

**HB**

**310**

<TARGET><BILL>HB 310</BILL><SUBJECT>HB  
310</SUBJECT><COMM>HJUD29</COMM></TARGET>

Alaska State Legislature  
House of Representatives  
Representative Tammie Wilson

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*Session*  
State Capitol Rm 412  
Juneau, AK 99801  
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Rep.Tammie.Wilson@akleg.gov

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MEMORANDUM

To: The Honorable Gabrielle LeDoux

Fr: Representative Tammie Wilson

Re: Hearing Request HB 310

Date: February 26, 2016

Dear Chair LeDoux,

I respectfully request HB 310 be considered in the House Judiciary Committee at your earliest convenience. My staff on this piece of legislation is Barbara Barnes. She can be reached at (907) 465-4797.

Sincerely,

*Tammie*

Rep. Tammie Wilson

**Alaska State Legislature  
House of Representatives  
Representative Tammie Wilson**

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**SPONSOR STATEMENT**

**HB 310**

**"An Act relating to the duties of the Department of Health and Social Services; relating to child-in-need-of-aid proceedings; relating to child protection; and amending Rules 6(a), 6(b)(2) and (3), 10(c)(2) and (3), 10(e)(2), 10.1(a)(1) and (2), 15(f)(2), 17(c), 17(d)(2), 17.1(b), 17.1(d)(3), 17.2(a), 17.2(e), 17.2(f), 18(c), and 19.1(c), Alaska Child in Need of Aid Rules of Procedure, and repealing Rules 17.1(a), 17.1(c), and 17.1(d)(2), Alaska Child in Need of Aid Rules of Procedure."**

Inequality should not be tolerated! Currently, the Office of Children Services (OCS) has two discriminatory standards for Alaska's children.

Congress passed the Indian Child Welfare Act (ICWA) in 1978 as a response to then-prevalent culturally insensitive state government child welfare practices that negatively impacted "Indian children", their families, and their tribes. The ICWA aims to ensure that Indian children are removed from their parents only after carefully crafted efforts have been made to maintain the Indian family.

In 1996, the Alaska Court System received a major federal grant to study and improve the state's handling of child protection cases, including child abuse, neglect, foster care, and adoption litigation. These cases are called child in need of aid cases, or CINA. The CINA guide describes how these cases are handled by the state, the roles played by various individuals, agencies, and courts.

The child's ethnicity changes the level of the State's duty. When the child in custody is Indian, the State has an affirmative duty to make "active efforts" to reunify the family (ICWA). When the child is non-Indian, the State must make "reasonable efforts" (CINA). "Active efforts" is a more stringent standard than "reasonable efforts," which embody duties that touch on important rights of parents.

HB 310 raises the standard so that all of Alaska's children are treated the same.

I would appreciate your support.

## **HB 310**

### **SECTIONAL ANALYSIS**

#### **Section 1. AS 47.05.065**

This section is amended to ensure that remedial and rehabilitative programs are offered to all families so they have the opportunity to remedy the parental conduct or condition in the home that placed the child at risk of damage or harm and that the more stringent requirement of “active” efforts (as opposed to “reasonable” efforts) are made to ensure the child is provided with reasonable safety, adequate care and adequate treatment for the time the child is a ward of the state.

#### **Sec. 2. AS 47.10.011**

This section is amended to ensure that the more stringent standards are used by the court when determining, by a preponderance of the evidence, that a child is in need of aid.

#### **Sec. 3. AS 47.10.011**

This section is amended by adding a new subsection so that the same standards used to make a determination of physical damage or harm are parallel to the more stringent standards of U.S.C. 1901-1963, as set forth in the Indian Child Welfare Act of 1978, (ICWA) regardless of whether the child is an Indian child.

#### **Sec. 4. AS 47.10.013(a)**

This section is amended to require that the court substantiate the more stringent standards of “serious” risk, as opposed to “substantial” risk. It also adds “physical damage,” in addition to “harm” to parallel ICWA standards.

#### **Sec. 5. AS 47.10.015.**

This section is amended to ensure that the more stringent standards of ICWA are used by the court when determining, by a preponderance of the evidence, that a child was a victim of harm or neglect from the conduct by, or conditions created by a parent, guardian or custodian.

#### **Sec. 6. AS 47.10.030(c)**

This section is amended to require the court to make a finding that the conditions or surroundings are such that a child must be removed to prevent imminent physical damage or harm to the child.

**Sec. 7. AS 47.10.080(f)**

This section is amended to require an additional finding by the court as to whether the child should be returned to the custody of the parent or guardian.

**Sec. 8. AS 47.10.080(l)**

Section 2(A) is amended to require the court, when establishing a permanency plan for the child, to determine that returning the child to the child's parents or guardian is likely to result in serious emotional or physical damage.

It requires the department to have made "active" efforts in their requirements under AS 47.10.086 to offer appropriate remedial services and rehabilitative programs.

It further requires a finding that returning the child to the child's parents or guardian is likely to result in serious emotional or physical damage in order for the department to keep the child in out-of-home care as part of a permanency plan.

**Sec. 9. AS 47.10.080(p)**

This section is amended to require the more stringent standards of ICWA in that active efforts must provide opportunities for and to facilitate reasonable visitation if the child is removed from the parental home.

**Sec. 10. AS 47.10.080 NEW SUB SECTION**

AS 47.10.080 is amended by adding a new subsection which would require that an order issued under this section not allow removal of a child from the child's home or continued placement of the child outside the child's home unless there is, at the time the order is issued, clear and convincing evidence, including the testimony of a qualified expert witness who is not employed by the department, that the child is likely to suffer serious emotional or physical damage if left with or returned to the child's parent or guardian.

**Sec. 11. AS 47.10.081(b)**

This section has been revised to require the determination of whether continued custody of the child by the child's parent or guardian is likely to result in serious emotional or physical damage and be included in the disposition report.

**Sec. 12. AS 47.10.086(a)**

This section has been revised to identify family support services; and that remedial services and rehabilitative programs may include services and programs provided by the community, a church, or other service organizations. It also requires "active" measures in referring and obtaining support services for a parent or guardian.

**Sec. 13. AS 47.10.086(b)**

This section is amended to parallel the more stringent standards as in ICWA.

**Sec. 14. AS 47.10.086(d)**

This section is amended to parallel the more stringent standards as in ICWA.

**Sec. 15. AS 47.10.086(e)**

This section is amended to parallel the more stringent standards as in ICWA.

**Sec. 16. AS 47.10.086(f)**

This section is amended to parallel the more stringent standards as in ICWA.

**Sec. 17. AS 47.10.088(a)**

This section is amended to parallel the more stringent standards as in ICWA.

It requires that evidence beyond a reasonable doubt, including the testimony of a qualified expert witness, who is not employed by the department, that continued custody of the child by the parent or guardian is likely to result in serious physical or emotional damage to the child.

**Sec. 18. AS 47.10.088(b)**

This section is amended for house-keeping purposes and to parallel the more stringent standards as in ICWA.

**Sec. 19. AS 47.10.088(d)**

Number (3) of this section directs the department to consider care by a relative for the child, as well, as documented compelling reasons to be a factor in determining that the petition for the termination of a parent's rights to a child is not in the best interest of the child.

**Sec. 20. AS 47.10.088(g)**

This section is amended so that the department must parallel the ICWA standards. In filing a petition to terminate parental rights, the department must determine that continued custody of the child by the child's parents or guardian would likely result in serious emotional or physical damage.

**Sec. 21. AS 47.10.142(a)**

This section is amended to parallel the more stringent standards as in ICWA.

**Sec. 22. AS 47.10.142(b)**

This section is amended to allow for the department to take emergency custody of a minor from the minor's parent or guardian only if it is necessary to prevent the

imminent physical damage or harm to the child.

**Sec. 23. AS 47.10.142(d)**

This section is amended to parallel the more stringent standards as in ICWA.

The court must determine that allowing the department's continuing temporary legal custody of the child is based on the necessity to prevent imminent physical damage or harm to the child.

**Sec. 24. AS 47.10.142(e)**

This section is amended to direct the court to also determine at the temporary custody hearing whether (1) by a preponderance of the evidence, removal of the child is necessary to prevent imminent physical damage or harm to the child, or (2) by clear and convincing evidence, including the testimony of a qualified expert witness who is not employed by the department, the child would likely suffer serious physical or emotional damage if left in the child's home.

