25 U.S.C. § 1903.

[27] 25 U.S.C. § 1903(1).

[28] 25 U.S.C. § 1903(1). *See also* Comanche Indian Tribe v. Hovis, 53 F.3d 298 (10th Cir. 1995), *cert. denied*, 516 U.S. 916 (1995).

[29] 25 U.S.C. § 1903(4).

[30] 25 U.S.C. § 1903(8). For a list of federally recognized tribes, see 53 Fed. Reg. 52829 (Dec. 29, 1988).

[31] *In re* Fried, 266 Mich. App. 535, 702 N.W.2d 192 (2005); *In re* A.D.L., 169 N.C. App. 701, 612 S.E.2d 639 (2005).

[32] *See, e.g.*, 44 Fed. Reg. 67584 (Nov. 26, 1979) (determination by the tribe that a child is or is not eligible for membership is conclusive); *see also* People *ex rel.* J.A.S., 160 P.3d 257 (Colo. App. 2007); *In re* Welfare of S.N.R., 617 N.W.2d 77 (Minn. App. 2000); Matter of Adoption of Riffle, 277 Mont. 388, 922 P.2d 510 (1996); In the Matter of Phillip A.C., 149 P.3d 51 (Nev. 2006); *In re* Dependency of T.L.G., 126 Wash. App. 181, 108 P.3d 156 (2005).

standardized method of doing so.[33] Consequently, the method of proving membership will vary from tribe to tribe.[34]

The statute applies where there is a child custody dispute involving an "Indian child." Several courts have held that the statute applies only if the child or the family has sufficient ties to the tribe or Indian culture so as to constitute an "existing Indian family."[35] Most state courts that have considered the question of the so-called existing Indian family exception, however, have rejected it,[36] and ICWA itself contains no requirement that the child have particular ties to the tribe beyond what the statute sets forth. In fact, 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.[37] If ICWA applies to the child and the proceeding, its provisions and protections pertain to both Native and non-Native parents and family members.

§ 12.3.2 Exclusive Tribal Jurisdiction

ICWA seeks to protect not only the interests of individual children and their parents but also the interests of the child's tribe.[38] Accordingly, the statute provides that tribes have exclusive jurisdiction over an Indian child who "resides or is domiciled within the reservation" or "is a ward of the tribal court."[39] A state court's authority to enter orders relating to an Indian child who is the ward of a tribal court or domiciled on a reservation but who is temporarily located off the reservation is sharply circumscribed. In such a situation, the court may order the child removed from a parent or Indian custodian only "to prevent imminent physical damage or harm to the child" and such an emergency order placing the child must terminate immediately when "no longer necessary to prevent imminent physical damage or harm to the child."[40] Where a state court has issued emergency orders regarding an Indian child who is domiciled on a reservation but temporarily off the reservation, it must transfer the case to tribal

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[33] *In re* Angus, 655 P.2d 208, 212 (Or. App. 1982).

[34] *Id.*

[35] *See, e.g., In re* Santos Y., 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (2001); *In re* J.J.G., 32 Kan. App. 2d 448, 83 P.3d 1264 (2004); Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996); Hampton v. J.A.L., 658 So. 2d 331 (La. App. 2d Cir. 1995), *writ denied*, 662 So. 2d 478 (La. 1995).

[36] *See, e.g.*, Matter of Adoption of Riffle, 277 Mont. 388, 922 P.2d 510 (1996); Michael J., Jr. v. Michael J., Sr., 198 Ariz. 154, 7 P.3d 960 (Ct. App. 2000); *In re* Vincent M., 150 Cal. App. 4th 1247, 59 Cal. Rptr. 3d 321 (2007), *rev. denied* (2007); *In re* Welfare of S.N.R., 617 N.W.2d 77 (Minn. 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* Matter of Baby Boy L., 103 P.3d 1099 (Okla. 2004).

[37] *See* CAL. WELF. & INST. CODE § 224(a)(1) (2006); OKLA. STAT. § 10-40.1 (1994).

[38] *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[39] 25 U.S.C. § 1911(a).

