

ARIZONA ICWA GUIDE 2015

Acknowledgements: We appreciate the permission of ICWA Special Committee of the Michigan State Court Administrative Office to use the Indian Child Welfare Act of 1978: A Court Resource Guide as a model for the Arizona ICWA Guide 2015 and to incorporate portions of the Michigan Resource Guide where appropriate. We also thank, then University of Arizona law student, John Walters for redrafting the Guide with Arizona references and University of Arizona Professor Barbara Atwood and Assistant Attorney General Dawn Williams for their continuing contributions to the contents of this Guide. Finally Administrative Office of the Courts staff David Withey and Brenda Lee Dominguez have performed ongoing editorial work on this Guide.

Use of Links: Users may navigate to content addressed in this Guide by using the control key to select a title in the table of contents. Links are provided within the text of this Guide to cited federal and state statutes, federal regulations, BIA guidelines, court cases, court rules, and Arizona Department of Child Safety policies and procedures. These links will be periodically updated. However, this is a guide to legal authority on ICWA to facilitate not replace individual research.

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I. Introduction

Congress passed ICWA in 1978 in response to a history of destructive governmental practices that had decimated American Indian families and their tribes. In the era preceding the enactment of ICWA, over a quarter of all “Indian children” (a term defined in ICWA) were living in BIA-run institutions and other out-of-home placements, the majority of which were non-Indian. As a result, generations of Indian people lost touch with their cultural and spiritual roots. ICWA not only recognizes the central role of tribal courts in Indian child welfare matters but also heightens the standards governing state child welfare proceedings to prevent the unwarranted removal of Indian children from their families.

Judges and practitioners must understand the types of proceedings to which ICWA applies, the proper parties to an ICWA case, those parties’ respective burdens of proof, and the benefits of collaborating with the Department of Child Safety (DCS, formerly the Arizona Department of Economic Security / Child Protective Services) and the child’s tribe in ICWA cases. That knowledge will allow courts to apply ICWA correctly and uniformly throughout Arizona. This Guide will help judges, attorneys, state and tribal officials and other interested parties involved in juvenile proceedings in Arizona courts to understand ICWA concepts and how they interact with Arizona’s laws governing child welfare, guardianships, and adoptions. The goal of this Guide is to facilitate the implementation of ICWA for the benefit of Indian children, families, and tribes.

A. Relevant References

This Guide is intended to help Arizona judges and practitioners interpret and apply the Indian Child Welfare Act of 1978 (ICWA), [25 USC §§ 1901-1963](#), the related federal regulations, [25 CFR 23.1 – 23.83](#), and the less formal but more specific guidance provided by the U.S. Department of the Interior, Bureau of Indian Affairs (BIA) in its newly-revised [Guidelines for State Courts and Agencies in Indian Child Custody Proceedings \(“BIA Guidelines”\)](#), [80 Fed. Reg. 10,146 \(2015\)](#).¹ The Arizona Rules of Juvenile Procedure incorporate by reference the provisions of ICWA and any amendments to ICWA, [Ariz. R.P. Juv. Ct. 8\(B\)](#), and are cited and linked throughout this Guide. Arizona Department of Child Safety policies are also referenced and linked where appropriate. The Act and the 2015 BIA Guidelines are attached as Appendices A and B respectively. Unless the context requires a more formal citation, this Guide will cite individual sections of ICWA by their US Code section numbers (e.g., “ICWA §1901” or simply “§ 1901”). The same informal citation format will be used to cite specific sections of the BIA Guidelines.

¹ The [2015 BIA Guidelines](#) supersede and replace the [1979 BIA Guidelines](#). 80 Fed. Reg. at 10,147. The 1979 BIA Guidelines, published at 44 Fed. Reg. 67,584, were explicitly nonbinding, *id.*, but Arizona’s courts frequently relied on them for guidance, *see, e.g., Maricopa Cnty. Juv. Action No. JS-8287*, [171 Ariz. 104, 828 P.2d 1245 \(App. 1991\)](#). The 2015 BIA Guidelines state that they “should be applied in all proceedings and stages of a proceeding in which the Act is or becomes applicable.” 80 Fed. 10,150. The Department of the Interior has proposed a rule to implement most of the 2015 BIA Guidelines as binding regulations. *See Regulations for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Fed. Reg. 14,880 (2015). As of this writing, no final action on the proposed rule has been taken.

B. Terminology

ICWA itself uses the terms “Indian” and “Tribe”. For consistency, this Guide uses the Act’s terminology; Arizona state courts should do the same. The term “Indian” is a term of art in federal law that serves to differentiate between an individual’s political relationship with his or her tribe and any ethnic or racial heritage (often described as “Native American”). See [Pima Cnty. Juv. Action No. S-903, 130 Ariz. 202, 208, 635 P.2d 187, 193 \(App. 1981\)](#). As a result, a child’s status as an “Indian child” is a political designation for purposes of the Equal Protection Clause. See Jones, Tilden, & Gaines-Stoner, *The Indian Child Welfare Act Handbook* 13-16 (2008).

II. Proceedings Covered by ICWA: Child Custody Proceedings Involving an Indian Child

The provisions of ICWA apply to any “child custody proceeding” involving an “Indian child,” as defined by ICWA. Those terms have specific and unique meanings under ICWA that may differ from their ordinary usage, as discussed below. Note that the party asserting that ICWA applies to a proceeding has the burden of proving its applicability. [Maricopa Cnty. Juv. Action No. JS-7359, 159 Ariz. 232, 235, 766 P.2d 105, 108 \(App. 1998\)](#).

A. How does ICWA Define “Child Custody Proceeding”?

[ICWA § 1903\(1\)](#) defines “child custody proceeding” to include (i) “foster care placement,” (ii) “termination of parental rights,” (iii) “preadoptive placement,” and (iv) “adoptive placement.” ICWA defines “foster care placement” as:

[A]ny action removing an Indian child from his parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated. [§ 1903\(1\)\(i\)](#).

The [2015 BIA Guidelines](#) define “custody” to mean “physical and/or legal custody under any applicable tribal law or tribal custom or State law.” BIA Guidelines § A.2 (child custody proceeding). The 2015 BIA Guidelines further provide that “continued custody” means “physical and/or legal custody that a parent already has or had at any point in the past.” *Id.* The 2015 BIA Guidelines also state that a biological mother has had custody of a child. *Id.* These new provisions are significant in light of *Adoptive Couple v. Baby Girl* (U.S. 2013), discussed *infra* at Section III(D).

B. What Arizona Juvenile Proceedings are Covered by ICWA?

Foster care placements ([A.R.S. §§ 8-501 to -530](#))

Guardianships ([A.R.S. §§ 8-801 to -892](#); [Ariz. R.P. Juv. Ct. 63](#))

Terminations of parental rights ([A.R.S. §§ 8-531 to -544](#); [Ariz. R.P. Juv. Ct. 66](#))

Adoptions and preadoptive placements ([A.R.S. §§ 8-101 to -135](#); [Ariz. R.P. Juv. Ct. 84](#))

Incorrigible child custody ([A.R.S. § 8-201\(16\)](#), [§ 8-341\(A\)\(2\)](#)); But see [Ariz. R.P. Juv. Ct.](#), Rule 8.

C. What Arizona Juvenile Proceedings are not Covered by ICWA?

ICWA has only two exceptions to its broad definition of “child custody proceeding”: delinquency and dissolution of marriage proceedings.

Domestic Relations Proceedings. First, the statutory definition of a “child custody proceeding” does not include an award of custody to one of the parties in a dissolution of marriage proceeding. Thus, child custody and parenting time disputes between parents are not “child custody proceedings” and do not implicate ICWA. Courts have applied this exception to custody disputes between unmarried parents as well. See Jones, Tilden, & Gaines-Stoner, *The Indian Child Welfare Act Handbook* 28 (2d ed 2008).

Delinquency Proceeding. Second, if a juvenile commits an act that would be a crime if committed by an adult, then the proceeding and resulting placement is not a “child custody proceeding” and ICWA does not apply. If the investigation of a delinquency case involving a criminal act reveals that the Indian child suffered abuse and neglect, then ICWA will apply to any dependency case arising out of the delinquency case. All other placements of juveniles with anyone other than a parent, including status offenses, are “child custody proceedings” and fall under the provisions of ICWA. The [2015 BIA Guidelines](#) state that ICWA applies “to proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, preadoptive or adoptive placement, or a termination of parental rights.” [2015 BIA Guidelines § A.3\(a\)](#) (When does ICWA apply?).

Consistent with this reading of ICWA, the statute would apply to a juvenile the court adjudicates incorrigible and, pursuant [A.R.S. § 8-341\(A\)\(2\)](#), awards to a reputable citizen, to a public or private agency, or to relatives, rather than to the child’s parents. Some states, however, have applied ICWA when a child is removed from home because of a status offense, only if the removal is based on a finding that the parents or guardians are providing inadequate supervision or care. 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) (analyzing various state responses to ICWA’s application to status offenses).

If an Indian child is returned home after being found delinquent in a proceeding to which ICWA does not apply, the Department of Child Safety may intervene if a lack of proper supervision may have contributed to the child’s delinquent behavior. DCS may then file a new petition to provide in-home services or to remove the child from the home and place him in a foster care setting. Note that ICWA would apply to the proceedings under the new DCS petition even though it did not apply to the original juvenile proceeding that caused DCS to become involved.

Incorrigible Proceedings. Whether ICWA applies in a delinquency proceeding depends on two factors: (1) the type of offense or crime and (2) whether the placement was based upon an act that would be a crime if committed by an adult. If the Indian child is charged with a status offense,

then ICWA applies.² For all other juvenile offenses when placement was based on an act that would be a crime if committed by an adult, ICWA does not apply.

It should be noted that the Arizona Rules of Procedure for Juvenile Court, Rule 8(A) appears to conflict with the BIA Guidelines in excluding incorrigibility proceedings from ICWA coverage. (“The Indian Child Welfare Act, 25 U.S.C. 1901 et seq., shall not apply to delinquency, incorrigibility or transfer proceedings involving an Indian child.”) But see [Ariz. R.P. Juv. Ct. 8\(A\)](#) “Committee Comments” (Any conflict between these rules and the Act shall be resolved in favor of the Act. The Bureau of Indian Affairs Guidelines for State courts in Indian Child Custody Proceedings may be of assistance in interpreting provisions of the Act.).

In Arizona rarely if ever is a child removed from the home solely due to incorrigibility in which case ICWA does not apply. If an Indian child is brought before the court on one of the status offenses listed above and faces removal and the court follows the BIA Guidelines rather than Rule 8(A), then ICWA applies. Even if the child is not removed from the parents’ custody and ICWA does not apply, the court may nevertheless provide the child’s tribe notice of the proceedings. This would give the tribe the opportunity to intervene to assist in identifying and providing culturally competent services.³

In rare cases, for example, when a minor runs away and the police later detain him for a status offense, the case may qualify temporarily for an “emergency removal” placement. See [§ 1922](#). But ICWA still applies, which means that the placement based on the emergency situation must end as soon as the emergency itself does. See the [Emergency Removal & Protective Custody](#) section.

Another atypical status offense situation may arise when the status offense charge causes a court to find an Indian child in contempt of court for a probation violation. ICWA would not apply to the contempt order and resulting out-of-home placement because the placement would be based on an act that would be a crime if committed by an adult (i.e., not a status offense).

III. “Indian Child”

A. How Does ICWA Define “Indian Child”?

[ICWA § 1903\(4\)](#) defines an “Indian child” as someone who is (1) under the age of 18 and unmarried, and (2) *either* (a) a member of a federally recognized Indian tribe, or (b) the biological child of a member of an Indian tribe *and* eligible for membership in any federally-recognized Indian tribe. See also [Ariz. R.P. Juv. Ct. 37\(C\)\(2\) and 68\(B\)\(3\)](#).

² The [2015 BIA Guidelines](#) define “status offenses” to mean “offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person’s status as a minor (e.g., truancy, incorrigibility).” [2015 BIA Guidelines § A.2 \(Status Offense\)](#).

³ “Active efforts” and “qualified expert witness” have special meanings in ICWA. Those meanings and related considerations are discussed in more detail throughout this Guide. See [Active Efforts](#); [Qualified Expert Witness](#).

