



ICWA

THE INDIAN CHILD WELFARE ACT



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An Introduction



GENERALLY



Indian Child Welfare Act

United States Code, Title 25, Chapter 21, § 1911 – 1963

*Binding BIA Rules for Indian Child Welfare Act
Proceedings, 25 C.F.R. §§ 23.101-144 and
Guidelines*

Arizona Rules of Juvenile Procedure



Key statutory definitions § 1903

- **Indian child** – unmarried person under the age of 18 who is either member of recognized Indian tribe or eligible for membership and is biological child of tribal member
- **Parent** – biological parent of Indian child or Indian person who has adopted Indian child, but does not include unwed father where paternity has not been acknowledged or established
- **Child custody proceeding** – foster care placement, termination of parental rights, pre-adoptive and adoptive placement



Who is an Indian child...?

- *Tribe has last word!*
- **BIA Rule:**
 - ▣ Court may not consider lack of participation in tribal cultural activities or child's blood quantum
 - ▣ "Existing Indian family" exception rejected by Arizona case law and by substance of new BIA Rule.



Reason to Know, 25 C.F.R. § 23.107

ICWA applies if State has “reason to know” child is an “Indian child” *until* it is determined that child is not an “Indian child.”

The court and parties must treat the child as an Indian child until it is determined on the record that the child does not meet the definition.





JURISDICTION

EXCLUSIVE AND CONCURRENT

Basic Jurisdictional Structure

- ❑ **Exclusive tribal court jurisdiction over child custody proceeding involving Indian child who resides or is domiciled on reservation, or who is ward of tribal court – §1911(a)**

- ❑ **Concurrent tribal-state jurisdiction over foster care placement or termination of parental rights involving Indian child, with option to *transfer to tribal court* – §1911(b)**
 - ❑ **Parental veto**
 - ❑ **Good cause to contrary**



Exclusive tribal jurisdiction: *Mississippi Band of Choctaw Indians v. Holyfield* (US 1989)

Unmarried birth mother, member of Choctaw tribe, traveled off reservation to give birth to twins. She and father, also Choctaw, maintained domicile on reservation. Birth parents placed newborn twins for adoption with non-Indian couple. Tribe challenged state-court adoptions under ICWA.



Key points:

1. ICWA's grant of exclusive jurisdiction does not depend on parental wishes.
2. "Domicile" has federal meaning and is not subject to state definition.
3. Domicile of infant born to unmarried woman is that of the mother.
4. State court adoption decree was void for lack of jurisdiction.



State court ICWA proceedings – Section 1911(b)

- As to Indian children *not* domiciled or residing on reservation: Tribal court and state court share jurisdiction over proceedings for foster care placement or termination of parental rights.

- On request by parent or Indian custodian or tribe, state court **must transfer** proceeding to tribe, unless:
 - Either parent objects
 - Tribal court declines
 - Good cause to contrary



PETITION TO TRANSFER



Procedure

- Transfer governed by: **25 C.F.R. § 23.115 – 119**

- **Parent, Indian custodian, or Indian Child's tribe may petition for transfer**
 - In writing or orally on the record
 - At any stage of the foster care or termination proceeding
 - Tribe must be notified of the request to transfer in writing



Basis to Deny Petition to Transfer

- Either parent objects (unless rights terminated)
- The Tribal court declines the transfer
- Good cause exists to deny the transfer
- Objections based on Good cause must be in the record – in writing or orally



Transfer: What is good cause to the contrary?

- ❑ **Good cause is not defined. BIA Rule tells us what it is not!**
- ❑ **Court must *NOT* consider:**
 - ❑ Whether proceeding is at advanced stage if parent or Tribe did not receive notice until that stage
 - ❑ Whether transfer could affect placement
 - ❑ Child's cultural connections with Tribe
 - ❑ Socio-economic conditions



What Court might consider

- ❑ Good cause may not be based “solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.”
- ❑ Request of one or both parents
- ❑ Request of child of sufficient age and capacity to understand decision
- ❑ Presence of sibling attachment
- ❑ Extraordinary physical, mental, or emotional needs of child
- ❑ Unavailability of suitable placement after diligent search



Transfer – Denial or Transfer

Granted:

Court must expeditiously provide the Tribal Court with all records; pleadings, reports, the legal file, etc.

Court should work with Tribal court to ensure transfer of the custody of the Indian child and the proceeding is smooth and in a manner that minimizes the disruption of services to the family

Denied:

The basis for denial must be specified on the record or put in writing



No Evidentiary Standard for Good Cause...

Like Active Efforts, neither the statute or rule establishes a Federal standard of evidence for the determination of whether there is good cause to transfer a proceeding to Tribal Court.