[40] 25 U.S.C. § 1922.

jurisdiction, begin proceedings in the state court which are subject to the ICWA, or release the child to the parent or Indian custodian.[41]

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 an investigation regarding the child's domicile be undertaken. For an adult, domicile is determined by physical presence in a given place coupled with intent to remain in that place.[42] The Supreme Court has observed that a child obtains a "domicile of origin" at birth which remains the child's domicile until he or she establishes a "domicile of choice" later in life (which may, of course, be different than the "domicile of origin").[43] A child is unable to form the mental intent to stay in a particular place, and therefore the child's domicile is the domicile of his or her parents (or in the case of a child born to a single mother, that of the mother).[44] Thus, it is possible for a child to be domiciled in a place where she has never in fact been.[45] Such was the case in *Mississippi Band of Choctaw Indians v Holyfield*,[46] in which a mother 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 its right to notice of the adoption proceedings under the ICWA had been violated. The Mississippi Supreme Court ruled that the babies were never domiciled on the reservation and upheld the adoptions. The United State Supreme Court reversed, applying a federal definition of domicile and 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.[47]

§ 12.3.3 Concurrent Jurisdiction

In cases in which the child is an "Indian child" but resides off reservation, the state and tribal courts have concurrent jurisdiction.[48] However, 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."[49] When a parent objects to transfer, the state trial court is prohibited from transferring

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[41] 25 U.S.C. § 1922.

[42] *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989).

[43] *Id.*

[44] *Id.*

[45] *Id.* at 49–50.

[46] *Id.*

[47] *Id.* at 48–49.

[48] 25 U.S.C § 1911(b).

[49] 25 U.S.C. § 1911(b) (emphasis in original).

the case to a tribal court.[50] That is, while any party may object to a request to transfer the case, if a parent does so, that parent's objection acts as a veto prohibiting the transfer.

Alternatively, the child's parent, Indian custodian, or tribe may seek transfer of the case from the state to the tribal court.[51] Conspicuously absent from the list of parties that may seek transfer is the child himself or herself. Absent objection by either parent or a "good cause" showing not to transfer the case, the state court must transfer jurisdiction to the tribal court. The BIA Guidelines provide that a request to transfer may be made orally or in writing.[52] The purpose for permitting oral requests is to expedite the procedure.[53]

ICWA does not define what constitutes "good cause" for declining transfer of the case to tribal court. However, the BIA Guidelines suggest that a state trial court could find "good cause" to decline to transfer a case if: (1) the tribe does not have a tribal court; (2) the proceeding is at an "advanced stage" when transfer is sought and the petitioner for transfer did not make the request promptly after receiving notice of the proceeding; (3) the Indian child is over 12 years of age and objects to the transfer of the case; (4) the presentation of evidence to the tribal court would present an undue hardship to the parties or the witnesses; or (5) the child is over 5 years of age, the parents "are not available," and the child has had little or no contact with the tribe.[54] The BIA Guidelines make clear that the perceived inadequacy of a tribal court or tribal social services programs does not constitute good cause and cannot provide a state trial court with a rationale for denying transfer.[55] The burden of establishing good cause to deny transfer is on the person opposing transfer.[56] Even though the state court may be willing to grant a transfer request, the tribal court may decline.[57]

If the state court retains jurisdiction, the child's "Indian custodian"[58] or tribe may move to intervene in the state court proceeding.[59] 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.[60] If the tribe intervenes in the state court proceedings, it becomes a

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[50] *In re* Maricopa County Juvenile Action No. JD-6982, 922 P2d. 319 (Ariz. App. 1996).

[51] 25 U.S.C. § 1911(b).

[52] 44 Fed. Reg. 67590 at C.1.

[53] *See* Commentary to Guideline C.1. *Id.*

[54] 44 Fed. Reg. 67591 at C3.

[55] 44 Fed. Reg. 67591 at C.3.(c).

[56] 44 Fed. Reg. 67591 at C.3.(d).

[57] 25 U.S.C. § 1911(b). Note that the tribe's exercise of its right to decline transfer does not obviate the need for the state court to apply the ICWA in an appropriate case.

[58] The 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 care, custody, and control has been transferred by the parent of such child." 42 U.S.C. § 1903(6).

[59] 25 U.S.C. § 1911(c).

[60] 25 U.S.C. § 1911(c). *See, 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).

party to the case with the rights and responsibilities of any party, including the right to access all documents regarding the case.[61]

§ 12.3.4 Notice

ICWA's notice provisions[62] are arguably its most important. In addition to mandating that states notify the parent or Indian custodian, the Act also requires that the child's tribe be notified. If the child's tribal affiliation is uncertain because he or she may belong to more than one tribe, then notification must be provided to "any tribe that may be the Indian child's tribe."[63] In cases in which tribal affiliation is unknown, then notice must be sent to the Secretary of the Interior.[64] Some courts have broadly construed the tribal notice requirement so that if there is any hint of possible Native American heritage the state court must provide notice pursuant to the statute.[65] Therefore, in practice, whenever tribal affiliation is at all unclear, notice should be sent to the Secretary of the Interior.