If the Court finds that probable cause exists for believing that the child is a child in need of aid and that a sufficient showing has been made under either (1) or (2) of this subsection, it shall order the child committed to the department for temporary placement outside the home of the child's parent or guardian. If the court finds that probable cause does not exist for believing the child is a child in need of aid, but that a sufficient showing has not been made under (1) or (2) of their subsection the court shall order the child to be either committed to the custody of the department with temporary placement to be in the child's home or returned to the custody of the child's parent or guardian.

**Sec. 25. AS 47.10.142(f)**

This section is amended for house-keeping purposes to parallel the more stringent standards as in ICWA.

The provision, except as provided in (i) of this section, limits the temporary placement under this section to 30 days.

**Sec. 26. AS 47.10.142(h)**

This section is amended to change the timeline for court review of the placement plan and actual placement of the child under AS 47.10.080 (I) to occur within 30 days, as opposed to 12 months, after a child is committed to the department.

**Sec. 27. AS 47.10.142**

This section is amended by adding a new paragraph to read: The court may only order a child committed to the department for temporary placement under (e) and

(f) of this section for more than 30 days if the court determines by clear and convincing evidence, including the testimony of a qualified expert witness who is not employed by the department, that custody of the child by the child's parent or guardian is likely to result in imminent physical damage or harm to the child or that extraordinary circumstances exist.

**Sec. 28. AS 47.10.990**

This section is amended by adding a new paragraphs to define “active effort,” “emotional damage,” and “remedial services and rehabilitative programs”.

**Sec. 29. AS 47.14.100(r)** is amended to read:

This section is amended to parallel the more stringent efforts as in ICWA.

**Sec. 30. AS 47.17.290(3)**

This section is amended to parallel the more stringent efforts as in ICWA.

**Sec. 31. AS 47.17.290(10)**

This section is amended to further define “mental injury.”

**Sec. 32. The uncodified law of the State of Alaska is amended by adding a new section to read:**

*DIRECT COURT RULE AMENDMENT. Rule 6(a), Alaska Child in Need of Aid Rules of Procedure, is amended to reflect the more stringent ICWA standards as it pertains to “Emergency Custody Without Court Orders.”*

**Sec. 33. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT. Rule 6(b)(2), Alaska Child in Need of Aid Rules of Procedure; amends the “Form, Contents of Motion” standards for removal of a child to parallel the ICWA standards.*

**Sec. 34. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT. Rule 6(b)(2), Alaska Child in Need of Aid Rules of Procedure, is amended to read: (3) Order; amends the standards for emergency orders of removal of a child to parallel ICWA standards.*

**Sec. 35. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT. Rule 10(c)(2), Alaska Child in Need of Aid Rules of Procedure; amends the standards for removal of a child to parallel the ICWA standards.*

**Sec. 36. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT. Rule 10(c)(3), Alaska Child in Need of Aid Rules of Procedure; amends the standards for removal of a child to parallel the ICWA standards.*

**Sec. 37. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT. Rule 10(e)(2), Alaska Child in Need of Aid Rules of Procedure; amends that standards for the return of the child to the child's home to parallel ICWA standards.*

**Sec. 38. The uncodified law of the State of Alaska is amended by adding a new section to read:**

*DIRECT COURT RULE AMENDMENT. Rule 10.1(a)(1), Alaska Child in Need of Aid Rules of Procedure; amends Findings to parallel ICWA standards.*

**Sec. 39. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT. Rule 10.1(a)(2), Alaska Child in Need of Aid Rules of Procedure; amends the effect of a finding that the Department Failed to Make Active Efforts to parallel ICWA standards.*

**Sec. 40. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT. Rule 15(f)(2), Alaska Child in Need of Aid Rules of Procedure; amends the inquiry and findings required by CINA Rule 10.1 to parallel ICWA standards.*

**Sec. 41. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT. Rule 17(c), Alaska Child in Need of Aid Rules of Procedure; amends the Requirements for Disposition to parallel ICWA standards.*

**Sec. 42. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT. Rule 17(d)(2), Alaska Child in Need of Aid Rules of Procedure; amends the standards the court uses to approve the removal of the child from the child's home to parallel ICWA standards.*

**Sec. 43. The uncodified law of the State of Alaska is amended by adding a new section to read:**

*DIRECT COURT RULE AMENDMENT. Rule 17.1(b), Alaska Child in Need of Aid Rules of Procedure*, amends the standard used by the court in determining if a continuation of active efforts is not in the best interest of the child by paralleling them to the ICWA standard.

**Sec. 44. The uncodified law of the State of Alaska is amended by adding a new section to read:**

*DIRECT COURT RULE AMENDMENT. Rule 17.1(d)(3), Alaska Child in Need of Aid Rules of Procedure*; amends the standard to determine the Child's Best Interests to parallel the ICWA standard.

**Sec. 45. The uncodified law of the State of Alaska is amended by adding a new section to read:**

*DIRECT COURT RULE AMENDMENT. Rule 17.2(a), Alaska Child in Need of Aid Rules of Procedure*; amends the standards for Purpose and Timing of the Hearing for a child in need of aid to parallel ICWA standards.

**Sec. 46. The uncodified law of the State of Alaska is amended by adding a new section to read:**

*DIRECT COURT RULE AMENDMENT. Rule 17.2(e), Alaska Child in Need of Aid Rules of Procedure*; amends the standards used by the court for making written findings to parallel ICWA standards.

**Sec. 47. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT. Rule 17.2(f), Alaska Child in Need of Aid Rules of Procedure*; amends the standards used to apply additional findings to parallel ICWA standards.

**Sec. 48. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT. Rule 18(c), Alaska Child in Need of Aid Rules of Procedure*; amends the standard applied to Burden of Proof to parallel ICWA standards.

**Sec. 49. The uncodified law of the State of Alaska is amended by adding a new section:**

*DIRECT COURT RULE AMENDMENT.* Rule 19.1(c), *Alaska Child in Need of Aid Rules of Procedure*; amends the standard applied for Disposition Order, pursuant to AS 47.10.100(a) to parallel ICWA standards.

**Sec. 50. The uncodified law of the State of Alaska is amended by adding a new section:**

*REPEAL OF COURT RULES.* Rule 17.1(a), 17.1(c), and 17.1(d)(2), *Alaska Child in Need of Aid Rules of Procedure*, are repealed.

**Sec. 51.** AS 47.10.086(c), 47.10.086(g), 47.10.088(e), 47.10.990(11), 47.10.990(27), and 47.10.990(30) are repealed.

**Sec. 52. The uncodified law of the State of Alaska is amended by adding a new section:**

*TWO-THIRDS VOTE NOT REQUIRED.* Because the provisions of Rules 6(a), 6(b)(2) and (3), 10(c)(2) and (3), 10(e)(2), 10.1(a)(1) and (2), 15(f)(2), 17(c), 17(d)(2), 17.1(a), 17.1(b), 17.1(c), 17.1(d)(2) and (3), 17.2(a), and 18(c), *Alaska Child in Need of Aid Rules of Procedure*, that are affected by the provisions of this Act were adopted under the Alaska Supreme Court's interpretive authority exercised under art. IV, sec. 1, Constitution of the State of Alaska, secs. 32 - 45, 48, and 50 of this Act take effect even if secs. 32 - 45, 48, and 50 of this Act do not receive the two-thirds majority vote normally applicable to changing court rules under art. IV, sec. 15, Constitution of the State of Alaska.

**Sec. 53. The uncodified law of the State of Alaska is amended by adding a new section:**

*APPLICABILITY.* This Act applies to child-in-need-of-aid petitions filed or pending on or after the effective date of this Act.