The best way to identify an “Indian child” and determine the tribal affiliation is to obtain the required information from the child, the child’s family members, and the tribe.⁴ *The tribe’s determination of membership or eligibility for membership is conclusive.* See [2015 BIA Guidelines § B.3](#) (Who makes the determination as to whether a child is a member of a tribe?); Determining an Indian Child’s Tribe section and Department of Child Safety – Policy & Procedure Manual (“[DCS Policy Manual](#)”), [Chapter 6, Section 5, Procedures: Identifying the Child as an Indian child](#).

Practice Tip: To ensure the most timely and accurate response regarding a child’s membership or eligibility for membership in a tribe, the party seeking confirmation should provide as much information as possible, including maiden names, dates of birth, social security numbers, and tribal enrollment (or census) numbers. See [ICWA eNotice User Guide](#). Caveat: This contact does not constitute formal notice to the tribe. For more details, see this Guide’s section titled: [ICWA Notification Requirements](#).

Both statute and court rules require courts to “inquire if any party has reason to believe that the child at issue is subject to the Indian Child Welfare Act.”⁵ If the child is subject to ICWA, the court must meet all the requirements of the Act.

According to the new BIA Guidelines, a state court has reason to believe a child may be an Indian child if:

- 1) A party to the case, an Indian tribe, an Indian organization, or a public or private agency tells the agency or court that the child is an Indian child;
- 2) Any public or state-licensed agency involved in child protection services or family support has discovered information suggesting that the child is an Indian child;
- 3) The child gives the agency or court reason to believe he or she is an Indian child;
- 4) The court or agency knows that the residence or domicile of the child, the child’s biological parents, or the child’s custodian is a predominantly Indian community or an Indian Reservation; or
- 5) An employee of the agency or an officer of the court involved in the proceedings has knowledge that the child is an Indian child.

[2015 BIA Guidelines § B.2 \(Pretrial Requirements\)](#).

These are common circumstances that should be checked and would give a court reason to believe that the child may be an Indian child covered by ICWA. But the list is not exhaustive. Courts must watch for other indications that ICWA will apply to a child’s case.

If the case has been assigned to a DCS child safety worker, that worker should have access to that information. According to [DCS Policy](#), the child safety worker must make “diligent efforts” to

⁴ [A.R.S. § 8-824\(E\)\(7\)](#) requires the court to order a parent or guardian at a preliminary protective hearing to provide the names, relationships, and information necessary to locate persons related to the child.

⁵ [A.R.S. § 8-815](#); [Ariz. R.P. Juv. Ct. R. 50, R. 52, R. 62, R. 63.3, and R. 65](#).

identify whether a child is subject to ICWA within 48 hours of removal and within 5 days of a case opening for investigation. Courts should review what steps the child safety worker has taken to determine the child's status. This will significantly reduce the risk of discovering the child's Indian heritage at an advanced stage in the proceedings, thereby causing significant delays and wasting court time.

If in doubt, the court may order the parent or custodian to provide any available information about the child's Indian heritage to the child's attorney or to a guardian ad litem for the child appointed by the court to help investigate whether the child is an Indian child. Another option for identifying an Indian child's tribe is to contact the Bureau of Indian Affairs' regional office. For Arizona tribes (except the Navajo Nation), contact:

Western Regional Office
2600 N. Central Avenue
4th Floor Mailroom
Phoenix, AZ 85004-3050
Telephone: (602) 379-6600
Telefax: (602) 379-4413

For the Navajo Nation:

Navajo Regional Office
Bureau of Indian Affairs
P.O. Box 1060
Gallup, NM 87305
Telephone: (505) 863-8314
Telefax: (505) 863-8324

When contacting the BIA, be prepared to provide as much family-tree information as possible. This includes the child's name and the names of the parents and grandparents (including maiden names).

Unless and until the party asserting ICWA's application can prove that the child is an Indian child, however, only the ICWA notification requirements apply to the proceedings. See [Ariz. Dep't of Econ. Sec. v. Bernini, 202 Ariz. 562, 48 P.3d 512 \(App. 2002\)](#).

B. Special Considerations for Adopted Children.

A child adopted by a family whose parents are members of a particular tribe, regardless of the child's heritage by birth, may be subject to ICWA if the child is a member of the adoptive parents' tribe or any other tribe. Contact each tribe for details on whom the tribe considers a citizen or member for purposes of ICWA.

C. Special Considerations for Children of Unwed Fathers.

Under [ICWA § 1903\(9\)](#) and Arizona case law, an Indian father of a child born out of wedlock to a non-Indian mother must acknowledge or establish paternity before the Act applies. [Jared P. v. Glade T., 221 Ariz. 21, 209 P.3d 157 \(App. 2009\)](#); [Maricopa Cnty. Juv. Action No. A-25525, 136](#)

[Ariz. 528, 667 P.2d 228 \(App. 1983\)](#); [Michael J., Jr. v. Michael J., Sr., 198 Ariz. 154, 7 P.3d 960 \(App. 2000\)](#). The Arizona Court of Appeals has held that an unwed father need not strictly comply with state-law rules for establishing paternity to demonstrate that he has “acknowledged or established” paternity for purposes of the application of ICWA. See [Jared P., 221 Ariz. 21, 209 P.3d 157](#). The continued validity of the holding in *Jared P.* is subject to question in light of [Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 \(2013\)](#), as discussed in the following section. Even when one parent is a non-Indian and the child has been raised in a non-Indian home, the Act still governs the child’s placement if the child is an “Indian child” as defined by the Act. [Coconino Cnty. Juv. Action No. J-10175, 153 Ariz. 346, 349, 736 P.2d 829, 832 \(App. 1987\)](#). This holding, also, may be subject to reinterpretation in light of [Adoptive Couple](#) in situations where the Indian parent never had legal or physical custody of the child. A child who has an Indian parent may not be eligible for membership under the tribe’s membership criteria. In that circumstance, ICWA would not apply. All of these considerations underscore the need for prompt notice to the alleged father to ensure that the child’s Indian status can be quickly ascertained.

D. Existing Indian Family Exception.

Courts in a few states have refused to apply ICWA if the child is not part of an “existing Indian family unit,” even if the child is clearly included in the definition of “Indian Child” under ICWA. See *In re Adoption of Baby Boy L.*, 231 Kan. 199, 643 P.2d 168, 175–76 (1982) (first state court to adopt the “existing Indian family” exception), *overruled by In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009). Currently only Alabama, Indiana, Kentucky, Louisiana, and Tennessee recognize the exception, and Alabama and Indiana do not apply the exception if the child’s mother is Indian. See *Ex parte C.L.J.*, 946 So. 2d 880, 889 (Ala. Civ. App. 2006), and *Matter of D.S.*, 577 N.E.2d 572, 574 (Ind. 1991). Twenty states have rejected the exception judicially or legislatively. The California courts of appeal are split, but a statutory amendment in that state clarified the application of ICWA and was intended to bar the application of the exception. See generally *In re Vincent M.*, 150 Cal. App.4th 1247, 1265, 59 Cal.rptr.3d 321 (Cal App. 2007).

Arizona has explicitly rejected this “exception” for several reasons. [Michael J., Jr. v. Michael J., Sr., 198 Ariz. 154, ¶ 13, 7 P.3d 960, 963 \(App. 2000\)](#). In *Michael J., Jr.*, the court criticized the existing Indian family exception because it frustrated the express purposes of the Act. Most importantly the exception frustrated the tribe’s ability to protect the welfare of its children and its culture. Furthermore, the plain language of the Act does not require that the child be part of an existing Indian family and enforcing such a requirement inscribes a judicially made condition onto the Act. Consistent with the case law, the new BIA Guidelines flatly reject the exception. See [2015 BIA Guidelines § A.3\(b\)](#) (When does ICWA apply?).

In [Adoptive Couple v. Baby Girl, 133 S.Ct. 2552, \(2013\)](#), the Supreme Court did not endorse the existing Indian family exception but did reach a result arguably consistent with the reasoning underlying the exception based upon the language of ICWA. In its 5-4 decision, the Court held that an unmarried Indian father who had “abandoned” the child before birth and had never had custody under state law was not entitled to the protections of ICWA in a proceeding to terminate his parental rights.

The birth father was an enrolled member of the Cherokee Nation, and the birth mother was non-Indian, both Oklahoma residents. Their daughter was an “Indian child” within the meaning of

ICWA because she was eligible for tribal enrollment with the Cherokee Nation. The birth mother relinquished the child for adoption by a non-Indian couple from South Carolina. The birth father informally renounced his paternal rights in communications with the mother but objected to the adoption once he understood the mother's plan that the child be adopted.

As described by the majority opinion, "Birth Mother sent Biological Father a text message asking if he would rather pay child support or relinquish his parental rights. Biological Father responded via text message that he relinquished his rights." Furthermore, "[w]orking through a private adoption agency, Birth Mother selected Adoptive Couple, non-Indians living in South Carolina, to adopt Baby Girl. Adoptive Couple supported Birth Mother both emotionally and financially throughout her pregnancy. Adoptive Couple was present at Baby Girl's birth in Oklahoma on September 15, 2009, and Adoptive Father even cut the umbilical cord. The next morning, Birth Mother signed forms relinquishing her parental rights and consenting to the adoption." [133 S.Ct. at 2558.](#)

In connection with the adoption proceeding, "Biological Father signed papers stating that he accepted service and that he was 'not contesting the adoption.' But Biological Father later testified that, at the time he signed the papers, he thought that he was relinquishing his rights to Birth Mother, not to Adoptive Couple." *Id.* The Cherokee Nation subsequently intervened in the adoption proceeding. Under South Carolina law, the birth father's failure to assert his paternal rights in a timely fashion meant that he was not entitled to veto the adoption.

Both the South Carolina trial court and the state supreme court, however, held that the heightened evidentiary burdens and the placement preferences under ICWA trumped state law. Because the birth father's paternal rights could not be terminated, the adoption did not go forward, and the state trial court ordered the transfer of the child to the birth father.

The U.S. Supreme Court reversed and remanded. The majority announced three separate holdings, each of which marks an important limitation on ICWA.

- 1) The heightened burden, found in [ICWA's § 1912\(f\)](#), of showing "evidence 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" does not apply where the Indian parent never had physical or legal custody of the Indian child under state law. The Court reasoned that the term "continued custody" required this result, and it also found support for this interpretation in the original BIA Guidelines. [133 S.Ct. at 2560-62.](#)
- 2) The heightened requirement, found in [ICWA's § 1912\(d\)](#), of showing that "active efforts have been made to provide remedial services . . . designed to prevent the breakup of the Indian family" does not apply "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody." The Court reasoned that "there is no 'relationship' that would be 'discontinu[ed]—and no 'effective entity' that would be 'end[ed]—by the termination of the Indian parent's rights." [133 S.Ct. at 2562-64.](#)

- 3) The placement preferences under [ICWA § 1915\(a\)](#) do not apply “in cases where no alternative party has formally sought to adopt the child.” The Court pointed out that the “Biological Father is not covered by [§ 1915\(a\)](#) because he did not seek to adopt Baby Girl. . . . Moreover, Baby Girl’s paternal grandparents never sought custody of Baby Girl. . . . Nor did other members of the Cherokee Nation or ‘other Indian families’ seek to adopt Baby Girl, even though the Cherokee Nation had notice of—and intervened in—the adoption proceedings.” [133 S.Ct. at 2564-65](#).

Summarizing its ruling, the Court expressed clear disapproval of the application of ICWA to unwed fathers who are slow to assert their rights. According to Justice Alito, writing for the majority, “a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother - perhaps contributing to the mother’s decision to put the child up for adoption - and then could play his ICWA trump card at the eleventh hour to override the mother’s decision and the child’s best interests.” *Id.* at 2565. The Court further observed, “If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under ICWA. Such an interpretation would raise equal protection concerns, but the plain text of [§§ 1912\(d\) and \(f\)](#) makes clear that neither provision applies in the present context. Nor does the rebuttable adoption preferences in [§ 1915\(a\)](#) apply when no alternative party has formally sought to adopt the child.” *Id.* The implications of Adoptive Couple are still uncertain, but at least one court has held that the case did not endorse the existing Indian family exception. See *Thompson v. Fairfax County Dept. of Family Services*, 747 S.E.2d 838 (Ct. App. 2013).

IV. Determining an Indian Child’s Tribe

Identifying the child’s tribe is essential in light of the tribe’s right to intervene in state child custody proceedings, among other rights.