However, strong trend in state courts to apply a clear and convincing standard.



Post-Termination Transfer

Gila River Indian Community v. DCS, 395 P.3d 286 (Az Supreme Court 2017)

Holding:

ICWA provision did not prohibit state courts from transferring pre-adoptive or adoptive placement actions to tribal courts, although ICWA did not govern the transfer of such actions; and

Indian Community did not impliedly waive its right to seek transfer of adoptive proceeding by not seeking transfer until after parental rights were terminated.



ICWA REQUIREMENTS



Involuntary proceedings in the state courts: Procedural Rights under § 1912

- Notice to parent/Indian custodian & Tribe
- Absolute right to intervene
- Right to counsel



Emergency Removal

§1922 and 25 C.F.R. § 23.113

Indian Child:

State requirement: TC must be necessary to prevent abuse or neglect

ICWA requirement: TC must be necessary to prevent **imminent physical damage or harm to child.**

Placement preferences do not apply in an emergency proceeding

Must end when no longer necessary to prevent imminent physical harm or damage

BIA Rule provides presumptive limit of 30 days



Preliminary Protective Hearing

Court's Duty

Inquire of parties and any participant whether there is a reason to believe the child is an Indian child.

FINDINGS:

whether the emergency removal or placement was necessary to prevent imminent physical damage or harm to the child unless those findings were made prior to the removal pursuant to Rule 47.3(D)(1) and C.F.R. § 23.113(d), and;

that the emergency removal or placement terminated upon the filing of the dependency petition.



Preliminary Protective Hearing

Court's Duty continued...

When there is reason to know, order:

the petitioner provide certified notice to the Tribe, BIA, each parent, and

use due diligence to work with all tribes of which there is reason to know that the child may be a member or eligible to verify whether the child is enrolled or eligible. See 25 U.S.C. § 23.111



Preliminary Protective Hearing

Court's Duty continued...

Court is required to make findings pursuant to the standards and burdens of proof as required by ICWA and the Regulations

Those include whether there is good cause to deviate from placement preferences

These findings are most often deferred to allow Notice to the Tribe or to allow Petitioner to locate a QEW



Dependency Adjudication

Important Evidentiary Requirements

- Active efforts to prevent breakup of Indian family
- Testimony of qualified expert witness
- For foster care placement, proof by clear and convincing evidence that continued custody by parent is likely to result in serious emotional or physical damage to child



§ 1912 (d),(e); 25 C.F.R. § 23.120 -121 (a), (c)

Important Evidentiary Requirements, continued...

ICWA Placement Preferences: if placement is not ICWA compliant, court must be able to find by clear and convincing evidence that there is good cause to deviate

Tribe may have its own placement preferences and has authority to decide whether a placement is compliant

See, Rule 50.1



Placement preferences absent good cause to contrary – § 1915

- **Foster care placement**
 - Extended family member
 - Foster home specified by child's tribe
 - Indian foster home
 - Institution approved by a tribe or Indian organization

- **Adoptive placement**
 - Extended family member
 - Tribal member
 - Other Indian families



Note for Active Efforts

□ Guidelines:

While ICWA does not establish a standard of evidence for review of whether active efforts have been provided, the Department favorably views cases that apply the same standard of proof for the underlying action to the question of whether active efforts were provided

clear and convincing: for foster care placement

TPR: beyond a reasonable doubt

See, 25 C.F.R. § 23.120



Review and Permanency Hearings

- Court must be satisfied Active Efforts were made (25 C.F.R. § 23.120 – Defined § 23.2)
 - ▣ Affirmative, active, thorough, timely, tailored
 - ▣ AE must be listed on the record

- Placement preferences addressed

Note: Post-termination Review – only placement preference applies



Termination - Notice and Evidentiary Requirements

- Notice by certified mail to parent, BIA, and Tribe
- Active efforts to prevent breakup of Indian family (Guidelines recommend BRD)
- QEW: Proof beyond a reasonable doubt that continued custody by parent is likely to result in serious emotional or physical damage to child
- Placement preferences
See, Rules 65 & 66



Guardianship

- Notice by certified mail to parent, BIA, and Tribe
- Active efforts to prevent breakup of Indian family (Guidelines recommend BRD)
- QEW: Proof beyond a reasonable doubt that continued custody by parent is likely to result in serious emotional or physical damage to child
- Placement preferences

See, Rules 62 & 63



Voluntary Proceedings in State Court Foster Placement or TPR

- Court must determine if child is Indian child
- Notice to tribe *not required* under ICWA but recommended
- Written consent by parent in court no sooner than 10 days after birth
- May withdraw consent at any time, for any reason – without limits