**Sec. 54. The uncodified law of the State of Alaska is amended by adding a new section:**

*CONDITIONAL EFFECT.* AS 47.10.080(l), as amended by sec. 8 of this Act, AS 47.10.081(b), as amended by sec. 11 of this Act, and AS 47.10.142(d), as amended by sec. 23 of this Act take effect only if secs. 8, 11, and 23 of this Act receive the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

# LEGAL SERVICES

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## MEMORANDUM

February 15, 2016

**SUBJECT:** Definitions (Work Order No. 29-LS1223)

**TO:** Representative Tammie Wilson  
Attn: Barbara Barnes

**FROM:** Kate S. Glover *KG*  
Legislative Counsel

You asked me to send you the statutory definitions for: active, reasonable, serious, substantial, and damage. I have interpreted your request to refer to the differences between the terms used in the Indian Child Welfare Act (ICWA) and the terms used in the Child In Need of Aid (CINA) statutes. As I have noted in previous memos to your office regarding Work Order Nos. 29-LS1223, 29-LS0176\G.4, and 29-LS0105, not all of these terms are defined. If you would like to provide definitions for them, the definitions could be added to your bills. Some of the terms are not easily defined and may be reviewed in the context of a specific set of facts.

"Reasonable efforts" is defined under AS 47.10.086 and under AS 47.10.990(27). That definition was used for active efforts in 29-LS0176\G.4, lacking another definition.

"Active efforts" is not defined in ICWA. The Alaska Supreme Court has explained the term as follows:

"[T]he 'active efforts' requirement of ICWA is more demanding than the 'reasonable efforts' requirement of AS 47.10.086." We review the decision that OCS made active efforts "on a case-by-case basis." "As opposed to passive efforts such as simply developing a plan for the parent to follow, active efforts require that the state actually help the parent develop the skills required to keep custody of the children." We consider "the State's involvement in its entirety" in assessing whether the State met its burden.<sup>1</sup>

The Bureau of Indian Affairs proposed a new rule last year that would define "active efforts." The rule has not been finalized.<sup>2</sup>

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<sup>1</sup> *Kyle S. v. State*, 309 P.3d 1262, 1267 (2013) (citations omitted).

<sup>2</sup> See 80 Fed. Reg. 14,880 (Mar. 20, 2015). The text of the proposed rule is available here: <http://www.bia.gov/cs/groups/public/documents/text/idc1-029629.pdf>.

Representative Tammie Wilson  
February 15, 2016  
Page 2

Although the CINA statutes do not include a separate definition for the word "serious," "serious physical injury" is defined, under AS 47.10.990(30), to have the meaning given under AS 11.81.900(b). "Mental injury" and "physical injury" are also defined under AS 47.10.990.

"Substantial" is not defined under ICWA or under the CINA statutes. Whether an injury, or a risk of harm, is "substantial" in a particular case is a factual inquiry that the courts, or the Department of Health and Social Services, would make on a case-by-case basis. I do not know exactly how the term differs from "serious."

"Damage," the term used in ICWA, is not defined under ICWA or under the CINA statutes. I do not know how "damage" differs from "harm" or "injury".

If, as a policy matter, you would like to define any of these terms, please let me know how you would like to define them. Without a statutory definition, courts will apply the ordinary meaning of the term.

If I may be of further assistance, please advise.

KSG:dla  
16-157.dla

**2012**

**Indian Child Welfare Act of 1978:  
A Court Resource Guide**

ICWA Special Committee

State Court Administrative Office

July, 2012

## **FOREWORD**

This is one of the most rewarding projects I've experienced in my years as liaison Justice for the Native American tribes. The extensive participation of the tribes, the spirit of cooperation that permeated the committee, and the landmark product that emerged from these efforts leave me filled with hope for the future of state and tribal court relations.

Justice Michael F. Cavanagh

**This Court Resource Guide would not have been possible without the generous collaborative efforts of the following people:**

*The Committee wishes to express a special thank you to Michigan Supreme Court Justice Michael F. Cavanagh for his leadership and support during this project, as well as for his many years of service to the Native American Tribes and the Tribal Courts in Michigan.*

**Judge Michael J. Anderegg:** Marquette Probate Court / Michigan Probate Judges Association

**Ruth Anton:** Lac Vieux Desert Band of Lake Superior Chippewa Indians

**H. Daniel Beaton, Jr.:** Michigan Attorney General's Office

**Judge Robert J. Butts:** Cheboygan Probate Court / Michigan Probate Judges Association

**Juanita Bye:** Sault Ste. Marie Tribe of Chippewa Indians

**Orlene Christie:** Michigan Department of Community Health

**Judge Timothy P. Connors:** Washtenaw Circuit Court / Michigan Judges Association

**Lance S. Dexter:** Isabella Circuit Court

**Chris Durocher:** Michigan Department of Human Services

**Frank Ettawageshik:** Chairman, Little Traverse Bay Bands of Odawa Indians

**Rochelle Ettawageshik:** Little Traverse Bay Bands of Odawa Indians

**Matthew Fletcher:** Grand Traverse Band of Ottawa and Chippewa Indians

**Judge Richard Halloran:** Wayne Circuit Court / Michigan Judges Association

**Lauran F. Howard:** Oakland Circuit Court

**Bill Johnson:** Michigan Children's Institute

**Jim Keedy:** Executive Director, Michigan Indian Legal Services

**Judge Vera Klingman:** Lac Vieux Desert Band of Lake Superior Chippewa Indians

**Allie Greenleaf Maldonado:** Little Traverse Bay Bands of Odawa Indians

**Marge Marchlewicz:** Bay Circuit Court

**Kathleen McKee:** Pokagon Band of Potawatomi Indians

**William Memberto:** Little River Band of Ottawa Indians

**Jami Moran:** Sault Ste. Marie Tribe of Chippewa Indians

**Annette Nickel:** Pokagon Band of Potawatomi Indians / Varnum

**Matthew Lesky:** Little Traverse Bay Bands of Odawa Indians

**Leslie Pigeon:** Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians

**Laura Plachta:** Isabella Probate Court

**First Lieutenant Brian Postma:** Michigan State Police

**Tom Robertson:** Prosecuting Attorneys Coordinating Council

**R. Scott Ryder:** Nottawaseppi Huron Band of Potawatomi

**Corrie Schmidt-Parker:** Michigan Judicial Institute

**Shelley R. Spivack:** Referees Association of Michigan  
**Judge Angela Sherigan:** Little River Band of Ottawa Indians  
**Carol Siemon:** Director, Child Welfare Training Institute - Michigan Department of Human Services  
**Nancy Smit:** Nottawaseppi Huron Band of Potawatomi  
**Angela Smith:** Michigan Department of Community Health  
**David K. Sprague:** Chairman, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians  
**Stacey Tadgerson:** Director, Office of Native American Affairs - Michigan Department of Human Services  
**Kathryn Tierney:** Bay Mills Indian Community  
**Melissa VanLuven:** Sault Ste. Marie Tribe of Chippewa Indians  
**Matthew Wesaw:** United Tribes of Michigan  
**Velma Weston:** Kalamazoo Probate Court  
**Gene Zeller:** Little River Band of Ottawa Indians

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## INTRODUCTION

This court resource guide was written by a special committee formed by the Michigan Supreme Court to help Michigan judges learn about the federal Indian Child Welfare Act of 1978, the need for states to comply with the Act, and discuss its implementation in Michigan.

Some committee members asked, “Why now?” Why did the Court and the State Court Administrative Office (SCAO) wait more than 30 years to take a close look at the Indian Child Welfare Act (ICWA)? The answer has several components. First, SCAO’s Child Welfare Services division (CWS) recently began receiving more questions about our state’s compliance with this federal law. Second, CWS began participating in the Tribal State Partnership, a forum for the Michigan Department of Human Services (DHS) and the twelve federally-recognized tribes in Michigan. Third, the resulting discussions with local DHS personnel and tribal representatives made clear the need for a serious examination of how our state courts have applied (or ignored) the ICWA. Those events caused the Supreme Court to create this special committee and ask it to craft a court resource guide designed to provide practical ICWA advice to our state courts. Funding for the committee’s work was provided by SCAO’s Court Improvement Program and the State Bar of Michigan’s Interest on Lawyers Trust Accounts Program. See Administrative Order 1997-9.

Congress passed the ICWA in 1978 as a response to then-prevalent culturally insensitive state government child welfare practices that negatively impacted “Indian children” (a term defined in the ICWA), their families, and their tribes. Indian children who grow up in non-Indian homes lose touch with their cultural and spiritual roots. The ICWA aims to ensure that Indian children are removed from their parents only after carefully crafted efforts have been made to maintain the Indian family. This guide will help state courts to understand the ICWA concepts and how they interact with Michigan’s laws governing child welfare, guardianships, and adoptions. **The goal of the committee and this guide is to make the ICWA’s requirements the “best interest” considerations for Indian children, families, and tribes.**

While drafting this guide the committee as a whole met on four occasions between September 2008 and May 2009. The final product reflects the consensus agreements of the entire committee. In the future, CWS staff will review and update the guide periodically to ensure that it reflects evolving case law and court rule changes.