A. Definition of “Indian Tribe”

[ICWA § 1911\(c\)](#). [Section 1903\(8\)](#) defines an “Indian tribe” as “[A]ny Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians, including any Alaska Native village as defined in section [1602\(c\) of title 43](#).”⁶

i. Federally recognized tribes.

The federal [Bureau of Indian Affairs recognizes 565 American Indian and Alaska Native tribes](#). [BIA’s Designated Tribal Agents for Service of Notice](#) contains contact information for all tribal ICWA contacts. Arizona has 22 federally recognized tribes. They are:

- 1) Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation
- 2) Cocopah Tribe of Arizona

⁶ [Ariz. R.P. Juv. Ct. 37\(C\)\(5\)](#) applies ICWA definition.

- 3) Colorado River Indian Tribes of the Colorado River Indian Reservation (Arizona and California)
- 4) Fort McDowell Yavapai Nation
- 5) Fort Mojave Indian Tribe (Arizona, California and Nevada)
- 6) Gila River Indian Community of the Gila River Indian Reservation
- 7) Havasupai Tribe of the Havasupai Reservation
- 8) Hopi Tribe of Arizona
- 9) Hualapai Indian Tribe of the Hualapai Indian Tribe Reservation
- 10) Kaibab Band of Paiute Indians of the Kaibab Indian Reservation
- 11) Navajo Nation (Arizona, New Mexico and Utah)
- 12) Pascua Yaqui Tribe of Arizona
- 13) Pueblo of Zuni Tribe (Arizona and New Mexico)
- 14) Quechan Tribe of the Fort Yuma Indian Reservation (Arizona and California)
- 15) Salt River Pima-Maricopa Indian Community of the Salt River Reservation
- 16) San Carlos Apache Tribe of the San Carlos Reservation
- 17) San Juan Southern Paiute Tribe of Arizona
- 18) Tohono O’odham Nation of Arizona
- 19) Tonto Apache Tribe of Arizona
- 20) White Mountain Apache Tribe of the Fort Apache Reservation
- 21) Yavapai-Apache Nation of the Camp Verde Indian Reservation
- 22) Yavapai-Prescott Tribe of the Yavapai Reservation

ii. Special considerations for non-U.S. citizen children and unrecognized tribes.

Some Indian children are Canadian or Mexican⁷ citizens and members of U.S. federally recognized tribes. Because ICWA is not restricted to U.S. citizens, the Act may apply to those children because of their membership in tribes recognized by our federal government. ICWA does not apply to members of non-federally recognized tribes, state historic tribes,⁸ or tribes recognized by other countries.

B. Definition of “Indian Child’s Tribe”

[ICWA § 1903\(5\)](#) defines an “Indian child’s tribe” as the tribe (or tribes) that the child is a member of or eligible to join. If the child already belongs to more than one tribe or is eligible for membership in more than one tribe, then ICWA recognizes the tribe with which the child has the more significant contact. See also [Ariz. R.P. Juv. Ct. 37\(C\)\(5\) and 68\(B\)\(5\)](#), and [DCS Policy Manual Chapter 6, Section 5, Procedures, Notification to the Tribe](#).

⁷ The Tohono O’odham Nation is the only Arizona tribe that enrolls Mexican members, although those members are not U.S. citizens.

⁸ Approximately half of the states—but not Arizona—have recognized “state historic tribes,” that is, tribes that are not federally recognized but that enjoy some protection or benefit under state laws. Although members of state historic tribes are not entitled to ICWA’s protections, notifying such tribes may be beneficial in obtaining resources to help with reunification and location of relatives.

If a child already *belongs* to one tribe, that tribe is the “Indian child’s tribe” for purposes of ICWA even if the child is *eligible* for membership in another tribe. If a child first becomes a member of a tribe while the case remains pending, that tribe immediately becomes the “Indian child’s tribe” with respect to all subsequent proceedings. If the child becomes a member of a tribe other than the one that the court already has determined to be the Indian child’s tribe, the previous court determination remains valid.

Practice Tip: Even though ICWA does not apply to the last-mentioned groups, courts may choose to send notice of a proceeding to a non-federally-recognized tribe, a state historic tribe, or a tribe recognized by another country. Those tribes may offer culturally appropriate services that can help the child and family or provide assistance in locating relatives. Two websites with information about the First Nations of Canada are: [Aboriginal Canada](#) and [Aboriginal Affairs and Northern Development Canada](#). However, even if notice is sent and one of those tribes responds, it will not have the right of formal intervention pursuant to ICWA.

C. What Should Guide State Courts in Determining the Child’s Tribe if a Child is a Member or Eligible for Membership in More than one Tribe?

If a state court must determine which tribe is the “Indian child’s tribe” for purposes of ICWA, the BIA Guidelines recommend that the court consider, among other factors, the following:

- 1) Preference of parents, or extended family members who are likely to become adoptive or foster parents.
- 2) The child’s length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
- 3) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
- 4) Residence on or near one of the tribe’s reservation by the child’s relatives;
- 5) Tribal membership of custodial parent or Indian custodian;
- 6) Interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these Guidelines; and
- 7) The child’s self-identification.

See [2015 BIA Guidelines § B.4](#) (What is the procedure for determining an Indian child’s tribe when the child is a member or eligible for membership in more than one tribe?). The 2015 BIA Guidelines promote cooperative agreements between tribes to determine which of them should be designated the Indian child’s tribe. *Id.* at § B.4(d). [Ariz. R.P. Juv. Ct. 37\(C\)\(3\)](#) provides, “The term Indian child’s tribe means . . . in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.” The Rules of Procedure for Juvenile Court do not contain a definition of the term “significant contacts.”

Once the state court determines the Indian child’s tribe, the judge must record both the determination and the supporting reasoning on the record. A written statement of the judge’s

decision and reasoning must be sent to each party and to each person, tribe, or other governmental agency that received notice of the proceeding. See [Ariz. R.P. Juv. Ct. 50](#).

If a court cannot identify a child's tribe, the court must send a notice of that fact to the U.S. Department of the Interior's regional Bureau of Indian Affairs director at the following addresses:

Western Regional Office
2600 N. Central Avenue
4th Floor Mailroom
Phoenix, AZ 85004-3050
Telephone: (602) 379-6600
Telefax: (602) 379-4413

For the Navajo Nation:

Navajo Regional Office
Bureau of Indian Affairs
P.O. Box 1060
Gallup, NM 87305
Telephone: (505) 863-8314
Telefax: (505) 863-8324

V. Jurisdiction

ICWA requires state courts to recognize and respect tribal jurisdiction.⁹

A. Exclusive Tribal Court Jurisdiction

[ICWA § 1911\(a\)](#) states that an Indian tribe shall have exclusive jurisdiction over any child custody proceeding involving an Indian child who:

- 1) Resides or is domiciled within the tribe's reservation,¹⁰ or
- 2) Is a ward of the tribal court, regardless of the child's residence. ICWA does not define "ward," but courts around the country have defined this term to include occasions when a tribe exercises authority over a child by:
 - Tribal court order (for custody or placement), or

⁹ In some states, jurisdiction is vested in the state by a federal law known as Public Law 280 [see [18 USC 1162\(a\)](#) and [28 USC 1360\(a\)](#)]. In states that enacted Public Law 280, the state courts have concurrent jurisdiction over ICWA cases that arise on tribal land, unless the tribe reassumes jurisdiction under [25 USC 1918](#). Arizona is not a P.L. 280 state.

¹⁰ Note that not all federally recognized tribes have land set aside or reserved for their exclusive use. Those tribes may lack the territorial basis for exclusive jurisdiction. See Jones, Tilden & Gaines-Stoner, *The Indian Child Welfare Act Handbook* 56-57 (2d ed. 2008). An example of this is the San Juan Southern Paiute Tribe located on the Navajo reservation.

- Tribal resolution, where a tribe does not conduct formal tribal court proceedings. See [In re M.R.D.B., 787 P.2d 1219 \(Mont. 1990\)](#); [In re D.L.L., 291 N.W.2d 278 \(S.D. 1980\)](#); or [In re J.M., 718 P.2d 150 \(Alaska 1986\)](#).

“Domicile” is not defined in ICWA. The U.S. Supreme Court held that federal law determines the meaning of domicile [Mississippi Band of Choctaw Indians v. Holyfield, 490 US 30 \(1989\)](#). In recognizing a uniform federal definition under ICWA, the Court held that a child born in wedlock takes the parents’ domicile, and a child born out of wedlock takes the child’s mother’s domicile. Even before [Mississippi Band of Choctaw Indians v Holyfield, 490 U.S. 30 \(1989\)](#), an Arizona court found that the domicile of a child born out of wedlock derived from his mother, despite the fact that the child had never been on the reservation. [Pima Cnty. Juv. Action No. S-903, 130 Ariz. 202, 635 P.2d 187 \(App. 1981\)](#).

If the state court determines that the Indian child resides or is domiciled on a reservation, the state court must dismiss its case. The only exceptions are emergency removals; there, ICWA permits the state court to authorize the filing of a petition before transferring the case to the appropriate tribal court. See this Guide’s [Emergency Removals and Protective Custody](#) section. Exclusive tribal jurisdiction under § 1911 applies even if the Indian child is not a member of the tribe where the child is living. If the tribe’s own tribal code limits its jurisdiction to children who are members of that tribe, however, an inter-tribal transfer may be available. ICWA does not govern child welfare jurisdiction over a child who resides on an Indian reservation but who does not qualify as an Indian child under ICWA. Determining child welfare jurisdiction in this circumstance requires a case-by-case analysis using general principles of state and tribal jurisdiction that is beyond the scope of this Guide.

B. Concurrent State and Tribal Court Jurisdiction

If the state court determines that the Indian child is not a resident of or domiciled on a reservation, the tribal court still may have jurisdiction under the transfer mechanism in [ICWA § 1911\(b\)](#), described below. See this Guide’s Transfer to Tribal Court section below.

For Indian children who reside off their tribe’s reservation, federal law requires state courts to meet several requirements discussed in this Guide’s section titled: [ICWA Notification Requirements](#). If the state court determines that the child *previously* resided or was domiciled on a reservation, the court must contact the tribal court to ascertain if the child is a ward of that tribal court. If an Indian child is a ward of a tribal court, the Indian tribe retains exclusive jurisdiction regardless of the Indian child’s current residence or domicile.

If a state court discovers that it has erroneously exercised jurisdiction over an Indian child because the Indian child resides or is domiciled on a reservation, or is under tribal court jurisdiction at the time of referral, the state court must dismiss its case because the tribal court has exclusive jurisdiction in those circumstances.

C. Transferring Jurisdiction to Tribal Court

ICWA provides mechanisms through which tribes may exercise jurisdiction beyond reservation boundaries. Thus, even if an Indian child resides off the tribe’s reservation, if a transfer to a tribal

court is requested by a parent, an Indian custodian, or the tribe, the state court, in the absence of good cause, must transfer the case to the appropriate tribal court unless:

- 1) a parent objects; or
- 2) the tribal court declines to accept the transfer.

The Act permits states and tribes to craft agreements for the care and custody of Indian children which provide for the orderly transfer of jurisdiction. [ICWA § 1919\(a\)](#). In order to be valid under the Act, such agreements may be revoked by either party within 180 days on written notice to the other party. [ICWA § 1919\(b\)](#). Currently only the Navajo Nation and DCS have a binding Intergovernmental Agreement in place.

i. Who may petition for transfer to tribal court?

A parent, Indian custodian, or tribe may request (orally or in writing) that the state court transfer the Indian child's custody proceeding to the tribal court of the child's tribe. The tribal court must then decide whether to accept or decline the transfer request within 20 days after the tribe receives notice of the proceedings and the request. *See generally* the [2015 BIA Guidelines C](#) (Procedures for Making Requests for Transfer to Tribal Court); [DCS Policy Manual Chapter 6, Section 5, Procedures: Exploring if the Tribe will take Responsibility of the Child](#).

If the state court receives an oral request to transfer the case, the BIA Guidelines recommend that the state court record the request in writing and make it part of the court's record.

ii. When is there "good cause" not to transfer?