See, § 1913



PRACTICE POINTS



Practice Points

ICWA

- ❑ If reason to know but tribe does not respond, must continued to treat the case as ICWA
- ❑ ICWA applies to private severance petitions
S.S., S.S. v. Stephanie H., 241 Ariz. 419 (App. 2017)
- ❑ Arizona ICWA Guide



Practice Points

ICWA

- ❑ If eligible for enrollment, work with parents, DCS, and tribe to enroll the child
- ❑ If Tribe does not intervene ensure the assigned ICWA Rep from the tribe receives disclosure and minute entries and motions
- ❑ Continue to advocate for ICWA Compliant Placement if child can't be with a parent (SENECA Search, enlist Tribe)
- ❑ Keep a copy of Az. ICWA Guide, Code, and CFR's in reach



CONSEQUENCES FOR FAILING TO APPLY ICWA



Failure to Apply ICWA

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□ Invalidation:

The Indian child, parent, Indian custodian, or tribe may petition a court to invalidate an action upon a showing of violation of any provision of:

§1911 (jurisdiction/transfer/intervention)

§1912 (notice/active efforts/serious damage/procedural safeguards)

§1913 (voluntary placement/termination).

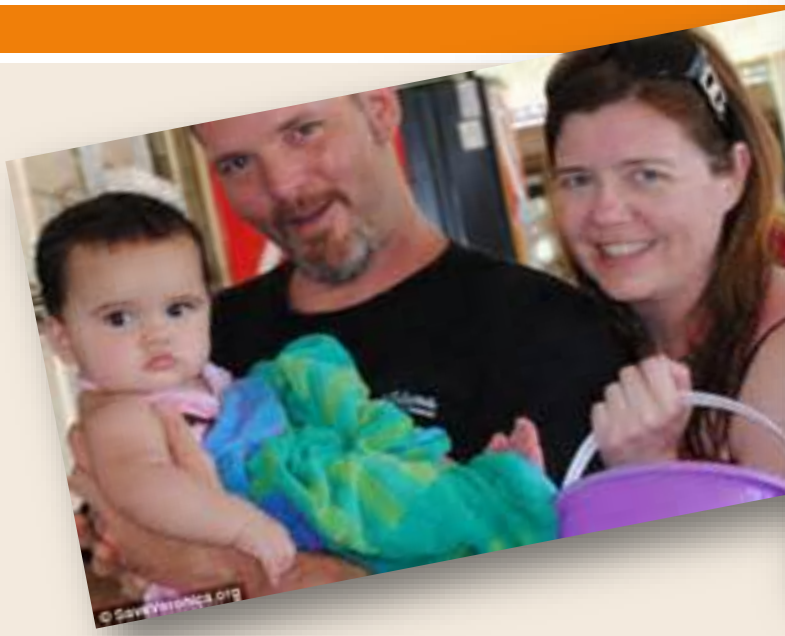
See § 1914. No case law in AZ.



FEDERAL CASE



Adoptive Couple v. Baby Girl (US 2013)



Child born to non-Indian mother and Cherokee father was placed for adoption by Mother shortly after birth, without notice to Father. When child was 4 months old, Father learned of adoption and brought challenge under ICWA. He prevailed in state courts and child, then 28 months old, was transferred to Father. Adoptive parents appealed to U.S. Supreme Court.

US Supreme Court:

- Because Father had never had legal or physical custody of child at time adoption petition was filed, he was not entitled to ICWA's procedural protections.
- Requirement of proof beyond reasonable doubt that "continued custody" by parent was likely to result in serious emotional/physical harm to child did not apply to Indian father who never had custody of child
- Requirement that State make active efforts to avoid "breakup" of Indian family did not apply where child had never lived in Indian family
- Additional holding: Placement preferences don't apply if only one petition to adopt is pending before the court

ICWA UPDATES



ICWA TODAY

- ❑ Continued disproportionality in state foster care populations
- ❑ Continued resistance to ICWA
- ❑ Challenges to constitutionality of ICWA
 - Brackeen v. Bernhardt, 5th Circuit*
- ❑ More states passing ICWA laws and incorporating ICWA into state rules
- ❑ ICWA Courts



Breaking News.....

□ Arizona Rules of the Supreme Court, Rule 39 Amended

Non-member attorney for tribe not required to associate with local counsel or pay fees to appear in Arizona Court

- Appearance is for limited purpose of representing a tribe in a child custody proceeding
- The attorney must represent a federally recognized tribe as defined by ICWA
- Tribe files motion to intervene and affirms child's membership or eligibility to enrollment
- The non-member attorney must file a motion to appear pro hac vice in court

See 25 U.S.C. § 1901, et. seq.



Thank you.