A subcommittee of the larger committee evaluated Michigan’s court rules and recommended that the Supreme Court rescind MCR 3.980 (then Michigan’s only court rule that referred to the ICWA), and insert ICWA-specific provisions throughout all the court rules that address child abuse and neglect proceedings, guardianships, and adoptions – all of which are proceedings to which the ICWA applies to some degree. Those recommended changes were adopted by the Court in January 2010, and became effective May 1, 2010. The new rules were included in the 2010 version of this Guide. While the full text of those rules do not appear in this 2011 edition, they can be reviewed

in full at SCAO's web site. The new or amended court rules are clearly marked in each corresponding section or subsection of this edition. However, SCAO recommends that the reader not rely solely on these references; a more thorough review of the revised rules themselves is highly recommended.

Questions or concerns about this guide may be directed to CWS staff, whose contact information appears in the Conclusion section.

## ICWA Fundamentals

This guide (“Resource Guide”) will help Michigan judges 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 US Department of the Interior, Bureau of Indian Affairs (BIA) in its *Guidelines for State Courts; Indian Child Custody Proceedings* (“BIA Guidelines”).

Unless the context requires a more formal citation, this guide will cite individual sections of the 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. With those exceptions, this guide will follow the Michigan Uniform System of Citation.

This preliminary section titled “ICWA Fundamentals” discusses several universal terms and concepts that apply to all ICWA proceedings. Judges must know the types of proceedings to which the ICWA applies, the proper parties to an ICWA case, those parties’ respective burdens of proof, and the benefits of collaborating with the Department of Human Services (DHS) and the child’s tribe in ICWA cases. That knowledge will allow courts to apply the ICWA correctly and uniformly throughout Michigan.

### **I. Why Does This Guide Refer to “Indian” Children and “Tribes” Instead of “Native American” Children and “Bands”? MCR 3.002(4) and (9)**

The ICWA itself uses the terms “Indian” and “Tribe”, starting with the Act’s official title. For consistency, this guide uses the Act’s terminology; Michigan state courts should do the same.

### **II. ICWA Definitions of “Child Custody Proceedings” and “Foster Care” MCR 3.002(1)**

ICWA §1903 states that the Act applies to any “child custody proceeding” involving an Indian child. It is important to note that the ICWA definition of “child custody proceeding” has a much broader scope than that in Michigan law. §1903(1) states that “child custody proceeding” shall mean and include – (i) “foster care placement” ... (ii) “termination of parental rights” ... (iii) “preadoptive placement” ....

The ICWA defines “foster care placement” as:

...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. §1903(1)(i).

This ICWA concept of foster care is broader than a typical Michigan child welfare case.

Comparing those two special ICWA definitions to Michigan's statutes, we can see that the ICWA applies to the following child custody proceedings:

- 1) Foster care placements (MCL 712A.1 – 32)
- 2) Guardianships (MCL 700.1101 – 8102)
- 3) Terminations of parental rights (MCL 712A.1 – 32)
- 4) Adoptions and preadoptive placements (MCL 722.95 - 906; 710.21 – 70).

The ICWA has only two exceptions to its broad definition of “child custody proceeding.” First, a child custody proceeding does not include “a placement based upon an act which, if committed by an adult, would be a crime.” If a juvenile commits an act that would be a crime if committed by an adult and the placement is based upon that act, then the placement is not a “child custody proceeding” and the ICWA does not apply. All other placements of juveniles, including status offenses, are “child custody proceedings” and continue to fall under the provisions of ICWA.

Second, the statutory definition of a “child custody proceeding” does not include an award of custody to one of the parties in divorce proceedings. Thus, child custody and parenting time disputes between parents are not “child custody proceedings” and do not implicate the ICWA.

### **III. Delinquency Proceedings (MCR 3.903[F], 3.905, 3.931, 3.935)**

The BIA Guidelines state, “Although most juvenile delinquency proceedings are not covered by the Act (ICWA), the Act does apply to status offenses ....” BIA Guidelines §B.3 and Commentary □ Determination That Placement Is Covered by the Act. Whether the 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 the ICWA applies. For all other juvenile offenses when placement was based on an act that would be a crime if committed by an adult, the ICWA does not apply.

**Important caveat:** If the investigation of a criminal delinquency case reveals that the Indian child suffered abuse and neglect, then the ICWA will apply to any abuse and neglect petition arising out of the delinquency case. BIA Guidelines §B.3 and Commentary □ Determination That Placement Is Covered by the Act.

#### Status Offenses

MCL 712A.2(a)(2)-(4) includes the following status offenses:

- (a)(2): The juvenile has deserted his or her home without sufficient cause, and the court finds on the record that the juvenile has been placed or refused alternative placement or the juvenile and the juvenile's parent, guardian, or custodian, have exhausted or refused family counseling.

(a)(3): The juvenile is repeatedly disobedient to the reasonable and lawful commands of his or her parents, guardian, or custodian, and the court finds on the record by clear and convincing evidence that court-accessed services are necessary.

(a)(4): The juvenile willfully and repeatedly absents himself or herself from school or other learning program intended to meet the juvenile's education needs, or repeatedly violates rules and regulations of the school or other learning program, and the court finds on the record that the juvenile, and the juvenile's parent, guardian, or custodian, and school officials or learning program personnel have met on the juvenile's educational problems and educational counseling and alternative agency help have been sought ....

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(d) If the court finds on the record that voluntary services have been exhausted or refused, concurrent jurisdiction in proceedings concerning a juvenile between the ages of 17 and 18 found within the county who is 1 or more of the following:

- 1) Repeatedly addicted to the use of drugs or the intemperate use of alcoholic liquors.
- 2) Repeatedly associating with criminal, dissolute, or disorderly persons.
- 3) Found of his or her own free will and knowledge in a house of prostitution, assignation, or ill-fame.
- 4) Repeatedly associating with thieves, prostitutes, pimps, or procurers.
- 5) Willfully disobedient to the reasonable and lawful commands of his her parents, guardian, or other custodian and in danger of becoming morally depraved ....

***If an Indian child is brought before a court on one of the status offenses listed above, the ICWA applies.*** Always give a child's tribe notice of the proceedings, even if the child is not removed from the home. This allows the tribe to intervene and assist with culturally competent services. If the child is to be removed from the home, the ICWA requires both "active efforts" and testimony by a "qualified expert witness" before a court may follow the ICWA placement preferences discussed later in this guide.

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. But the 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 below.

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. The 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)

#### Non-Status Offenses

If an Indian child is returned home after committing an act to which the ICWA does *not* apply, the DHS Child Protective Services division (CPS) may intervene if a lack of proper supervision may have contributed to the child's delinquent behavior. CPS 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 the ICWA *would* apply to the proceedings under the new CPS petition even though it did *not* apply to the original juvenile proceeding that caused CPS to become involved. See the BIA Guidelines §B.3 and Commentary.

#### **IV. Involuntary Proceedings (Multiple child protective proceeding court rules incorporate the concept of "involuntary" proceedings)**

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 Michigan law. In Michigan, that almost always will involve DHS, 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 petitions.<sup>1</sup>

If the removal is involuntary (i.e., pursuant to an abuse and neglect petition), the ICWA will apply and the following requirements must be met: <sup>2</sup>

- The tribe must be notified, along with the parents, Indian custodian, etc. MCR 3.905(C), 3.920(C), 3.921;
- "Active efforts" must be made to maintain the Indian family MCR 3.961;
- A "qualified expert witness" must testify to the necessity of the removal MCR 3.967;
- The placement preferences in the ICWA must be honored unless the child's tribe adopts a resolution that alters those preferences.

#### Involuntary Placement in Foster Care MCR 3.967

ICWA §1912(e) states that:

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<sup>1</sup> Juvenile guardianships pursuant to MCL 712A.19a and 19c, "full" guardianships pursuant to MCL 700.5204 are covered by the ICWA.