There are sometimes disagreements as to which entity—the petitioning child protection agency or the court—has the duty to provide notice. 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.[66] This provision of the law clearly suggests that the individual or agency petitioning the court to take protective action regarding the child is responsible for fulfilling the notice requirement, and a number of courts have so held.[67] Other courts, however, have made clear that the duty to provide proper notification must be borne by the court as well.[68]

§ 12.3.5 Appointment of Counsel

The United States Supreme Court has held that a parent has only a limited right to appointment of counsel at public expense in a child welfare proceeding.[69] ICWA,

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[61] 25 U.S.C. § 1912(c). *See* In the Matter of Baby Girl Doe, 262 Mont. 380, 865 P.2d 1090 (1993) (noting that the right to intervene means the right to meaningful intervention).

[62] 25 U.S.C. § 1912(a).

[63] 44 Fed. Reg. 67588 at B.5(b).

[64] 25 U.S.C. § 1912(a). The 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.

[65] *See, e.g., In re* Desiree F., 83 Cal. App. 4th 460, 99 Cal. Rptr. 2d 688, 696 (2000) ("The Indian status of the child need not be certain to invoke the notice requirement."); *In re* I.E.M., 233 Mich. App. 438, 592 N.W.2d 751 (1999) (notice required where "at least suggests" that child's mother and child "potentially qualify as tribal members").

[66] 25 U.S.C. § 1912(a).

[67] *See, e.g., In re* Desiree F., 83 Cal. App. 4th 460, 99 Cal. Rptr. 2d 688, 695 (2000); *In re* I.E.M., 233 Mich. App. 438, 592 N.W.2d 751 (1999).

[68] *In re* J.T., 166 Vt. 173, 693 A.2d 283 (1997); *In re* H.A.M., 25 Kan. App. 2d 289, 961 P.2d 716 (1998).

[69] Lassiter v. Dep't of Soc. Servs. of Durham County, N.C., 452 U.S. 18 (1981).

however, greatly expands the right to appointment of counsel for a parent or Indian custodian who is responding to a child protection action.[70] Under the Act, whenever a state trial court determines that a parent is indigent, it must appoint counsel for any "removal, placement, or termination proceeding."[71] 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.[72] The Child Abuse Prevention and Treatment Act requires, as a contingency to receiving federal funding, that states provide a guardian ad litem to represent a child.[73] ICWA requires the appointment of "counsel" if the court chooses to appoint a representative for the child. To ensure compliance with both CAPTA and ICWA, courts should appoint an attorney to represent the child in every child protective proceeding to which ICWA applies. In those states that do not routinely provide counsel to indigent parents or children 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.[74]

§ 12.3.6 Removal

The law seeks to preserve Indian families by requiring a higher standard of evidence to support the removal of an Indian child from home. Before a state court removes an Indian child from his or her parent the court must make a finding based on 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."[75] To address the historical imposition of middle class, White values onto Native American families, Congress mandated that the court must have "qualified expert witness" testimony on this point.[76] The statute does not define "qualified expert witness." Again, the BIA Guidelines provide helpful embellishment of the statutory provision. First, to be qualified, an expert should be able "to speak specifically to the issue of whether continued custody by the parents or Indian custodian is likely to result in serious physical or emotional damage to the child."[77] Persons who may fulfill this requirement include: (1) a member of the child's tribe who has expertise in the family organization and childrearing practices of the tribe; (2) a non-Indian expert who has "substantial experience" in providing family services to Indians and "extensive knowledge of prevailing social and cultural standards and childrearing practices" within that child's particular tribe; or (3) a "professional person having substantial education

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[70] 25 U.S.C. § 1912(b).

[71] 25 U.S.C. § 1912(b).

[72] 25 U.S.C. § 1912(b).

[73] 42 U.S.C. § 5106a(b)(2)(A)(xiii).

[74] 25 U.S.C. § 1912(b).

[75] 25 U.S.C. § 1912(e).

[76] 25 U.S.C. § 1912(e).