[Section 1911\(b\)](#) of ICWA requires the state court to transfer the case of an Indian child who resides off the reservation to the tribal court upon the petition of either parent or the Indian custodian or the Indian child's tribe unless there is good cause to the contrary. Only a parent can veto a transfer. [ICWA § 1911\(b\)](#); [Maricopa Cnty. Juv. Action No. JD-6982, 186 Ariz. 354, 922 P.2d 319 \(App. 1996\)](#) (noting that a parent's objection to a placement is distinct from the issue of transfer of jurisdiction). Any other party may object to the transfer but must demonstrate good cause to deny the transfer request. "Good cause" is a high standard, and the burden is on the party seeking to block transfer to show that good cause exists. When the opposition to a transfer comes from a party other than a parent, the court should hold a hearing to allow all parties to express their views. There is no requirement that the transfer request be made in writing. The BIA Guidelines provide for oral requests. *See* BIA Guidelines § C.1 (How are petitions for transfer of proceeding made?).

Although Arizona case law and the Rules of Procedure for the Juvenile Court have not specifically defined "good cause," Arizona courts have discussed factors to consider. [Pima Cnty. Juv. Action No. S-903 130 Ariz. 202, 635 P.2d 187, \(App. 1981\)](#). In particular Arizona cases have looked to:

- 1) the availability of the child's biological parents;
- 2) whether an Indian custodian has been appointed;
- 3) the amount of contact between the child and tribe over a period of time;
- 4) whether the child has lived on the reservation and for what period; and
- 5) if the child, over 12 years of age, has indicated any opposition to the transfer.

Id. The party opposing the transfer carries the burden to prove that good cause exists to deny the transfer. [Michael J., Jr. v. Michael J., Sr., 198 Ariz. 154, ¶ 21, 7 P.3d 960, 965 \(App. 2000\)](#). The court may not consider the tribe's socio-economic conditions or the adequacy of tribal services when making a good-cause finding. *Id.* An appellate court will determine whether a trial court abused its discretion in deciding whether good cause exists to deny transfer. [Maricopa Cnty. Juv. Action No. JS-8287, 171 Ariz. 104, 828 P.2d 1245 \(App. 1991\)](#).

Some other examples of good cause as outlined in the *original* BIA Guidelines included the following situations:

- 1) The Indian tribe does not have a tribal court.
- 2) The proceeding was at an advanced stage when the petition to transfer was received, and the petitioner did not file the petition promptly after receiving notice of the hearing.
- 3) The child is over twelve years of age and objects to the transfer.
- 4) Requiring the parties or witnesses to present evidence in tribal court would cause undue hardship.
- 5) The child is over five years of age, the parents are not available, and the child has had little or no contact with the tribe or tribal members.

The [2015 BIA Guidelines](#) have substantially revised the discussion of good cause to refuse transfer. Rather than giving examples of what might constitute good cause, the 2015 BIA Guidelines explain that state courts must presume that transfer is in the Indian child's best interests and that state courts may *not* consider any of the following: whether the case is at an advanced stage, whether transfer would result in a change of placement, the child's contacts with the tribe or reservation, socio-economic conditions, or the tribal court's prospective placement. See [2015 BIA Guidelines § C.3](#) (How is a determination of good cause made?)

D. Tribal Intervention in State Court Proceedings

[ICWA § 1911\(c\)](#) makes it clear that, in any state court proceeding involving an Indian child's foster care placement or termination of parental rights, both the child's Indian custodian and the child's tribe¹¹ have a right to intervene at *any* point in the foster care or termination proceedings. [Section 1911\(c\)](#) does not include adoption or preadoption proceedings, but permissive intervention in an adoption matter is probably an option. Sometimes a tribe will intervene, but then opt not to appear at any hearing or seek a transfer. ICWA applies throughout a case even if no tribal representative intervenes, appears, or requests a transfer.

¹¹ Arguably a tribe may intervene without having an attorney - or an attorney licensed to practice in Arizona - to represent them. See [In re Shuey, 850 P.2d 378 \(Or. Ct. App. 1993\)](#); [In re Elias L., 277 Neb. 1023, 767 N.W.2d 98 \(Neb. 2009\)](#).

VI. ICWA Notification Requirements

A. In Which Cases Must ICWA Notice Be Provided?

For *involuntary* dependency proceedings, [ICWA § 1912\(a\)](#) requires that, where the court knows or has reason to know that an Indian child is involved, the party who initiates the child custody proceeding must provide notice to the child's:

- 1) Parents;
- 2) Indian custodians; and
- 3) Any tribe or tribes the child belongs to or is eligible to join¹²

Under [§ 1911\(c\)](#), Indian custodians and tribes have the right to intervene at any time during foster care or termination of parental rights proceedings. Without notice of the proceedings, they could not invoke that right. [Section 1912\(a\)](#) goes on to state:

If the identity or location of the parent or Indian custodian and the Indian tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in the like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe.

As to voluntary proceedings, however, ICWA does not expressly require notice to the tribe, even though the tribe has the right to intervene in such proceedings as well. *See* [Holyfield](#). The 2015 BIA Guidelines state that notice should be sent in voluntary proceedings as well. The [2015 BIA Guidelines § B.6\(j\)](#) (What are the notice requirements for a child custody proceeding involving an Indian child?). The 2015 BIA Guidelines explain that notice in voluntary proceedings is necessary because the tribe might have exclusive jurisdiction or the right to intervene, and notice might help the agency and court in determining whether the child is an Indian child and in complying with ICWA 1915. *Id.* *See also* [2015 BIA Guidelines § E.1\(b\)](#) (Voluntary Proceedings) (“Agencies and State courts should provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene . . .”).

B. What Information Is Required in ICWA Notices?

Under the new BIA Guidelines, notice must include comprehensive information, including but not limited to the following:

- 1) The name of the Indian child.
- 2) The child's tribal affiliation.
- 3) A copy of the petition, complaint, or other document initiating the proceedings.
- 4) The petitioner's name, along with the name and address of the petitioner's attorney.
- 5) A statement that the parents, Indian custodian, and tribe all have a right to intervene in the proceedings.
- 6) A statement that the court will appoint counsel for the parents or custodian if they cannot afford one.
- 7) A statement that the parents or Indian custodian may have additional time to prepare for the proceedings, if needed.

¹² See also [A.R.S. § 8-535](#) and [Ariz. R.P. Juv. Ct. 64\(D\)](#)

- 8) The court's location, mailing address, and telephone number.
- 9) A statement that the parents, custodian, and tribe all have a right to petition the court to transfer the case to the tribal court.
- 10) The potential legal consequences of a current adjudication for the future custodial rights of the parents or custodian.
- 11) A statement that the child custody proceedings may be confidential and that the tribe must not share information about the proceedings with anyone who is not entitled to know it.¹³

See [2015 BIA Guidelines § B.6\(c\)](#) (What are the notice requirements for a child custody proceeding involving an Indian child?) (setting out additional items of information for inclusion in notice).

C. How Must ICWA Notice Be Provided and Proved?

[Section 1912\(a\)](#) also specifies *how* the court may provide notice. It can be provided by:

- 1) Registered mail, return receipt requested;¹⁴ or
- 2) Personal service

The original or a copy of each notice along with return receipts or other proofs of service must be filed with the court. If the court determines that the parent or custodian does not understand the written notice due to inadequate comprehension of written English, the [2015 BIA Guidelines](#) direct the court to provide a translated version or have the notice read in a language the parent or Indian custodian understands. The [2015 BIA Guidelines § B.6\(i\)](#). If this is not feasible, a court should contact the nearest Bureau of Indian Affairs regional office so the BIA can ensure that the notice is explained to the parent or custodian in a language that he or she understands. *Id.*; [DCS Policy Manual Chapter 6, Section 5, Procedures, Notification to the Tribe](#).

Practice Tip: The petitioner may use additional means to communicate the notice such e-mail, telephone or other electronic communication. These additional means may help ensure that tribes receive actual notice, but they are not a substitute for the required statutory notice.

D. What Are the Time Limits for Notice?

Regardless of the service method, ICWA [§ 1912\(a\)](#) requires service be completed at least 10 days prior to an initial hearing. If a notified party subsequently requests additional time to prepare for a hearing, the court must adjourn the case for up to 20 additional days. This requirement is design to give the parent or Indian custodian and the tribe time to prepare for the hearing. See [Ariz. R.P. Juv. Ct. 48, 61, and 64](#); [2015 BIA Guidelines § B.7](#) (What time limits and extensions apply?). A conflicting, state law adopted to comply with other federal law requires that the court “hold a

¹³ See also [Ariz. R.P. Juv. Ct. 64](#) for notice requirements.

¹⁴ See [Ariz. R.P. Juv. Ct. 48\(D\)\(9\) and 64\(D\)](#). In Arizona, notice of ICWA proceedings is usually sent by certified mail, return receipt requested, since both methods require a signature for delivery and provide confirmation of receipt, but certified mail is considerably less expensive and typically arrives more quickly than does registered mail. However, the Arizona Rules of Procedure for Juvenile court provide for use of registered mail.

preliminary protective hearing to review the taking into temporary custody of a child . . . not fewer than five days nor more than seven days after the child is taken into custody, excluding Saturdays, Sundays and holidays.” [A.R.S. § 8-824\(A\)](#). This statute permits the court to grant one continuance of no more than five days if “clearly necessary to prevent abuse or neglect, to preserve the rights of a party, or for other good cause shown.” *Id.* These requirements are designed to minimize the time a child remains in custody without a hearing.

There are several schools of thought regarding resolution of this conflict. First, the state statute’s provision for a continuance “to preserve the rights of a party” can be read to support continuing the preliminary protective hearing to comply with ICWA’s notice requirements. On the other hand, an argument can be made that getting the parties into court as quickly as possible gives the parent a chance to limit the duration of the child’s out-of-home placement by challenging the state’s temporary custody, an added protection afforded by state law and thus supported by ICWA. See [§ 1921](#). And, finally, the preliminary protective hearing requires an order either affirming or denying continued temporary custody pending an adjudication hearing on the dependency petition. In light of the function of the preliminary protective hearing in Arizona it may fall within the “emergency removal” provision of ICWA (see [§ 1922](#) and [Emergency Removals & Protective Custody](#) in this Guide). Therefore, the ten-day notice provision may be seen to apply to the dependency adjudication hearing held later, typically well after ICWA’s ten-day notice window.

Practice Tip: Parents and tribes often waive ICWA’s ten-day notice requirement in the interest of quickly determining temporary custody, but the practice is not standardized, and nothing obligates a parent or tribe to do so.

VII. Involuntary Proceedings

A. Involuntary Proceedings in General

[ICWA § 1903\(1\)\(i\)](#) defines “foster care placement” to include “any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution . . . where the parent or Indian custodian cannot have the child returned upon demand.” This would include both emergency removals under [ICWA § 1922](#) and other involuntary removal procedures authorized by Arizona law. In Arizona, that almost always will involve DCS, whose removal of a child from a parent is an involuntary proceeding from the parent’s perspective. The ICWA definition of an [involuntary] “foster care placement” also includes guardianship motions.¹⁵ See the [Guardianship](#) section of this Guide.

If the removal is involuntary (i.e., pursuant to a dependency petition), ICWA will apply and the following requirements must be met:

- The tribe must be [notified](#), along with the parents and any Indian custodian;
- “[Active efforts](#)” must be made to maintain the Indian family;
- A “[qualified expert witness](#)” must testify to the necessity of the removal;

¹⁵ [A.R.S. § 8-871](#) Permanent Guardianship of a Child.

- The [placement preferences](#) in ICWA must be honored unless the child’s tribe adopts a resolution that alters those preferences or the court finds good cause to deviate from those preferences.

i. When may an Indian child be placed in involuntary foster care?¹⁶

[ICWA § 1912\(e\)](#) states that:

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.¹⁷

Furthermore, [ICWA § 1912\(d\)](#) states that any party who petitions a state court to remove an Indian child from the home must show that “active efforts” were made to prevent the need for the child’s removal.¹⁸ These efforts must take into account the tribe’s socio-economic conditions, cultural traditions, and contemporary way of life, and should involve use of tribal and extended family resources. But see Emergency Removals & Protective Custody for additional considerations.

To meet ICWA’s “clear and convincing evidence” threshold, the evidence must show the existence of particular conditions in the home or factors relating to the continued custody of the child that are likely to result in serious emotional or physical damage to the child. The evidence must show the relationship between the conditions and the damage that is likely to result. See BIA Guidelines § D.3(c) (What are the applicable standards of evidence?). That evidence must be forward-looking, that is, it must not be limited to evidence of past harm, such as the original incident that led to DCS or court involvement. [Steven H. v. Ariz. Dep’t of Econ. Sec., 218 Ariz. 566, 190 P.3d 180 \(2008\)](#).