<sup>2</sup> "Active efforts" and "qualified expert witness" have special ICWA definitions. Those definitions and the other requirements listed in the text above are discussed in more detail throughout this guide.

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.

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. These efforts must take into account the tribe’s social and cultural conditions and way of life, and they should make use of tribal and extended family resources.

To meet the ICWA’s “clear and convincing evidence” threshold, the evidence must show the existence of particular conditions in the home 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 and Commentary - Standards of Review.

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 BIA Guidelines §D.3 and Commentary - Standards of Review.

#### Involuntary Termination of Parental Rights (MCR 3.977[G])

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 custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Before seeking a termination of parental rights, the petitioner must have made the same types of “active efforts” described above and discussed in more detail in section IX below.

The 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 her parents or Indian custodian. See BIA Guidelines and Commentary §D.3 - Standards of Evidence and Commentary.

Notice of Involuntary Proceedings (MCR 3.905[C], 3.921[C])

According to the BIA Guidelines §B.5 - Notice Requirements, notice of an involuntary proceeding must clearly state all of the following information:

- 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.
- 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.

In a unanimous opinion that decided two cases, the Michigan Supreme Court recently clarified several issues related to notice in *In re C. I. Morris, Minor and In re J. L. Gordon, Minor*.<sup>3</sup> The Court held that: A) “. . . sufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the ICWA notice requirement.” B) “. . . a parent of an Indian child cannot waive the separate and independent ICWA rights of an Indian child's tribe and . . . the trial court must maintain a documentary record including, at minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a) and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice.”<sup>4</sup> C) “[T]he proper remedy for an ICWA-notice violation is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue.”<sup>5</sup>

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<sup>3</sup> 491 Mich 81, 82 (2012).

<sup>4</sup> In a footnote, the Court highlighted part IV(C) of its opinion, noting that “a complete record should also include any additional correspondence between the Department of Human Services, the trial court, and the Indian tribe or other person or entity entitled to notice.” 491 Mich 89, n1.

<sup>5</sup> The sole issue for decision in *In re Morris* was whether a “conditional affirmance” is an appropriate appellate remedy for an ICWA violation. In reaching its holding that a conditional reversal is the most appropriate remedy, the Court considered: “(1) deference to tribal interests, as expressed by ICWA, (2) the best interests of the children, both Indian and non-Indian, in establishing and maintaining permanency, (3) the need to encourage compliance with ICWA, especially in light of the potential effects of the 25 USC

An appendix to the Court's opinion entitled "AN OVERVIEW OF THE 25 USC 1912(a) NOTICE PROCESS" provides a brief summary of the ICWA's notice requirements and is designed to help Michigan's trial courts properly apply 25 USC 1912(a).<sup>6</sup>

## V. Voluntary Proceedings

Certain parts of the ICWA apply to voluntary proceedings such as parental consents to foster care, termination of parental rights, adoptive placement, and guardianships. See ICWA §1913. If the ICWA applies to one of these proceedings, the following procedural issues must be addressed:

- Notice. Under §1911(c), Indian custodians and tribes have the right to intervene at any time during the 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.) MCR 3.802(A)(3); MCR 3.807(B)(2); MCR 5.109, MCR 5.402(E)(3)
- Consent. A valid consent document must be executed (see below for details and statutory authority).
- Placement. The placement preferences in the ICWA must be followed unless amended by the tribe. (See PLACEMENT OF INDIAN CHILDREN Section below.)

A parent's request for anonymity has priority over the ICWA notice and placement-preference provisions.

Some proceedings may be voluntary as to one parent and involuntary as to the other.<sup>7</sup> As noted earlier, ICWA §1903(1)(i) defines the term "foster care placement" to include

...any action removing an Indian child from its parent or Indian custodian for temporary placement in ... 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 ....

In voluntary placement cases, ICWA §1915(c) gives certain rights to tribes and extended family members.<sup>8</sup> For example, the ICWA defers to specific tribal child placement

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1914 remedy when errors occur, and (4) the conservation of judicial resources." 491 Mich 109. The Court determined that conditional reversal is more deferential to tribal interests while ensuring that those interests are protected by the trial courts. The Court then overruled all Michigan cases applying the conditional-affirmance remedy to ICWA-notice violations.

<sup>6</sup> The full *Morris* and *Gordon* opinion, including the appendix can be accessed at: [HTTP://COA.COURTS.MI.GOV/DOCUMENTS/OPINIONS/FINAL/SCT/20120504\\_S142759\\_97\\_MORRIS-OP.PDF](http://COA.COURTS.MI.GOV/DOCUMENTS/OPINIONS/FINAL/SCT/20120504_S142759_97_MORRIS-OP.PDF)

<sup>7</sup> 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 the ICWA requirements for an involuntary placement are followed with respect to the nonconsenting parent.

priorities that differ from those established in the ICWA. Because of this provision allowing a tribal resolution to alter the ICWA placement preferences, several courts have required that tribes and extended family members receive notice of voluntary placement proceedings. See, e.g., *Holyfield*. Without such notice, the tribe would not have the opportunity afforded by ICWA §1915(c) to invoke their own placement preferences. Therefore, even when a case is voluntary for purposes of the ICWA, notice must be sent to the tribe to allow for its full participation as authorized by the ICWA.

**Best Practices 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.

#### Consent to Foster Care Placement or Termination of Parental Rights

Pursuant to ICWA §1913(a), courts may recognize a 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 with 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.

#### Voluntary Consent Document

Consent documents<sup>9</sup> 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.

See BIA Guidelines §E.2 – Content of Consent Document.<sup>10</sup>

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<sup>8</sup> MCL 722.954a(2) also requires the supervising agency (DHS) to identify, locate, and consult with relatives in an effort to place a child with a fit and appropriate relative. These Michigan requirements complement those in the ICWA §1915(c).

<sup>9</sup> While consent documents are required for various court proceedings, revocation of that consent may vary depending on the proceeding. See specific proceeding sections for consent revocation requirements.

<sup>10</sup> While the general requirements for consent documents are the same for all ICWA court proceedings (e.g., adoption, termination of parental rights), the requirements for revoking consent may vary depending

**VI. Indian Child (MCR 3.002[5], 3.807, 5.402[E][1])**

Only an Indian tribe can determine whether a child is a member of that tribe and, thus, an “Indian child” for purposes of the ICWA. Each tribe in Michigan has its own unique membership requirements. ICWA §1903(4) defines “Indian child” to mean:

- ...any unmarried person who is under age eighteen and is either
- (a) a member of an Indian tribe, or
- (b) is eligible for membership in an Indian tribe *and* is the biological child of a member of an Indian tribe. (Italics added)

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 the ICWA if the child belongs to 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 the ICWA.

To determine whether a child is a member of a specific tribe, agencies should contact that tribe and provide as much information about the child as possible (e.g., the child’s name, the name of each parent, and the names of grandparents). If DHS caseworkers<sup>11</sup> are providing services to the child, they will have access to this information.

MCR 3.935(B)(5) and MCR 3.965(B)(2) require the court to inquire at the preliminary hearing whether the child or either parent is a member of any American Indian tribe or band. The court rule goes on to state that, “If the child is a member, or if a parent is a member and the child is eligible for membership in the tribe, the court must determine the identity of the child’s tribe, notify the tribe or band, and, if the child was taken into protective custody pursuant to MCR 3.963(A) or the petition requests removal of the child, follow the procedures set forth in MCR 3.967.”

Another option for identifying an Indian child’s tribe is to contact the Bureau of Indian Affairs’ regional office. For Michigan tribes, contact:

Director, Midwest Regional Office  
Bureau of Indian Affairs  
5600 American Boulevard West  
Suite 500  
Bloomington, MN 55437-1464  
Phone: (612) 713-4400

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on the nature of the proceeding. In this Resource Guide, see the specific sections for each type of court proceeding.

<sup>11</sup>The term “DHS caseworkers” also includes private agency caseworkers.

When contacting the BIA, they will need as much family-tree information as possible. This includes the child's name and the names of the parents and grandparents.