[77] 44 Fed. Reg. 67593 at D.4.

and experience in the area of his or her specialty."[78] The expert witness requirement is a direct effort on Congress's part to counteract the imposition of cultural bias by state officials. Thus, as the Oklahoma Supreme Court has noted, 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."[79]

Some states have refined these definitions in their state ICWAs, and some of these refinements have led to more exacting standards than the federal law demands. For instance, Iowa's statutory law provides that a "'qualified expert witness' may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, spiritual leader, historian, or elder."[80] It also contains stricter definitions of "qualified expert witness" and makes clear 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.[81] On the other hand, some state appellate courts have held that so long as the expert is otherwise qualified, he or she is not required to have more specific expertise in Indian culture or Indian families.[82]

§ 12.3.7 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."[83] A similar showing must be made when the petitioner is seeking termination of parental rights.[84] ICWA does not define "active efforts." The BIA Guidelines provide that when determining whether active efforts have been made, courts should consider the "prevailing social and cultural and way of life of the Indian child's tribe."[85] The Act's "active efforts" requirement is generally thought to demand more of the petitioning state authorities than the "reasonable efforts" requirement of other federal laws. As the Court of Civil Appeals

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[78] 44 Fed. Reg. 67593 at D.4.

[79] *In re* N.L., 754 P.2d 863, 867 (Okla. 1988) (citing State *ex rel.* Juvenile Dep't v. Tucker, 76 Or. App. 673, 710 P.2d 793, 799 (1985)).

[80] IOWA CODE § 232B.10.

[81] IOWA CODE § 232B.10.

[82] *See, e.g.*, Rachelle S. v. Arizona Dep't of Econ. Sec., 191 Ariz. 518, 958 P.2d 459 (1998); People In Interest of R.L., 961 P.2d 606 (Colo. App. 1998); State *ex rel.* Juvenile Dep't v. Tucker, 76 Or. App. 673, 710 P.2d 793, 799 (1985); *In re* Mahaney, 146 Wash. 2d 878, 51 P.3d 776 (2002).

[83] 25 U.S.C. § 1912(d).

[84] 25 U.S.C. § 1912(d).

[85] 44 Fed. Reg. 67592 (Nov. 26, 1979).

of Oklahoma observed, "the 'active efforts' standard requires more effort than the 'reasonable effort' standard in non-ICWA cases."[86]

While this more demanding standard is generally required, several state appellate courts have held that "active efforts" are not required if making such efforts would be futile.[87] Other courts have rejected this futility test.[88]

§ 12.3.8 Placement Preferences

When an Indian child is removed from the parental home and placed, 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 that placement be reasonably proximate to the child's home.[89] Further, ICWA imposes, in the absence of a determination to the contrary by the child's individual tribe, a descending order of placement preferences when a child is removed from the parent or Indian custodian.[90] First, the statute requires that an Indian child be placed in the home of a member of the extended family.[91] If no family member is able to provide for the child, then the statute permits placement in a foster home that has been licensed or otherwise approved by the child's tribe.[92] Only if one of these preferred placements is not available may the child be placed in an Indian foster home licensed by a "non-Indian licensing authority."[93] ICWA does not explicitly provide for placement with a non-Indian foster home licensed by a non-Indian licensing authority. 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."[94]

A state court may deviate from these placement preferences only when the child's tribe has established a different order of placement priorities[95] or for good cause.[96]

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[86] *See In re* J.S., 177 P.3d 590, 593–94 (Okla. Civ. App. 2008). *See also In re* A.N., 325 Mont. 329, 106 P.3d 556 (2005); A.M. v. State, 945 P.2d 296 (Alas. 1997).

[87] *See, e.g.*, Wilson W. v. State, 185 P.3d 94 (Alas. 2008); *In re* K.D., 155 P.3d 634 (Colo. App. 2007); Letitia v. Superior Court, 81 Cal. App. 4th 1009, 97 Cal. Rptr. 2d 303 (2000).

[88] *See, e.g., In re* J.L., 483 Mich. 300, 770 N.W.2d 853, 867 (2009).

[89] 42 U.S.C. § 1915(b).

[90] 25 U.S.C. §§ 1915(b).

[91] 25 U.S.C. § 1915(b)(i). ICWA does not distinguish between Native and non-Native family members in the placement priorities.

[92] 25 U.S.C. § 1915(b)(ii).

[93] 25 U.S.C. § 1915(b)(iii).

[94] 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).

[95] 25 U.S.C. § 1915(c).

