

The Indian Child Welfare Act

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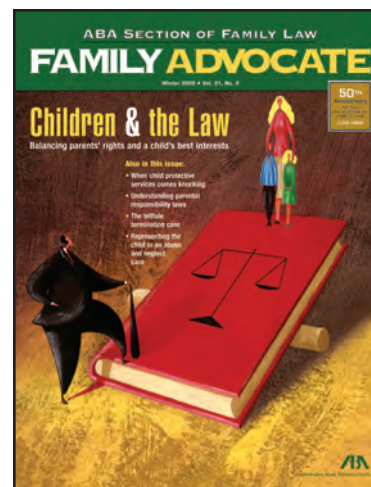
The Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq.*, applies to cases involving an “Indian child,” a term of art referring to an unmarried person under the age of 18 who is (1) a member of a federally recognized Indian Tribe or Native Alaskan Village, or (2) eligible for such membership *and* the child of a member. The amount of Native heritage is irrelevant, and membership or eligibility for membership is determined solely by the criteria of the tribe or tribes in question. ICWA applies to proceedings for guardianship, foster-care placement, status offenses, termination of parental rights, preadoptive placement, and adoption. It does not apply to custody disputes solely between parents or to juvenile delinquency cases. To the extent that state law conflicts with provisions of ICWA, as a federal law ICWA preempts and overrides state provisions; however, where the state offers greater protection to parents than ICWA, the more stringent state provisions will apply. See 25 U.S.C. § 1921.

If the child is a ward of the tribal court, resident, or domiciled on the reservation, the tribe has exclusive jurisdiction (see 25 U.S.C. § 1911). However, the state court may enter an emergency order to prevent imminent physical damage or harm to a child found off the reservation until the tribal court can assume jurisdiction. See 25 U.S.C. § 1922. The United States Supreme Court held in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L.Ed. 2d 29 (1989), that parents domiciled on a reservation cannot defeat ICWA by temporarily leaving the reservation to give birth to a child and place the child for adoption. The Court applied a federal definition of domicile, whereby the domicile of the child is that of the parent.

Where the tribe does not have exclusive jurisdiction, it has concurrent jurisdiction with state court. The state court is required to transfer jurisdiction to the tribe upon request, except when one parent objects or the court finds good cause has been shown. See 25 U.S.C. § 1911. The BIA has promulgated guidelines (BIA Guidelines) to assist state courts in applying provisions of the Act. See 44 Fed. Reg. 67584, § C.3 (Nov. 26, 1979); 25 C.F.R. § 23.11.

ICWA was enacted in response to the erosion of Indian families and culture by removal of children and placement in dominant society foster and group homes and institutions, often without any understanding of the cultural norms and practices of the tribe. Notice provisions of ICWA are critical and must strictly be complied with. The child’s tribe, parent, and “Indian custodian” are entitled to timely notice of proceedings and may intervene in them at any time. See 25 U.S.C. § 1903. Where the tribe or whereabouts of the parent cannot be determined, notice must be provided to the Secretary of the Interior. See 25 U.S.C. § 1912. In addition, state courts must recognize and consider that the tribe has an independent interest in the case

Grounds for removal from parental custody require proof by clear and convincing evidence (proof beyond a reasonable doubt for termination of parental rights cases), supported by an expert’s testimony that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. See 25 U.S.C. § 1912. With respect to Indian aspects of the cases, the expert should have familiarity with the tribal culture and be prepared to testify solely as to issues relevant



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to tribal values and practices. Another expert may be needed to testify about physical or psychological aspects of the case.

If the child must be placed in other than a parent's home, ICWA provides for certain placement priorities. With respect to who constitutes the child's "family," Indian relatives are not favored over non-Indian relatives, and the tribe may apply a broad definition of who constitutes "family" within the tribal culture. Foster-care placement priorities are: (1) a member of the child's extended family (whether Indian or non-Indian), (2) a foster home licensed or approved by the tribe, (3) an Indian foster home approved by another licensing authority, or (4) an institution approved by the Indian tribe or operated by an Indian organization. See 25 U.S.C. § 1915.

Adoptive placement priorities are: (1) a member of the child's extended family, (2) other members of the child's tribe, or (3) other Indian families. *Id.* Under ICWA, the child's tribe may adopt a different order of placement priority, in which case the court must follow that order. *Id.* In any event, the court may deviate from the placement priorities upon a showing of good cause to the contrary. Again, the BIA Guidelines provide assistance as to factors the court may consider.

Voluntary or involuntary placements

ICWA applies to voluntary foster-care and adoption placements as well as to involuntary ones. See 25 U.S.C. § 1913. The parent (whether Native American or not) of an Indian child has greater protection in voluntarily surrendering a child for adoption than a parent of a non-Indian child. To be valid, the consent must be executed no sooner than 10 days after the child's birth, in writing, and recorded before a judge of competent jurisdiction. See 25 U.S.C. § 1913. The judge must certify that the terms and consequences of the consent were fully explained in detail and understood in English or translated into a language the parent or Indian custodian understood. *Id.* Regardless of provisions of state law, the parent of an Indian child may revoke the consent for any reason and demand return of the child at any time before entry of a final adoption or order terminating parental rights. *Id.* Consent may be withdrawn within two years of a final order for fraud or duress. *Id.*

Because membership requirements are determined by each tribe, some based on quantum of blood and some based on lineage alone, it is not always apparent who might qualify as an "Indian child" under ICWA. Therefore, attorneys dealing with any type of third-party custody encompassed within ICWA should make specific inquiry about the child's Indian status. When in doubt, provide notice to the Secretary of the Interior, who is then responsible for determining the tribal membership of the child or parents. Some children are eligible for membership in more than one tribe, in which case all relevant tribes are entitled to be notified and to intervene in state court proceedings.

State court actions taken in violation of ICWA requirements may be vacated on the basis of noncompliance. In dealing with any of the covered categories of proceedings, family law attorneys must investigate whether ICWA applies to the case at hand and, if so, comply carefully with all of its terms. FA

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