If courts or caseworkers have other questions or need general assistance, the BIA's branch office in Michigan often can help. Although official notices must go to the BIA's multistate regional office in Minnesota, the BIA's Michigan agency can answer many questions. Its contact information is:

Michigan Agency  
Bureau of Indian Affairs  
2901.5, 1-75 Business Spur  
Sault Ste. Marie, MI 49783  
Phone: (906) 632-6809

## **VII. Indian Tribe (MCR 3.002[9])**

ICWA §1903(5) defines "Indian child's tribe" to mean

...(a) the Indian tribe in which an Indian child is a member or eligible for membership or (b) 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.

For more details, see this guide's section titled: *IDENTIFYING AN INDIAN CHILD OR INDIAN TRIBE; NOTIFICATION REQUIREMENTS*.

The ICWA allows an Indian tribe to intervene in state court on a tribe member's behalf. ICWA §1903(8) defines an "Indian tribe" as "...any 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."

Michigan has 12 federally-recognized tribes. They are:

- 1) Bay Mills Indian Community
- 2) Grand Traverse Band of Ottawa and Chippewa Indians
- 3) Hannahville-Potawatomi Indian Community
- 4) Keweenaw Bay Indian Community
- 5) Lac Vieux Desert Band of Lake Superior Chippewa Indians
- 6) Little River Band of Ottawa Indians
- 7) Little Traverse Bay Bands of Odawa Indians
- 8) Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians
- 9) Nottawaseppi Huron Band of Potawatomi
- 10) Pokagon Band of Potawatomi Indians
- 11) Saginaw Chippewa Indian Tribe
- 12) Sault Ste. Marie Tribe of Chippewa Indians

Tribal Courts: The following link will take you to a page on the STATE COURT ADMINISTRATIVE OFFICE website that lists the contact information for all Michigan tribal courts. [HTTP://COURTS.MICHIGAN.GOV/SCAO/SERVICES/TRIBALCOURTS/TRIBAL.HTM](http://COURTS.MICHIGAN.GOV/SCAO/SERVICES/TRIBALCOURTS/TRIBAL.HTM).

If a child involved in Michigan's child welfare system may belong to a non-Michigan tribe, Michigan agencies and courts must send notices to the tribe or tribes to which the Indian child belongs or may belong. The following link will take you to a BIA webpage that has contact information for all federally-recognized tribes in the United States: [HTTP://WWW.BIA.GOV/IDC/GROUPS/XOIS/DOCUMENTS/TEXT/IDC002652.PDF](http://WWW.BIA.GOV/IDC/GROUPS/XOIS/DOCUMENTS/TEXT/IDC002652.PDF). You may also check the website for the National Congress for American Indians at: [HTTP://WWW.NCAI.ORG/INDEX.PHP?ID=125&SELECTPRO\\_LETTER=C](http://WWW.NCAI.ORG/INDEX.PHP?ID=125&SELECTPRO_LETTER=C).

Some Indian children are both Canadian citizens and members of U.S. federally-recognized tribes. The ICWA applies to those children because of their membership in tribes recognized by our federal government. The ICWA does not apply to members of non-federally recognized tribes, Canadian tribes, or state historic tribes.

**Best Practices Tip:** Even though the ICWA does not apply to the last-mentioned groups, courts may choose to send notice of a proceeding to a non-federally-recognized tribe, Canadian tribe, or a state historic tribe. Those tribes may offer culturally appropriate services that can help the child and family. Two websites with information about the First Nations of Canada are:

[HTTP://WWW.ABORIGINALCANADA.CA/FIRSTNATION/INDEX.HTML](http://WWW.ABORIGINALCANADA.CA/FIRSTNATION/INDEX.HTML) and

[HTTP://WWW.AINC-INAC.GC.CA/INDEX-ENG.ASP](http://WWW.AINC-INAC.GC.CA/INDEX-ENG.ASP). However, even if notice is sent and one of those tribes responds, it will not have the right of formal intervention pursuant to the ICWA.

### **VIII. Tribal Jurisdiction (MCR 3.807[B], 3.905, 5.402[E])**

The ICWA requires state courts to honor tribal jurisdiction.<sup>12</sup> ICWA §1911(a) states that an Indian tribe shall have exclusive jurisdiction over any child custody proceeding involving an Indian child who:

- Resides or is domiciled within the tribe's reservation,<sup>13</sup> or
- Is a ward of the tribal court, regardless of the child's residence. The 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:

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<sup>12</sup> In some states (not Michigan), 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. Because Michigan is *not* a Public Law 280 state, Michigan tribes have exclusive jurisdiction over cases arising on tribal land.

<sup>13</sup> In *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30 (1989), 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. Also note that not all federally-recognized tribes in Michigan have land set aside or reserved for their exclusive use. Those tribes will not have exclusive jurisdiction.

- Tribal court order (for custody or placement) or
- Tribal resolution, where a tribe does not conduct formal tribal court proceedings. See *In re M.R.D.B.*, 787 P2d 1219 (Mont, 1990); *In re D.L.L.*, 291 NW2d 278 (SD, 1980); or *In re J.M.*, 718 P2d 150 (Alas, 1986).

**Best Practices Tip:** If the tribal court order or resolution does not include the word “ward” in its order or decree, state courts should try to discern the intent of the document to determine whether the Indian child is a ward of the tribe. If the tribe intends to maintain some type of jurisdiction or oversight of the child, then the court should treat the child as a ward of the tribe for purposes of jurisdiction.

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, the 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 REMOVAL* section.

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: *IDENTIFYING AN INDIAN CHILD OR INDIAN TRIBE; NOTICE 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.

## **IX. Active Efforts (MCR 3.961[B])**

### What are “active efforts” and when are they required?

The ICWA requires that any party seeking an involuntary foster care placement of, or involuntary termination of parental rights to, an Indian child must 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. Therefore, courts need to address the issue thoroughly at the first hearing.

However, the ICWA does not define “active efforts.” To discern the meaning of a federal law, it must be assumed that it does not depend upon state law. “...[I]n the absence of a plain indication to the contrary, ... Congress when it enacts a statute is not making the application of the federal law dependent on state law.” *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 43 (1989). *Holyfield* goes on to explain that one reason Congress passes laws is to create uniform federal law and that in the absence of express statutory definition’s the plain meaning of words imbued with the policies prompting the statute should control.

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 looked at in conjunction with the ICWA's underlying policies. In *Empson-Lavolette v Crago*, 280 Mich App 620; 760 NW2d 793 (2008), the Michigan Court of Appeals acknowledged that "[i]n adopting the ICWA, Congress sought to establish 'minimum Federal standards for the removal of Indian children from their families' in order to protect the best interests of Indian children and to promote the stability and security of Indian tribes and their families," citing ICWA §1902; *In re Elliott*, 218 Mich App 196, 201.

Many appellate court opinions have defined "active efforts." Here are three examples:

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 NW2d 789 (2008), quoting *AA v Dep't of Family & Youth Servs*, 982 P2d 256, 261 (Alaska, 1999) (further citation omitted.)

"Active efforts" 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.*, Minn App, 2007 (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 P3d 556, 560 (2005).

The Michigan Court of Appeals in *In Re Krefl*, 148 Mich App 682 (1986), held that the following efforts *did* meet the active efforts standard:

- 1) The caseworker assisted the mother in filling out the application for public assistance because the mother found it confusing.
- 2) The caseworker helped the mother find emergency housing and obtain basic household items, including items for the baby.
- 3) The caseworker offered to help find more suitable housing, but the mother refused.
- 4) DHS arranged for personal visits to the mother by a homemaking mentor.
- 5) The mother received parent aid services from 1979 to 1982.

- 6) The mother received visits from someone who provided nutritional guidance and attempted to help the mother understand her child's growth and development processes.
- 7) A mental health social worker attempted to contact the mother on six different occasions. Although the mother appeared to be at home, she did not answer the door.
- 8) A social worker from Catholic Social Services contacted the mother while she was in the hospital, met with her three times in the ensuing month, and made subsequent attempts to contact her.

"Active efforts" is an ICWA requirement and differs from the "reasonable efforts" requirements of Michigan law for nonIndian children. "Active efforts" is a higher standard and requires more than "reasonable efforts." Review the DHS POLICY on this topic to see what DHS instructs caseworkers to do to meet this requirement. **"Active efforts" are required for each Indian child and family. This requirement follows the child, and it applies to the child's entire extended family regardless of the family members' Indian status.** This heightened level of required effort includes ensuring that adequate parenting time is ordered and appropriately facilitated. One hour of supervised visitation in a local DHS office, for example, will not meet this heightened standard. In all ICWA cases, courts must go the extra mile in their orders to maintain family, tribal, and cultural ties.