Generalized evidence of community or family poverty, crowded or inadequate housing, or nonconforming social behavior does not constitute “clear and convincing evidence” of home conditions that will cause serious emotional or physical damage. The evidence for removal must focus on specific conditions and the likelihood that they will cause serious damage to the child. See [2015 BIA Guidelines § B.3](#).

ii. When may parental rights to an Indian child be involuntarily terminated?¹⁹

To terminate the parental rights to an Indian child, [ICWA § 1912\(f\)](#) requires evidence beyond a reasonable doubt—including testimony from “qualified expert witnesses”— that continued

¹⁶ For the DCS process for securing *voluntary* foster-care arrangements, see [DCS Policy Manual Ch. 6, Sec. 5-13-07](#).

¹⁷ See [Ariz. R.P. Juv. Ct. 51\(B\)](#).

¹⁸ See [Ariz. R.P. Juv. Ct. 57\(C\)\(6\)](#).

¹⁹ [DCS Policy Manual Chapter 6, Section 6, Voluntary Foster Care](#) and [Chapter 6, Section 7](#).

custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.²⁰ See the [Qualified Expert Witness](#) section.

Before seeking termination of parental rights, the petitioner must have made the same types of “active efforts” described above and discussed in more detail in the [Active Efforts](#) section.

In [Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 \(2013\)](#), the United States Supreme Court held that the phrase “continued custody” in [ICWA § 1912\(f\)](#) refers to custody a parent already has exercised, or at least had exercised at some point in the past. Therefore, the protections of [ICWA § 1912\(f\)](#) did not extend to an unwed parent of an Indian child who had abandoned the child before birth, failed to provide support for mother or child after birth, and never had physical or legal custody of the child under state law. See Part II(B)(iv) for a summary of the case.²¹

The heightened burden of proof under ICWA means a court may not terminate parental rights simply because:

- 1) someone else could do a better job of raising the child; or
- 2) termination is in the child’s best interest; or
- 3) the parents or custodians are “unfit parents.”

The petitioner must prove that serious emotional or physical damage to the child will occur if the child stays with (or is returned to) her parents or Indian custodian. See [2015 BIA Guidelines § D.3\(b\)](#); [Steven H. v. Ariz. Dep’t of Econ. Sec., 218 Ariz. 566, 190 P.3d 180 \(2008\)](#); [Ariz. R.P. Juv. Ct. 65\(C\)\(1\) and \(D\)\(4\)](#). ICWA requires that this must be proved beyond a reasonable doubt before the court can terminate parental rights. [Valerie M. v. Ariz. Dep’t of Econ. Sec., 219 Ariz. 331, 334, ¶ 11, 198 P.3d 1203, 1206 \(2009\)](#). This is a higher burden of proof than the standard Arizona law requirement of proof by clear and convincing evidence. *Id.*

B. Emergency Removals & Protective Custody

When physically located *off* the reservation, an Indian child may be subject to an emergency removal by law enforcement officials acting pursuant to state statutory authority. [ICWA § 1922](#) states: “Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child.” But [ICWA § 1922](#) also limits a placement following an emergency removal to no longer than necessary to prevent imminent damage or harm to the child. **When the emergency ends, the out-of-home placement also should end.** See BIA Guidelines B.8 (What is the process for the emergency removal of an Indian child?). The [2015 BIA Guidelines](#) provide much more detailed standards for emergency removals than the [1979 BIA Guidelines](#). See also [DCS Policy Manual, Chapter 6, Section 6, Procedures, Removal and Temporary Custody](#). The

²⁰ [Ariz. R.P. Juv. Ct. 65\(D\)\(4\)](#) applies ICWA burden of proof to any ICWA findings. See [Valerie M. v. Arizona Dept. of Economic Sec., 219 Ariz. 331, 334, ¶ 11, 198 P.3d 1203, 1206 \(2009\)](#).

²¹ In a concurring opinion necessary for the majority decision, Justice Breyer stated the holding was limited to the particular facts of the case.

state court's involvement should end when the tribe takes custody of the child or the reason for the emergency removal is otherwise resolved.

Practice Tip: Courts may order DCS to notify the court as soon as the emergency ends. This will help ensure a timely conclusion of the court's jurisdiction and placement pursuant to ICWA § 1922.

But when a child's Indian heritage and tribal affiliation are in question at the time of the off-reservation emergency removal, the state agency may request an interim foster care placement order while it works to definitively determine whether the child is an "Indian child" and give notice to the child's tribe. Upon determining that the child is an Indian child, the provisions of ICWA will apply. See Jared P. v. Glade T., 221 Ariz. 21, 26, 209 P.3d 157, 162 (App. 2009); Ariz. Dep't of Econ. Sec. v. Bernini, 202 Ariz. 562, 564-65, 48 P.3d 512, 514-15 (App. 2002).

Whenever a known Indian child is removed from a parent or Indian custodian by a law enforcement officer pursuant to the emergency removal provisions of state law, the law enforcement agency responsible for the removal should ask a DCS child safety worker to *immediately* ascertain the residence and domicile of the child so that the appropriate tribe can be notified. See 2015 BIA Guidelines § B.8(c)(3). Meanwhile, the interim placement of the Indian child will proceed exactly as for all other children removed under similar circumstances.

When a petition seeks a state court order authorizing *continued* emergency placement of a child known to be an Indian, the petition must be accompanied by an affidavit containing complete information about the need for the removal and the individuals affected, including but not limited to the following:

- 1) Name, age, and last known address of the Indian child.
- 2) Names and addresses of the child's parents (or Indian custodians, if any). If those individuals are unknown, the affidavit must include a detailed explanation of the petitioner's efforts to identify and locate them.
- 3) Facts necessary to determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation, then the name of the reservation.
- 4) Tribal affiliation of the child and the parents or Indian custodians.
- 5) A detailed account of the emergency removal circumstances.
- 6) If the child is believed to reside on the reservation of a tribe that will have exclusive jurisdiction, a statement of the efforts made to transfer the child to the tribe's jurisdiction.
- 7) A detailed statement of any efforts already made to return the child safely to a parent or Indian custodian.

See the 2015 BIA Guidelines § B.8(d) (identifying 10 items of information for inclusion in the affidavit). The BIA Guidelines provide that, absent extraordinary circumstances, emergency removal should not continue for more than 30 days without a court's determination (based on clear and convincing evidence and the testimony of a qualified expert witness) that returning the child to the custody of the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 2015 BIA Guidelines § B.8(f). See also A.R.S. § 8-821, A.R.S. § 8-823(A), Ariz. R.P. Juv. Ct. 48 (B), 50(C)(6), 51(D).

C. Active Efforts

i. Why does Congress require “active efforts” when ICWA applies?

Each federally recognized tribe is a sovereign nation whose right to self-governance can be impeded or obstructed only in limited ways by the federal government. Under current U.S. policy and long standing Supreme Court doctrine, state governments and state law cannot interfere with tribal self-governance. See [Worcester v. Georgia, 31 U.S. 515 \(1832\)](#).

As Congress stated in ICWA’s congressional findings, there is no resource more vital to the continued existence and integrity of Indian tribes than their children. The United States has a direct interest, as trustee, in protecting Indian children who are members of or eligible for membership in Indian tribes.

The historical trauma associated with the forced removal of tribes from their native lands and with the removal of children from their families has impacted all Indian communities. One of the reasons Congress adopted a more stringent level of required assistance before removing an Indian child from her home was to protect the tribe’s sovereignty and its investment in the future. Similarly, Congress noted that in many cases *no* efforts were being made to preserve Indian families prior to the forced removal of their children.

Given their sovereign status, tribes intervene in child welfare cases to act as a quasiparent. The tribes have an interest in protecting the best interests of their children while also protecting the existence and future of their citizenry.

ii. When are “active efforts” required?

ICWA requires that any party seeking an involuntary foster care placement of, or involuntary termination of parental rights to, an Indian child show 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.” [ICWA § 1912\(d\)](#). The active efforts must be made prior to the child’s removal from home, except in an emergency placement pursuant to [ICWA § 1922](#). See [2015 BIA Guidelines §§ A.2 & B.8; Emergency Removals & Protective Custody, Part VII\(B\), infra](#). Even in emergency situations, the new BIA Guidelines provide that the state agency must conduct “active efforts to prevent the breakup of the Indian family as early as possible, including, if possible, before removal of the child.” [2015 BIA Guidelines § B.8\(c\)\(2\)](#). [Ariz. R.P. Juv. Ct. 51](#) allows a parent, guardian, or Indian custodian at the preliminary protective hearing to request a review of temporary custody. At a review of temporary custody, the petitioner must show that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proved unsuccessful.

“Active efforts” are required in all involuntary proceedings. Some proceedings may be voluntary as to one parent and involuntary as to the other (e.g., adoptions where the custodial parent consents but the noncustodial parent objects). The non-consenting parent in that case would receive all the

protections under ICWA, including active efforts. See the [Voluntary Proceedings](#) and [Involuntary Proceedings](#) sections.

While ICWA does not require “active efforts” in voluntary cases, the court may choose to require them. This Guide recommends that courts evaluate the circumstances behind any voluntary petition and determine if “active efforts” might preserve the Indian family or the child’s connection to a tribe. Nothing prohibits a court from applying ICWA provisions in voluntary proceedings consistent with the spirit of ICWA.

Note: In [Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 \(2013\)](#), which involved the voluntary adoptive placement of an Indian child by her non-Indian birth mother, the Supreme Court held that the active efforts requirement of [ICWA § 1912\(d\)](#) did not apply to the termination of parental rights of an unwed father who had abandoned the child before birth, failed to provide support for the mother or child after birth, and never acquired custody rights under state law. See [Existing Indian family exception](#) section for a discussion of the case.

iii. What are “active efforts”?

ICWA does not define “active efforts.” To discern the meaning of an undefined term in federal law, courts look to the plain meaning of words and the policies prompting the statute.

The term “active” when used as an adjective modifying “efforts,” means: “characterized by action rather than by contemplation or speculation;” or “participating.” *Webster's Third New International Dictionary* 22 (1986). This definition must be considered in conjunction with ICWA’s core policies, including the establishment of “minimum Federal standards for the removal of Indian children from their families” in order to help protect tribal identity and culture. [ICWA § 1902](#); [Valerie M. v. Ariz. Dep’t. of Econ. Sec., 219 Ariz. 331, 198 P.3d 1203 \(2009\)](#).

Although Arizona case law has not provided a fixed definition, it does contain some guidance for courts and practitioners to consider. DCS does not need to “provide every imaginable service or program designed to prevent the breakup of the Indian family before the court may find that ‘active efforts’ took place.” [Yvonne L. v. Ariz. Dep’t of Econ. Sec., 227 Ariz. 415, ¶ 34, 258 P.3d 233, 241 \(App. 2011\)](#). However, DCS must provide the parent the opportunity and the time to participate in the services. *Id.* Arizona courts may also look to the parent’s own efforts in order to determine whether DCS has fulfilled its obligation under the statute. *Id.*

The new BIA Guidelines state that the “active efforts” requirement imposes a higher standard than the “reasonable efforts” as required by Title IV-E of the Social Security Act, § 671(a)(15). [2015 BIA Guidelines § A.2](#), contained in state law. While courts in other states have recognized that “active efforts” establishes a higher standard, e.g., [In re J.S., 177 P.3d 590 \(Okla. Civ. App. 2008\)](#), the issue remains unresolved in Arizona. One unpublished opinion from the Arizona Court of Appeals agreed with an earlier California case that called both standards “indistinguishable.” [Pascua Yaqui Tribe v. Ariz. Dep’t of Econ. Sec., 2007 WL 5515315, ¶ 42 \(App. 2007\)](#) (unpublished opinion cannot be cited for precedential value) (citing [In re S.B., 130 Cal.App. 4th 1148, 1165, 30 Cal.Rptr.3d 726 \(2005\)](#)).

Although Arizona courts and Arizona Rules of Procedure of Juvenile Court have not defined “active efforts” in the context of ICWA, the 2015 BIA Guidelines provide a detailed set of examples. See [2015 BIA Guidelines §A.2](#). In addition, the DCS Policy Manual provides some guidance:

Make active efforts to assist the parent, guardian or Indian custodian in arranging for the child’s re-entry into the family by ensuring the following have been considered and implemented where appropriate:

- Housing assistance;
- Child care arrangements;
- School placement;
- Health care and mental health services;
- Physical needs (e.g., bed, formula, etc.);
- Community or recreational activities for the child; and
- Other services as needed to ensure reunification.