[96] 25 U.S.C. § 1915(b).

The BIA Guidelines provide direction regarding what constitutes good cause for deviating from the statutory placement preferences.[97]

§ 12.3.9 Termination of Parental Rights

Just as ICWA demands a higher standard of proof of harm before removing an Indian child from his or her home, it 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.[98] Note that this compares to the clear and convincing standard of evidence that the Supreme Court has held is mandated in non-Indian cases.[99] As is the case with removal, a proceeding for termination of parental rights must include testimony of at least one "qualified expert witness,"[100] and the court must find that "active efforts" have been made to preserve or return the child to his or her family before entering an order terminating the parents' rights.[101]

§ 12.3.10 Adoption Placement Preferences

When a state court terminates the parental rights of an Indian child's parents and the goal for the case changes to adoption, the Act again delineates a set of placement preferences.[102] 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. 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 or that the child be placed with the nearest blood relative.[103]

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[97] *See* 44 Fed. Reg. 67594 at F.3 (one of the following may constitute good cause to alter the placement preference: (1) the parent or child request a different placement; (2) extraordinary physical or emotional needs of the child; (3) no family meeting the preference is available after a diligent search).

[98] 25 U.S.C. § 1912(f).

[99] *See* Santosky v. Kramer, 455 U.S. 745 (1982).

[100] 25 U.S.C. § 1912(f); see the discussion of "qualified expert witness" in § 12.3.6, Removal.

[101] 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.").

[102] 25 U.S.C. § 1915(a).

[103] For instance, in *In re Adoption of Bernard A.*, 77 P.3d 4 (Alas. 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 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 (Alas. 2001)).

§ 12.3.11 Miscellaneous Provisions

The statute contains several additional provisions of which counsel should be aware.[104] First, because ICWA's provisions are jurisdictional, it appears that any party can bring a petition to invalidate state court action undertaken in violation of the Act at any time.[105] Certainly, the statute contains no time limit by which an action to invalidate must be filed. Thus, even if the court applies the state's statute of limitations, as some courts have done, such an action may delay permanency for the child and could have a disruptive effect on the stability of the child's situation. Counsel can largely avoid such problems by taking steps to ensure that ICWA's provisions are strictly adhered to.

Next, state courts and child welfare agencies must give full faith and credit to the "public acts, records, and judicial proceedings of any Indian tribe . . . to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity."[106] States, however, are not required to provide more full faith and credit to the orders of tribal courts than they do other entities.[107]

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."[108] For instance, where state law provides a higher notice standard than ICWA, the higher state standard must be applied.[109] It appears that the higher standard rule contained in ICWA applies not just to individual litigants, but also to Indian tribes.[110]

§ 12.4 Conclusion

Although the Indian Child Welfare Act was enacted more than 30 years ago, significant problems with the statute's implementation remain.[111] One major problem, which is indicative of other implementation challenges, is the overrepresentation of

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[104] Space limitations do not permit a more detailed discussion of these provisions; however, this is not to suggest that these portions of the statute are of less importance.

[105] 25 U.S.C. § 1914. *See generally* Mississippi 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).

[106] 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).

[107] Navajo Nation v. Dist. Court for Utah County, 624 F. Supp. 130 (D. Utah 1985), *aff'd,* 831 F.2d 928 (10th Cir. 1987).

[108] 25 U.S.C. § 1921.

[109] *See In re* Elliott, 218 Mich. App. 196, 554 N.W.2d 32 (1996).

[110] *See, e.g.*, Cherokee Nation v. Nomura, 160 P.3d 967 (Okla. 2007).

[111] *See* U.S. General Accounting Office, *Indian Child Welfare Act, Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States* (2005).

Indian children placed in out of home care.[112] In 2005, the General Accounting Office found that nationally American Indian children comprised 3% of the foster care population in fiscal year 2003 while they make up only approximately 1.8% of the country's population of children under age eighteen.[113] To better serve Indian children and their parents, it is important that counsel become familiar with the detailed provisions of ICWA and that counsel take every reasonable step to ensure that its provisions are carefully and faithfully applied.

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[112] *Id.* at 11. *See also* Carol A. Hand, *An Ojibwe Perspective on the Welfare of Children: Lessons of the Past and Visions for the Future*, 28/1 CHILD. YOUTH SERV. REV. 20, 27 (2006).

[113] U.S. General Accounting Office, *Indian Child Welfare Act, Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States*, p. 1 (2005).