"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 nonconsenting parent in that case would receive all the protections under the ICWA, including active efforts. See the *Voluntary and Involuntary Proceedings* section above.

The ICWA does not require the DHS or the tribe to provide services each time a new termination proceeding is commenced against a parent when past efforts failed and it does not appear that providing the additional services will prove different. *In re JL*, 483 Mich 300 (2009). However, the Michigan Supreme Court went on to hold in *In re JL* that,

... [T]he ICWA requires the DHS to undertake a thorough, contemporaneous assessment of the services provided to the parent in the past and the parent's response to those services before seeking to terminate parental rights without having offered additional services." *Id.* at 304.

The Court in *In re JL* stated that the ICWA does not require "current" active efforts. This does not mean that those efforts provided long ago are enough to meet the statutory threshold. Trial courts are to "carefully assess the timing of the services provided to the parent. Services provided too long ago to be relevant to a person's current circumstances do not establish by clear and convincing evidence that active efforts have been made..."

The Court concluded by stating that the timing and nature of the services provided must be evaluated against the parent's current situation.

The Court in *In re JL* also "decline[d] to hold that active efforts must always have been provided in relation to the child who is the subject of the current termination proceeding." *Id* at 325. Rather, the Court noted that "the efforts made and services provided in connection with the parent's other children are relevant to the parent's current situation and abilities so that they permit a current assessment of parental fitness as it pertains to the child who is the subject of the current proceedings." *Id.* at 325.

In agreeing with the Michigan Court of Appeals decision of *In re Roe*, 281 Mich App 88 (2003), the Michigan Supreme Court held in *In re JL* that "active efforts" require affirmative rather than passive efforts, and that more effort is required under the active efforts standard than is required under Michigan's reasonable efforts standard.

While the ICWA does not require "active efforts" in voluntary cases, the court itself may choose to require them. SCAO 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 complying with the spirit of the ICWA.

**Best Practices Tip:** Because the Court in *In re JL* specifically declined to adopt a "futility test" to determine whether more active efforts are required to terminate parental rights under a newly filed petition, SCAO recommends that courts evaluate the following:

1. What previous active efforts were provided.
2. How long ago those efforts were provided.
3. What circumstances or situations those efforts were meant to address.
4. How the parent(s) responded to those efforts.
5. Whether additional efforts would assist the parents in eradicating any barriers to reunification.
6. Whether the tribe has participated in the previous efforts and if they are willing to continue.

SCAO further recommends that evidence of these issues be addressed and preserved on the record.

#### Why Does Congress Require "Active Efforts" When the ICWA Applies?

Each federally-recognized tribe in Michigan is a sovereign nation whose right to self-governance cannot be impeded or obstructed by the federal or any state government.

As Congress stated in the 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.

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

**Best Practices Tip:** If courts have questions or concerns about the adequacy of the efforts made, *SCAO recommends that courts call the tribe and encourage DHS caseworkers to do the same.* The tribe can help the caseworkers with the investigation and help the court know what efforts will satisfy the active efforts requirement. See the contact information for all federally recognized tribes in Michigan plus service area maps for several of the tribes in Appendix A. Also, see Appendix B for recommended questions a court might ask DHS caseworkers to ensure that active efforts are made.

#### **X. Qualified Expert Witness (MCR 3.967[A] and [D], 3.977[G])**

Section 1912 of the ICWA states 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*,<sup>14</sup> 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." 25 USC 1912(e) and (f).

According to the BIA Guidelines for State Courts, 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
- 3) A professional person having substantial education and experience in the area of her specialty. See BIA Guidelines § D.4 – Qualified Expert Witness.

Michigan Rules of Evidence (MRE) 702 requires Michigan judges to determine whether someone is "qualified as an expert" which has led to some confusion about exactly who may testify as a "qualified expert witness" for purposes of the ICWA. An ICWA expert is a person who possesses more than knowledge earned from formal education; it is someone who, based on educational background and prior experience, can provide more

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<sup>14</sup> The ICWA does not require any particular number of expert witnesses. Therefore, courts have interpreted it to mean that only one expert is necessary. *In re Elliott*, 218 Mich App 196, 207 (1996); *In re Kreft*, 148 Mich App 682, 690 (1986).

reliable judgments about a tribe's culture than someone who is not an expert. If cultural bias is not implicated in the case, the expert witness need not have special knowledge of Indian culture, but the witness must have more specialized knowledge than the average social worker. *In re Elliott*, 218 Mich App 196, 207 (1986). The party presenting the expert witness has the burden of establishing the witness's qualifications. BIA Guidelines § D.4 and Commentary – Qualified Expert Witness.

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 for purposes of the ICWA is the Indian child's tribe itself.

*In Re Kreft*, 148 Mich App 682 (1986), held that three of the witnesses at a prior termination of parental rights hearing were appropriately qualified as experts and that the trial court appropriately weighted their combined testimony. Two were psychologists, who lacked specific knowledge about the child's tribe but were experts in their respective fields. The third "had substantial experience relative to child and family services to Indians .... [I]n providing services as a social worker to the tribe, she utilized a variety of available resources." In addition, this third witness was born on a reservation and knew of Indian child-rearing practices.

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 the ICWA if the individual meets those tribal criteria, but the tribe must still show that the witness is an expert by virtue of education and experience. The Indian child's tribe or the BIA may help courts locate ICWA qualified expert witnesses. BIA Guidelines § D.4 and Commentary – Qualified Expert Witness.

## **XI. Funding for Cases Involving Indian Children**

If an Indian child's case remains in a state court, or if a court has made DHS 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.

### Title IV-E of the Social Security Act

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

effects on Title IV-E funding for tribes, see this *INFORMATIONAL MEMORANDUM* on the Children's Bureau website at:  
[HTTP://WWW.ACF.HHS.GOV/PROGRAMS/CB/LAWS\\_POLICIES/POLICY/IM/2008/IM0803.HTM](http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2008/im0803.htm)

### **IMPORTANT NOTE REGARDING REQUIRED FINDINGS AND INDIAN CHILDREN**

After discussions with the U.S. Department of Health and Human Services (DHHS), SCAO confirmed that in order to preserve Title IV-E funds for Indian children, **both reasonable efforts and active efforts findings must be made**. DHHS recognized that determining that active efforts have been made presumably includes a "lesser" finding that reasonable efforts were made. However, because our state statute does not define "active efforts," both findings must be made to preserve Title IV-E funding. Michigan court forms will be amended to include both findings when the hearing involves an Indian child.

#### County Child Care Fund (CCF)

Children who are not Title IV-E eligible may qualify for placement and services paid for by a county or tribal Child Care Fund (CCF). If a tribal court has jurisdiction and that tribe provides services, then the tribal CCF<sup>15</sup> will fund those services -- subject to funding availability.

#### State Ward Board and Care (SWBC)

If an Indian child's case remains pending in a state court, the child may be eligible for SWBC funding and services. Special eligibility criteria apply to this alternative funding source.

### **XII. Interstate Compact for Placement of Children (ICPC)**

The ICPC 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 Michigan is a Michigan law that all of this state's courts and agencies must follow. Its rules apply any time a Michigan court sends a child to another state or receives a child from another state.

The ICPC applies to Indian children if either the receiving state or the sending state will provide services to the child and family.<sup>16</sup> However, the ICPC does not apply to tribe-to-tribe case transfers.

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<sup>15</sup> Some tribal CCFs are administered through intertribal agreements.

<sup>16</sup> Remember that the ICWA classifies as "foster care placements" *all* out-of-home placements, *including* placements with relatives.

## **Identifying an Indian Child or Indian Tribe; Notification Requirements**

**MCR 3.802(A), MCR 3.905, MCR 3.920, MCR 3.921,  
MCR 5.109, MCR 5.402(E)(3)**

To ensure compliance with the ICWA, state courts must determine: (1) whether the child appearing before the court is an “Indian child” (2) if so, to which tribe the child belongs and (3) if the child is eligible for membership in multiple tribes, which tribe the ICWA designates as “the Indian child’s tribe.”