See [DCS Policy Manual, Chapter 6, Section 8, Procedures, Returning the Child Home](#). See also [Chapter 6, Section 10, Permanency Planning for an Indian Child, Procedures, Selecting Services and Supports to Achieve Permanency Plan](#).

Other states have produced their own definitions, which may be helpful to consider.

Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring the plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child.

[In re Roe, 281 Mich. App 88; 764 N.W.2d 789 \(2008\)](#), quoting [AA v Dep’t of Family & Youth Servs, 982 P.2d 256, 261 \(Alaska 1999\)](#) (further citation omitted.)

“Active [e]fforts” means active, thorough, careful, and culturally appropriate efforts . . . to prevent placement of an Indian child and at the earliest possible time to return the child to the child’s family once placement has occurred.

[In re Welfare of S.W., 727 N.W.2d 144 \(Minn. App, 2007\)](#).

The term active efforts, by definition, implies heightened responsibility compared to passive efforts. Giving the parent a treatment plan and waiting for him to complete it would constitute passive efforts.

[In re A.N., 325 Mont. 379, 106 P.3d 556, 560 \(2005\)](#).

In summary, case law suggests that the “active efforts” requirement places responsibility on the agency to identify appropriate services and make them available to parents, and to assist parents

in accessing the services. Courts must consider the timing and nature of the services in light of the parent's current situation.²²

iv. What standard of proof is required to establish "active efforts"?

ICWA does not provide the standard by which a party seeking the termination of parental rights to an Indian child must prove that "active efforts" were made and were unsuccessful. See [ICWA § 1912\(d\)](#). Some jurisdictions apply differing burdens of proof depending on the nature of the proceeding, while others have recognized state-chosen burdens of proof. *In re G.S.*, 312 Mont. 108, 59 P.3d 1063, 1071 (2002) (applying different standards for foster care and termination proceedings); cf. *In re Vaughn*, 320 Wis.2d 652, 770 N.W.2d 795, 810, ¶ 44 (App.2009) (recognizing the state's power to apply its own evidentiary standard).

In the absence of a congressional mandate, Arizona applies a clear and convincing standard of proof to show "active efforts." *Yvonne L. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 415, ¶ 26, 258 P.3d 233, 239 (App. 2011). Note, also, that ICWA does not require qualified expert witness testimony to support the "active efforts" finding. See [ICWA § 1912\(d\)](#); *Yvonne L.*, 227 Ariz. 415, 258 P.3d 233 (App. 2011).

D. Qualified Expert Witness

[Section 1912 of ICWA](#) provides that a court may not order an involuntary foster care placement or terminate a parent's rights "in the absence of a determination, supported by clear and convincing evidence, including testimony of *qualified expert witnesses*, 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." [ICWA § 1912\(e\) and \(f\)](#).²³

i. Who qualifies as a qualified expert witness?

According to the original BIA Guidelines, the following people meet the requirements to testify as a "qualified expert witness" in an ICWA case:

- 1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs and how they pertain to family organization and child rearing practices;
- 2) Any lay expert witness having substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe; or

²² [In re JL](#), 483 Mich. 300 (2009).

²³ [Ariz. R.P. Juv. Ct. 51\(B\), R.55\(C\), R.63\(C\), R.66\(C\), R.84\(C\)\(6\)](#) incorporates the language into the petitioner's burden of proof at a:Review of Temporary Custody, Dependency Adjudication Hearing, Guardianship Adjudication Hearing, Termination Adjudication Hearing, and Hearing to Finalize Adoption.

- 3) A professional person having substantial education and experience in the area of her specialty. See [1979 BIA Guidelines, 44 Fed. Reg. 67,584, § D.4](#) – Qualified Expert Witnesses.²⁴

The [2015 BIA Guidelines](#), in a departure from the case law and earlier Guidelines, provide that a qualified expert witness should have specific knowledge of the culture and customs of the child’s tribe. [2015 BIA Guidelines § D.4\(a\)](#). The 2015 BIA Guidelines go on to list “in descending order” categories of individuals presumed to meet the requirements for a qualified expert witness. Under the 2015 BIA Guidelines, a professional person with education and experience in the area of his or her specialty must have “knowledge of the prevailing cultural standards and childrearing practices within the Indian child’s tribe.” [2015 BIA Guidelines § D.4\(b\)](#). In other words, under the new BIA Guidelines, a professional person who lacks familiarity with the cultural standards of the child’s tribe no longer meets the standard for “qualified expert witness.” *Id.*

The party presenting the expert witness has the burden of establishing the witness’s qualifications.

ii. Why is a qualified expert witness needed?

Arizona courts recognize that expert testimony may be required in order to diminish the risk of cultural bias in light of different childrearing practices and customs among tribes. [Steven H. v. Ariz. Dep’t. of Econ. Sec., 218 Ariz. 566, ¶ 17, 190 P.3d 180, 185 \(2008\)](#). Congress’s primary intent in passing this provision was to prevent courts from basing decisions on the testimony of social workers with no specialized cultural knowledge. *Id.*

iii. What is the substance of a qualified expert witness’s testimony?

The qualified expert witness must address the specific issue of whether continued parental custody is likely to result in serious physical injury or emotional damage. If the expert has knowledge about the tribe’s culture and child-rearing practices, this will help the court extrapolate from proven behaviors to the actual probability of physical or emotional injury. The best resource for state courts seeking to identify a qualified expert witness concerning matters affected by the tribe’s culture is the Indian child’s tribe itself.

A tribe may already have identified specific criteria for qualified expert witnesses in ICWA cases involving members of that tribe. State courts should consider qualifying a witness as an expert under ICWA if the individual meets those tribal criteria, but the tribe must still show that the witness is an expert by virtue of education or experience. The Indian child’s tribe or the BIA may help courts locate ICWA qualified expert witnesses. [2015 BIA Guidelines § D.4\(c\)](#).

Notwithstanding this function, expert witnesses do not need to possess specialized knowledge of tribal culture, if their testimony supports the determination “that continued custody will likely result in serious emotional or physical harm to the child.” [Steven H., 218 Ariz. 566, ¶ 18, 190 P.3d 180, 185 \(2008\)](#). An expert need not have expertise in Indian culture or child-rearing practices if

²⁴ The Arizona Rules of Procedure for Juvenile Court do not define or set out standards for a “qualified expert witness.”

their testimony does not relate to cultural mores and if they are otherwise an expert in their field, such as a psychologist ([Brenda O. v. Ariz. Dep't of Econ. Sec., 226 Ariz. 137, 244 P.3d 574 \(App. 2010\)](#)) or a physician ([Rachelle S. v. Ariz. Dep't of Econ. Sec., 191 Ariz. 518, 958 P.2d 459 \(App. 1998\)](#)). In rare instances, a DCS child safety worker with exceptional qualifications may be qualified as an expert witness. See [Maricopa Cnty. Juv. Action No. JS-8287, 171 Ariz. 104, 828 P.2d 1245 \(App. 1991\)](#).

The substance of the expert's testimony must be forward looking, regarding whether the parent or Indian custodian's continued custody of the child is likely to result in serious emotional or physical damage to the child. [Steven H., supra](#). The expert's testimony need not be the sole basis for the court's finding of future harm, and it need not be expressed in any particular manner or language so long as it supports the finding. [Id.](#)

VIII. Placement of Indian Children

ICWA mandates specific placement priorities for adoptions and foster care. Potential placements must be considered in the order specified by ICWA unless a different preference is established by tribal code or resolution. However, a court may override ICWA priority sequence for good cause.²⁵ This section examines the placement options and explains what constitutes good cause to depart from ICWA's priority sequence.

If the child is placed in a non-Indian foster home where the child's siblings already have been placed, the siblings' presence does not cause the new placement to satisfy the extended family requirement. The siblings are not the placement. The foster parents must meet the placement preferences.

Note: In [Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 \(2013\)](#), the United States Supreme Court held that the adoptive placement preferences of [ICWA § 1915](#) do not apply when there is only one proposed adoptive placement before the court. See Part III(D), *supra*, for a summary of the case. The Alaska Supreme Court has held that the Section 1915 holding of *Adoptive Couple* applies to involuntary proceedings as well as voluntary proceedings. See [Native Village of Tununak v. State of Alaska, 334 P.3d 165 \(Alaska 2014\)](#).

A. Adoptive Placement Options

Absent good cause to the contrary, state courts must give preference to potential adoptive parents of Indian children as follows:

- 1) A member of the child's extended family.²⁶
- 2) Other members of the child's tribe.

²⁵ [Ariz. R.P. Juv. Ct. 52, 61, 65, and 68](#).

²⁶ [ICWA § 1903\(2\)](#) states that "extended family member" shall be defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

- 3) Other Indian families, including single parent families.

See [ICWA § 1915\(a\)](#); BIA Guidelines Part F(Disposition); [A.R.S. § 8-105.01\(B\)](#); [DCS Policy Manual Chapter 6, Section 9, Placement Preferences of an Indian Child](#).

The [2015 BIA Guidelines](#) also make the following points regarding adoptive placements:

- 1) If the Indian child's tribe establishes a different order of preference by resolution, tribal code, or some other means, the court ordering the placement must follow the tribal rule as long as the placement is the least restrictive setting appropriate to the needs of the child. Many tribal codes are published on tribal websites, but courts may also contact the tribe directly to determine if a different placement preference exists -- or request a caseworker or court officer to make that contact or inquiry.
- 2) If the parent has not asked for anonymity, the court must notify the child's extended family and the tribe as part of the required effort to honor ICWA's placement preferences. But if the consenting parent requests anonymity in the adoption process, the court "shall give weight to such desire in applying the preferences." See [ICWA § 1915\(b\)](#).

The 2015 BIA Guidelines provide detailed procedures for complying with the placement preferences of ICWA. In particular, the state agency must demonstrate by clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy ICWA. [2015 BIA Guidelines § F.1\(b\)](#).

Practice Tip: For voluntary proceedings in which a biological parent has requested anonymity, the court may need to contact the Bureau of Indian Affairs' regional office to confirm the child's tribal membership or eligibility for membership.

B. Foster Care Placement Options

For foster care or preadoptive placements, [ICWA § 1915\(b\)](#) requires placing the child:

- 1) In the least restrictive setting that best approximates a family and in which the child's special needs may be met.
- 2) Within reasonable proximity to the child's home, taking into account any special needs.
- 3) According to the following placement priority ranking, unless the court finds "good cause" to choose a lower-ranked placement or a placement not listed here:
 - a. A member of the Indian child's extended family.
 - b. A foster home licensed, approved, or specified by the Indian child's tribe.
 - c. An Indian foster home licensed or approved by an authorized non-Indian licensing authority (e.g., DCS).
 - d. An institution for children approved by an Indian tribe or operated by an Indian organization if the institution has a program suitable to meet the Indian child's needs.

If the Indian child's tribe establishes a different order of preference by resolution, tribal code, or other means, then the court that orders the foster care or preadoptive placement must follow the tribe's rule as long as the placement is the least restrictive setting appropriate for the needs of the child. Where appropriate, a state court must also consider the wishes of the Indian child or the

child's biological parents. These requirements assume that the family or tribal preferences are based on the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the family maintains social and cultural ties. See [2015 BIA Guidelines § F.1\(b\)](#); A.R.S. §§ [8-514.02](#) to [8-514-03](#), and [DCS Policy Manual, Chapter 6, Section 9, Placement Preferences of an Indian Child](#).

In Arizona, only the Pascua Yaqui have expressly created placement preferences that differ from those established by ICWA. [DCS Policy Manual, Chapter 6, Section 9, Placement Preferences of an Indian Child](#). These include both adoptive and foster care placement preferences. See [3 PYTC § 2-6-380](#), (Adoption Preferences); [5 PYTC § 7-210](#) (Foster Care).

The state must maintain records that show the state's efforts to comply with the placement preferences specified by the tribe or requested by the child or the child's parent. Courts should ask for specifics and allow child safety workers an opportunity to detail the state's compliance efforts on the record.

Some initial foster care placements may not comply with the placement preferences established by ICWA because the placement followed an emergency removal or because no ICWA-compliant placement was initially available.

C. Good Cause to Deviate from Foster Care or Adoption Placement Preferences

Under the [1979 BIA Guidelines](#), "good cause" to deviate from ICWA's placement preferences might include one or more of the following considerations:

- 1) The request of the biological parents or a child of sufficient age.
- 2) Extraordinary physical or emotional needs of the child as established by the testimony of one or more qualified expert witnesses.
- 3) Unavailability of families suitable for placement if a diligent search has been made for families that would meet the preference criteria.

See [1979 BIA Guidelines, 44 Fed. Reg. 67,584, F.3 and Commentary](#) – Good Cause To Modify Preferences.

The [2015 BIA Guidelines](#) depart in significant respects from this framework. The 2015 BIA Guidelines require proof of good cause by clear and convincing evidence. [2015 BIA Guidelines § F.4\(b\)](#). Moreover, the 2015 BIA Guidelines require that good cause be based on one or more of the following considerations:

- 1) The request of the parents if both parents attest that they have reviewed the placement options that comply with the order of preference.
- 2) The request of the child, if the child is able to understand and comprehend the decision that is being made.
- 3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live.
- 4) The unavailability of a placement after a showing by the agency that active efforts have been made to find placements that meet the preference criteria.

BIA Guidelines § F.4(c). The [2015 BIA Guidelines](#) go on to prohibit the consideration of “ordinary bonding or attachment” and bar an independent consideration of the best interests of the Indian child, since “the preferences reflect the best interests of an Indian child in light of the purposes of the Act.” See [§ F.4\(c\)\(3\)](#). In this respect, the 2015 BIA Guidelines directly contravene Arizona case law.

Although some states have held that psychological bonding with a current custodian should not be a factor in determining “good cause,” Arizona courts look to the level of a child’s bonding as a relevant factor in finding good cause to deviate from ICWA’s placement preferences. See [Navajo Nation v. Ariz. Dep’t of Econ. Sec., 230 Ariz. 339, 284 P.3d 29 \(App. 2012\)](#); [Maricopa Cnty. Juv. Action No. A-25525, 136 Ariz. 528, 534, 667 P.2d 228, 234 \(App. 1983\)](#). In those cases, the appellate court upheld the trial courts’ reliance on the potential emotional and psychological damage that could result from removing a child who had bonded with adoptive or foster care placements.

The party requesting a deviation from ICWA’s preferences has the burden of establishing good cause.

IX. Guardianship

ICWA defines “child custody proceedings” as including any “foster care placement.” However, ICWA defines the latter phrase broadly to include more than just the foster care placements authorized by Arizona law. See [A.R.S. § 8-862\(H\)](#), [A.R.S. § 8-872\(F\)](#); [A.R.S. § 8-874\(D\)](#), [A.R.S. § 14-5204](#) and [DCS Policy Manual Chapter 6, Section 11, Permanent Guardianship for an Indian Child](#).

[ICWA § 1903\(1\)\(i\)](#) defines “foster care placement” to mean “any action removing an Indian child from his parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.”

ICWA distinguishes between voluntary and involuntary proceedings. Because ICWA views a guardianship as a “foster care placement,” this Guide’s earlier [Foster Care](#) section covers all ICWA requirements for involuntary juvenile guardianships. Note, however, that by statute, state-law guardianship findings must be made beyond a reasonable doubt (unlike state-law termination findings, which need not be made by an elevated burden of proof). See [Valerie M. v. Ariz. Dep’t of Econ. Sec., 219 Ariz. 331, 198 P.3d 1203 \(2009\)](#) (recognizing the difference in requirements based on legislative action in guardianship proceedings absent from termination proceedings).

If the Indian child’s parent is available to provide consent for a guardianship, the court should obtain the consent in compliance with [ICWA § 1913\(a\)](#), thereby making the proceedings “voluntary.”²⁷ See the discussion in the [Voluntary Proceedings](#) section. Consent can be sought with the notice of hearing.

²⁷ That parent’s right to revoke his consent at any time must also be honored.

Voluntary guardianships, or petitions for limited guardianships, are not explicitly covered by ICWA. However, voluntary adoptions have been held to be within the scope of ICWA. [*Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30 \(1989\)](#). If a voluntary guardianship meets the definition of “child custody proceeding,” then notice must be sent, placement preferences must be honored, and a valid consent document must be executed.

While [ICWA § 1915\(c\)](#) states that the preference of the “Indian child or parent shall be considered,” neither Arizona courts nor the U.S. Supreme Court has decided whether parental preference constitutes good cause to diverge from ICWA’s placement preferences. See [2015 BIA Guidelines § F.4\(c\)\(1\)](#) (request of both parents may constitute good cause if they attest that they have reviewed placement options).

As a practical matter, courts in a voluntary guardianship proceeding should:

- 1) Send notice to the tribe.
- 2) Work closely with a tribe that intervenes and objects to a voluntary placement petition by a parent. Communication and collaboration between state and tribal courts is the key to successful compliance with the federal law.

If the Indian child’s tribal affiliation is known when a guardianship petition is filed, the state court may refer the petitioner to the tribal court so it can consider the issue. Although the petitioner is not required to file the petition initially in the tribal court, that court may be in a better position to evaluate the need for a guardianship and decide how best to preserve the child’s relationship with his family and tribe.

Practice Tip: Guardianship as a permanency option may be particularly well-suited when severance of parental rights would be inconsistent with the child’s best interests and the tribe’s cultural traditions. In situations where the child has an emotional relationship with his or her parent that is of positive value to the child, a guardianship would prevent legal termination of that relationship.

X. Voluntary Proceedings

Certain protections under ICWA apply to voluntary proceedings, such as notice requirements, procedures to ensure voluntary parental consent, and the provisions for mandatory placement preferences. See [ICWA § 1913](#). In particular, the following requirements must be satisfied.

- **Notice.** Under [ICWA § 1911\(c\)](#), Indian custodians and tribes have the right to intervene at any time during foster care placement and termination of parental rights proceedings. Without notice of the proceedings, they could not invoke that right. See [*Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30 \(1989\)](#).
- **Consent.** A valid consent document must be executed (see Consent to Foster Care Placement or Termination of Parental Rights section X(C).) The court must certify that the terms and consequences of the consent were explained to the parent in a language the parent understands and that the parent understood the explanation. See [ICWA § 1913\(a\)](#).

- **Placement.** The placement preferences in ICWA must be followed unless amended by the tribe or a court finds good cause to deviate from them. (See [Placement of Indian Children](#) section.)
- **Revocation or Invalidation.** There are special procedures for revoking a consent for a foster care or adoptive placement or to seek the invalidation of a court order entered on such a consent.

Some proceedings may be voluntary as to one parent and involuntary as to the other.²⁸ In addition, recall that [ICWA § 1903\(1\)\(i\)](#) defines “foster care placement” more broadly than Arizona law. In ICWA cases, it means “[A]ny action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian *cannot* have the child returned upon demand, but where parental rights have *not* been terminated.”

A. Notice Requirements for Voluntary Proceedings

[ICWA § 1915\(c\)](#) gives certain rights to tribes and extended family members. For example, ICWA defers to specific tribal child placement priorities that differ from those established in ICWA. Because of this provision allowing a tribal resolution to alter ICWA placement preferences, some courts have required that tribes and extended family members receive notice of voluntary placement proceedings. See, e.g., [In re Baby Girl Doe, 865 P.2d 1090 \(Mont. 1993\)](#). Without such notice, the tribe would not have the opportunity afforded by [ICWA § 1915\(c\)](#) to invoke its own placement preferences. The 2015 BIA Guidelines require notice in voluntary proceedings. See [2015 BIA Guidelines § B.6\(j\)](#).

Practice Tip: Provide notice to the tribe of an Indian child in a voluntary proceeding to enable the tribe to fully participate as authorized by ICWA.

B. Requests for Anonymity

A parent’s request for anonymity has priority over ICWA notice and placement-preference provisions. See [ICWA § 1915\(c\)](#). When a parent requests anonymity, the court should consider whether additional measures to protect confidentiality are warranted. The 2015 BIA Guidelines, however, provide that “a request for anonymity does not relieve the agency or court of the obligation to comply with the placement preferences.” [2015 BIA Guidelines § F.1\(c\)](#).

Practice Tip: For those voluntary proceedings in which a biological parent has requested anonymity, the court may need to contact the Bureau of Indian Affairs’ regional office to confirm the child’s tribal membership or eligibility for membership. Contacts with the BIA are the only exceptions to the rule that the parent’s anonymity must not be compromised.

²⁸ An example would be when two parents disagree about the appropriate placement for a child and only one parent consents to a particular placement. State courts must ensure that ICWA requirements for an involuntary placement are followed with respect to both an Indian and a non-Indian parent.

C. Requirements for a Valid Consent to Foster Care Placement or Termination of Parental Rights

Pursuant to [ICWA § 1913\(a\)](#), courts may recognize consent to a foster care placement or termination of parental rights as valid only if:

- 1) The consent is in writing.
- 2) The consent is recorded before a judge of a court of competent jurisdiction.
- 3) The presiding judge certifies in writing that the terms and consequences of the consent were fully explained (with assistance from a translator if necessary) and were fully understood by the parent or Indian custodian. The court should place a copy of this certification in the court file.
- 4) The consent was signed more than 10 days after the birth of the Indian child.

i. What must a voluntary consent document contain?

Consent documents must contain the following:

- 1) Name and birth date of the Indian child.
- 2) Name of the child's tribe.
- 3) Any identifying number or other indication of the child's membership in the tribe.
- 4) Name and address of the consenting parent or Indian custodian.
- 5) Name and address of the person or entity through which placement was arranged, or the name and address of the prospective foster parents, if known at the time.

ii. Special considerations for adoption consents

An adoption under ICWA can be voluntary or involuntary. If the parents of an Indian child decide to voluntarily place the child for adoption, they will first agree to a termination of their parental rights, and then sign a consent form allowing the adoption. An involuntary adoption typically follows an involuntary termination of parental rights. [A.R.S. § 8-106](#), [A.R.S. § 8-116.01](#), [DCS Policy Manual, Chapter 6: Section 13, Adoption Consent of an Indian Child](#).

See [2015 BIA Guidelines § E.3](#); [Ariz. R.P. Juv. Ct. 81\(C\)](#).

Furthermore, given the special nature of proceedings involving an Indian Child, the court should ensure that the child safety worker:

- Informs the parent of the placement preferences.
- Informs the parent that in order to find an appropriate adoptive placement, the Indian child's tribe will be notified. Unless the consenting parent has requested anonymity, extended family members will also be notified.
- Consults with the tribal social services and/or ICWA representative and the parent's attorney if any, and inform the tribe of the parent's desire to place his or her child for adoption, and of the parent's request for anonymity, if applicable.

[DCS Policy Manual Chapter 6, Section 13, Procedures, Initiating Voluntary Termination of Parental Rights](#).

In addition, the court must ensure and certify that the parent understands the implications for both themselves and their child. See [ICWA § 1913\(a\)](#). This is usually accomplished at a hearing in open court. See also [Ariz. R.P. Juv. Ct. 81](#), [DCS Policy Manual Chapter 6, Section 13, Procedures, Initiating Voluntary Termination of Parental Rights](#).

iii. Tribal customary adoption: Discussion of customary adoption and its recognition under California law and practice

Under the traditions of numerous Indian tribes, customary adoption permits recognition of parental rights in someone other than the biological parents without first severing the parental rights of the biological parents. California law now includes “tribal customary adoption” as a permanency option within its child welfare code. See [West’s Ann. Cal. Welf. & Inst. Code § 366.24](#)²⁹. The new statutory recognition was applied in [In re H.R.](#), 208 Cal. App.4th 751 (Cal. Ct. App. 2012).

iv. Stepparent adoption

If an Indian child’s parent seeks a stepparent adoption by a new spouse, then ICWA does apply. A valid consent must be obtained to terminate a parent’s rights. Without such a consent, the stepparent adoption may occur only if the non-consenting biological parent’s rights are terminated involuntarily after following all of the requirements for termination stated in [ICWA § 1912 \(d\) and \(f\)](#). For additional information, please see the [Involuntary Termination of Parental Rights](#) section. See [DCS Policy Manual Chapter 6, Section 12, Termination of Parental Rights and Adoption of an Indian Child](#).

D. Placement Considerations in Voluntary Proceedings

The Act’s placement preferences apply, either as outlined in § 1915(a) or a different order of preference adopted by the tribe under § 1915(c). Although ICWA does not expressly require notice to a tribe of a voluntary adoption, parties may choose to give notice in order to permit the tribe to participate in the proceedings. The 2015 BIA Guidelines require such notice. See [2015 BIA Guidelines § E.1\(b\)](#). A parent’s request for anonymity, however, must be respected under ICWA. For notice requirements with regard to anonymity requests by the parents in voluntary proceedings, see the Voluntary Proceedings section. According to the 2015 BIA Guidelines, the court or agency has a duty to notify the child’s extended family and tribe of the Act’s placement preferences, unless a parent asks for anonymity. See [2015 BIA Guidelines §F.1 and Commentary – Adoptive Placements](#).

[ICWA § 1916\(b\)](#) requires compliance with ICWA any time an Indian child is transferred from a foster home or institution to a different foster care, preadoptive, or adoptive placement -- unless the transfer returns the child to the parents or a previous Indian custodian. When ICWA applies, it requires sending a notice of the transfer to the Indian child’s parents or previous Indian custodian. They may waive this right to notice, but they also may revoke that waiver at any time.

²⁹ [Cal. Welf. & Inst. Code § 366.24](#).

E. Revocation of Consent

i. Revocation of consent for foster care placement

When no one has alleged abuse or neglect, a parent or Indian custodian who consents to the voluntary placement of an Indian child into foster care (e.g., by petitioning the court for a guardianship) may withdraw the consent at any time. See [DCS Policy Manual, Chapter 6: Section 7, Procedures, Considering Voluntary Foster Care](#).

If a parent or previous Indian custodian withdraws the consent to placement, the court must return the child to the parent or Indian custodian as soon as is practical. The withdrawal of consent should be filed in the same court as the earlier consent document was filed. See [ICWA § 1913\(b\)](#) and [2015 BIA Guidelines § E.4](#).

ii. Revocation of consent to termination of parental rights

[ICWA § 1913\(c\)](#) states that parents may withdraw their consent to a termination for *any* reason -- but only *prior to* the entry of a final decree of termination.

To withdraw consent, the parent must file with the court a signed and notarized document that clearly states the parent's changed position. The clerk of the court that receives the withdrawal-of-consent document must promptly inform the other interested parties by notifying the preadoptive or adoptive placement agency. Whoever has physical custody must then return the child to the parent (or other approved custodian) as soon as practicable. The court may need to get involved in this process because the biological parents may not know the adoptive parents' identity. See [2015 BIA Guidelines § E.4 and Commentary – Withdrawal of Consent to Adoption](#) and [Ariz. R.P. Juv. Ct. 82\(J\)](#).

iii. Revocation of consent for adoption

[ICWA has specific requirements for valid consents](#) to preadoptive placements. Even after a consent is taken, the following may apply:

- Under [ICWA § 1913\(c\)](#), parents may withdraw a consent to adoptive placement for any reason at any time prior to the entry of a final decree of adoption. To withdraw consent to an adoption, the parent must file with the court a signed and notarized withdrawal notice that clearly states the parent's changed position. The clerk of the court receiving the withdrawal-of-consent document must promptly inform the other interested parties by notifying the preadoptive or adoptive placement agency. Whoever has physical custody must then return the child to the parent (or other approved custodian) as soon as practicable. The court may need to get involved in this process because the biological parents may not know the adoptive parents' identity. See [2015 BIA Guidelines § E.5](#) (applying same standard to withdrawal of consent to terminating parental rights and withdrawal of consent to adoption). In Arizona, there is no need for the Indian parent to provide an explanation or justifications for the withdrawal of consent. See [Pima Cnty. Juv. Action No. S-903, 130 Ariz. 202, 635 P.2d 187 \(App. 1981\)](#) and [Ariz. R.P. Juv. Ct. 82\(J\)](#).

- In very limited circumstances, [ICWA § 1913\(d\)](#) allows the parent to withdraw consent *after* the entry of a final adoption order of an Indian child. ICWA allows this *only* if the court finds that someone used fraud or duress to obtain the parent’s initial consent. In that event, the court must vacate the adoption order. Note, however, that a parent has only two years postadoption to claim fraud or duress; after that, the adoption becomes irrevocable. See also [Ariz. R.P. Juv. Ct. 85\(F\)](#). A petition to vacate the adoption order due to fraud or duress must be filed in the same court that ordered the adoption. Upon receipt of the petition, the court must notify all the parties to the adoption proceedings and hold a hearing on the petition. See [2015 BIA Guidelines § G.1](#). Upon finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. An adoption which has been effective for at least two years may not be invalidated under the provisions of this subsection unless otherwise permitted under the state law.

iv. Effect of setting aside an adoption or adoptive parents’ voluntary consent to the termination of their parental rights

If an Indian child’s adoption is set aside, or if the *adoptive* parents voluntarily consent to the termination of *their* parental rights, the court must notify the child’s biological parents.³⁰ The biological parents may waive their right to receive this notice, but they also may revoke that waiver at any time. [See 2015 BIA Guidelines § G.4](#) (When must notice of change in child’s status be given?).

Whenever an adoption is set aside, a biological parent or prior Indian custodian may petition the court for the child’s return. The court must grant the petition unless a return is not in the child’s best interests. Hearings on these return-of-custody requests must follow all of the requirements outlined in [ICWA § 1912](#).³¹

v. Petition to invalidate a foster care placement order

[ICWA § 1914](#) allows the parent or Indian custodian of an Indian child to petition any court of competent jurisdiction to invalidate the child’s foster care placement if the placement violated [ICWA §§ 1911, 1912, or 1913](#). See [Ariz. R.P. Juv. Ct. 59\(E\)\(5\)](#).

- 1) [ICWA § 1911](#) lists ICWA’s requirements for jurisdiction, transfer of proceedings, and intervention.

³⁰ The same is true if the adoption fails before the final order is signed. The biological parents could then petition the court to let them become involved in the case and be considered as a placement option for the child.

³¹ These requirements include notice, appointment of counsel, the opportunity to review reports or other documents, and the higher standards of proof for foster care placement orders (probable cause) and parental rights termination (clear and convincing evidence) as described in the [Foster Care and Termination of Parental Rights](#) sections.

- 2) [ICWA § 1912](#) outlines the requirements for notice, appointment of counsel, examination of reports, preventive or rehabilitative programs, and orders for foster care placement or parental rights termination.
- 3) [ICWA § 1913](#) governs the voluntary foster care placements and voluntary terminations of parental rights.

XI. Other Matters

A. Information sharing on request by adult adoptee

Adopted Indians who have reached age 18 may ask the court that entered their final adoption order for information about their tribal affiliation. The court must provide the information so that the adult adoptee can protect any rights flowing from their tribal relationships. See [2015 BIA Guidelines § G.3](#) (What are the rights of adult adoptees?); [Ariz. R.P. Juv. Ct. 86\(B\)](#).

Adopted Indian children possess this right to discover their tribal origins even if ICWA did not apply to the original adoption. Therefore, even if the biological *parents* filed a confidentiality request with the central registry, the BIA may identify the child's *tribe* in response to the child's request. This is important because the adoptee probably retains eligibility for membership in that tribe, and membership may confer important rights. Note that the BIA can identify the tribe without violating the biological parents' personal confidentiality request. Therefore, if the biological parents filed a confidentiality request, the court should work with the BIA, which can confidentially ask the tribe whether the child is eligible for membership. See [2015 BIA Guidelines § G.3](#).

Practice Tip: Courts should obtain and maintain the adopted child's tribal affiliation information from the beginning of the adoption case because the court may need that information later if the child requests it.

B. Funding for Cases Involving Indian Children

If an Indian child's case remains in a state court, or if a court has made DCS responsible for the child's care and supervision, then the money to administer the case and pay for the Indian child's care will come from the same federal, state, and local sources that provide funding for other children's cases.

Historically, Indian tribes have not had *direct* access to federal Title IV-E funds. However, the [Fostering Connections to Success and Increasing Adoptions Act of 2008, PL 110-351](#)--which was enacted and given immediate effect on October 7, 2008--allows tribes to either access Title IV-E funds directly or to continue operating under their current state agreements. That section of the Act has been codified as [42 USC 679](#), an entirely new section within Title IV-E. For more information on this new Act and its 20 effects on Title IV-E funding for tribes, see this *INFORMATIONAL MEMORANDUM* on the [Children's Bureau website](#).

C. Interstate Compact on the Placement of Children (ICPC)

The ICPC, codified in Arizona at [A.R.S. §§ 8-548 to 548.06](#) is a uniform state law that specifies how to handle a child’s out-of-home placement to another state, and how the child will receive services in that other state. In addition to traditional foster care placements, the ICPC also applies to out-of-state placements with relatives or institutions. The ICPC as enacted in Arizona is an Arizona law that all of this state’s courts and agencies must follow. Its rules apply any time an Arizona court or an agency or entity (other than certain specified relatives) sends a child to another state or receives a child from another state. See also [DCS Policy Manual, Chapter 6, Section 1-4](#).

The ICPC applies to Indian children if either the receiving state or the sending state will provide services to the child and family.³² However, because tribes are not signatories to the ICPC, it does not apply to tribe-to-tribe case transfers or transfers from state to tribal custody (even if the tribe is in another state).

D. Expedited Permanency, ASFA, and ICWA

The [Adoption and Safe Families Act of 1997 \(“ASFA”\)](#)³³ was enacted to address national concerns regarding the safety of children alleged to be victims of abuse and neglect, to accelerate permanent placements for children whose parents were unable or unwilling to reunify with them, and to promote adoptions as the preferred form of permanency for children who could not reunify with their parents.³⁴ ASFA requires states to initiate severance proceedings if the child has been in foster care for 15 of the last 22 months, or if the child is in a relative’s care. However, nothing in ASFA’s language or legislative history indicates an intent to modify or impact ICWA.³⁵ In response to ASFA, Arizona amended the timelines for its statutory grounds for severance to nine- and fifteen-months’ out-of-home placement.³⁶ And in 2008, Arizona added an additional termination ground allowing the court to terminate the parental rights of a parent of a child under three years of age after only six months if that parent has substantially neglected or willfully refused to remedy the circumstances that cause the child’s out-of-home placement.³⁷

Concerns have arisen that ASFA’s mandate for expedited permanency may conflict with ICWA’s requirement of active efforts at reunification. Put differently, the policy underlying ASFA – to move children out of foster care more quickly – may in some cases be at odds with ICWA’s policy of preserving Indian families whenever possible. Many tribes oppose ASFA’s time lines, arguing that they provide insufficient time to locate, provide, and monitor appropriate reunification services to the parents of Indian children—who may need specialized services, have cultural or

³² Remember that ICWA classifies as “foster care placements” *all* out-of-home placements, *including* placements with relatives.

³³ Pub. L. No. 105-89 (1997) (codified in relevant part at 42 U.S.C.A. § 671)

³⁴ For a discussion of ASFA, its history, goals, and provisions, see [Child Welfare Information Gateway: Adoption and Safe Families Act of 1997 Overview](#).

³⁵ For a discussion of the intersection of ASFA and ICWA, see the [Native American Rights Fund’s “A Practical Guide to the Indian Child Welfare Act” § 19.9 – 19.10](#) and [“P.L. 105-89 Adoption and Safe Families Act of 1997 for Tribes and States Serving Indian Children.”](#)

³⁶ A.R.S. § 8-533(B)(8)(a) and (c).

³⁷ A.R.S. § 8-533(B)(8)(b).

language barriers, or live in remote areas—as well as insufficient time to allow those services to work. On the other hand, the longer a child remains in an out-of-home placement, the more likely that child will bond with the placement with the consequence that the child may be traumatized by removal and placement with a parent or an [ICWA-preferred placement](#), if the child is not in one. There is no easy answer to determine which view best promotes an Indian child’s welfare. Courts, parties, and stakeholders must look at each child’s particular needs and circumstances to best determine how to comply with ICWA, ASFA, and state law.

XII. Conclusion

This Guide has been developed as a collective effort by the Indian Child Welfare Act Committee of the Arizona State, Tribal & Federal Court Forum. It is intended as a resource for state and tribal court personnel, child welfare workers, attorneys, and guardians ad litem. We invite individuals and agencies involved in implementing ICWA in Arizona to offer comments and suggestions for further improvement of the Guide. We hope the Guide will help provide a foundational and common understanding of federal and state law in this important area that will ultimately benefit Indian children, families, and tribes.