### **I. Is the Child an “Indian Child” for Purposes of the ICWA?**

ICWA §1903(4) defines an “Indian child” as someone who is (1) under the age of 18 and unmarried, and *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.<sup>17</sup>

The best way to identify an “Indian child” and determine the tribal affiliation is to contact the tribe and inquire. *The tribe’s determination of membership or eligibility for membership is conclusive.*

#### Ask the DHS Caseworker About a Child’s ICWA Status

MCR 3.935(B)(5) and MCR 3.965(B)(2) requires courts to “inquire if the child or either parent is a member of any American Indian tribe or band.” If so, the court “must determine the identity of the child’s tribe.”

If a court has assigned a DHS caseworker to the case, that caseworker will have access to this information. Caseworkers must determine at the outset whether a child is an “Indian child” for purposes of the ICWA. DHS POLICY instructs caseworkers to work with tribes to meet this requirement. SCAO recommends that courts verify specific steps taken by the DHS caseworker to determine the child’s American Indian 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 No DHS Caseworker has Been Assigned to the Case

Not all state court child welfare matters will involve DHS caseworkers. For example, filing a petition for a limited or full guardianship will not automatically cause DHS to become involved. See MCR 5.404(A).

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<sup>17</sup> The court in *In re Fried*, 266 Mich App 535 (2005), held that the ICWA does not apply if the Indian child’s tribe is not federally recognized.

In those cases, the petitioning party must designate the child as an Indian child,<sup>18</sup> pursuant to MCR 5.404(A).

According to the BIA Guidelines, § B.1 Determination That Child Is an Indian, 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 court that the child is an Indian child.
- 2) Any public or state-licensed agency involved in child protection services or family support has information suggesting that the child is an Indian child.
- 3) The child gives the court reason to believe he or she is an Indian child.
- 4) The court knows that the residence or domicile of the child, the child's biological parents, or the child's custodian is a predominantly Indian community.
- 5) An officer of the court involved in the proceedings has knowledge that the child is an Indian child.

These are the most common circumstances that should give a court reason to believe that the child may be an Indian child, thereby invoking the ICWA. But the list is not exhaustive. Courts must watch for other indications that the ICWA will apply to a child's case.

If in doubt, a court may appoint a lawyer guardian ad litem for the child to help investigate the child's Indian heritage or order DHS or a court employee to investigate the child's tribal affiliation after a temporary guardianship is ordered. See the Guardianship section below for more details.

## **II. What is the "Indian Child's Tribe" for Purposes of the ICWA? (MCR 3.002[6])**

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 the ICWA recognizes the tribe with which the child has the more significant contact.

The ICWA applies to all federally-recognized tribes in the United States. The federal Bureau of Indian Affairs recognizes 565 American Indian and Alaska Native tribes.<sup>19</sup> Twelve of those federally-recognized tribes reside in Michigan.

- 1) Bay Mills Indian Community
- 2) Grand Traverse Band of Ottawa and Chippewa Indians
- 3) Hannahville-Potawatomi Indian Community
- 4) Keweenaw Bay Indian Community

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<sup>18</sup> Guardianship petitioners can designate a child as an "Indian child" by checking Item 5 on *SCAO FORM 651* (Petition for Appointment of Guardian of Minor) or by checking the second box on Item 3 on the *SCAO FORM 650* (Petition for Appointment of Limited Guardian of Minor).

<sup>19</sup> Source: U.S. BUREAU OF INDIAN AFFAIRS

- 5) Lac Vieux Desert Band of Lake Superior Chippewa Indians
- 6) Little River Band of Ottawa Indians
- 7) Little Traverse Bay Bands of Odawa Indians
- 8) Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians
- 9) Nottawaseppi Huron Band of Potawatomi
- 10) Pokagon Band of Potawatomi Indians
- 11) Saginaw Chippewa Indian Tribe
- 12) Sault Ste. Marie Tribe of Chippewa Indians

See this STATE COURT ADMINISTRATIVE OFFICE webpage for each tribe's contact information.

[HTTP://COURTS.MICHIGAN.GOV/SCAO/SERVICES/TRIBALCOURTS/TRIBAL.HTM](http://courts.michigan.gov/scao/services/tribalcourts/tribal.htm) .

If a child already *belongs* to one tribe, that tribe is the "Indian child's tribe" for purposes of the 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.<sup>20</sup>

When an Indian child may be eligible for membership in more than one federally-recognized tribe, the court *must* notify *all* of those tribes about the child's pending case. Michigan tribes often have intertribal agreements on how to handle cases involving a child who is eligible for membership in multiple tribes. If the court provides proper notice, the tribes can decide amongst themselves which tribe is the "Indian child's tribe" for purposes of the ICWA. However, if the tribes cannot agree, the state court may have to make the determination. See the next section for additional guidance.

#### State Court Determination of the Child's Tribe

If a state court must determine which tribe is the "Indian child's tribe" for purposes of the ICWA, the BIA Guidelines and SCAO both recommend that the court consider, among other factors, the following:

- 1) The child's length of residence on or near the reservation of each tribe and the frequency of contacts with each tribe.
- 2) The child's participation in each tribe's activities.
- 3) The child's fluency in the language of each tribe.
- 4) Whether one tribe's court has adjudicated a previous matter regarding the child.
- 5) The child's relatives' residence on or near a reservation.

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<sup>20</sup> The BIA Guidelines state that continuity for the child is of the utmost importance. That explains why, if the court has made a tribal determination, that determination remains in effect for the duration of the proceedings even if the child later becomes a member of a different tribe.

- 6) The interest expressed by each tribe after receiving notice of the proceedings involving a member or potential member of that tribe.
- 7) The child's self-identification.

See BIA Guidelines §B.2 – Determination of Indian Child's Tribe.

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.

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 address:

Director, Midwest Regional Office  
Bureau of Indian Affairs  
5600 American Boulevard West  
Suite 500  
Bloomington, MN 55437-1464  
Phone: (612)713-4400

The BIA Agency located in Michigan may also be able to help with questions or concerns.

Michigan Agency  
Bureau of Indian Affairs  
2901.5, I-75 Business Spur  
Sault Ste. Marie, MI 49783  
Phone: (906) 632-6809

### **III. The Potential Tribe(s) Has Been Identified. Now What? (MCR 3.807(B), MCR 3.920, MCR 3.921, and MCR 5.402[E])**

For *involuntary* 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 join.<sup>21</sup>

Under §1911(c), Indian custodians and tribes have the right to intervene at any time during the proceedings. See MCR 3.905(D). Without notice of the proceedings, they could not invoke that right. *So, regardless of the voluntary or involuntary nature of the*

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<sup>21</sup> The BIA's TRIBAL LEADER DIRECTORY lists the addresses to which courts must send their notices to tribes in Michigan and around the country.

*proceedings, notice should be sent.* See *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30 (1989).

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.

Finally, §1912(a) also specifies *how* the court may provide notice. It can be provided by:

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

Regardless of the service method, the service must 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.

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 court must send the notice to the “area director” at the nearest Bureau of Indian Affairs regional office<sup>22</sup> so the BIA can ensure that the notice is explained to the parent or custodian in a language that he or she understands. See BIA Guidelines §B.5 and Commentary – Notice Requirements.

**Best Practices Tip:** In *In re NEGP*, 245 Mich App 126 (2001), the Michigan Court of Appeals held that when the child’s father stated that he was affiliated with the “Anishinabe” people, notice sent only to the BIA regional office was not enough to satisfy the ICWA’s notice requirements. In that case, the trial court had relied upon the BIA’s response letter stating that the father had no tribal affiliation. However, only the tribe can make that determination. “Anishinabe” might identify any of several tribes, including some outside Michigan. It was incumbent upon the petitioner to send notice to those potential tribes in addition to notifying the BIA regional office. In the future, if a court becomes aware of a potential affiliation with the “Anishinabe” or the “People of the Three Fires” and is unsure to whom this refers, SCAO recommends contacting the DHS Native American Affairs division for assistance.

#### Timeliness After Notice

A tribe, parent, or Indian custodian who receives a hearing notice may request up to 20 additional days from the date they received the notice to prepare for the hearing. The proceedings may not begin until the later of:

- 1) 10 days after the tribe, parent, or Indian custodian received notice; or

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<sup>22</sup> Area Director – Bureau of Indian Affairs – Minnesota address on previous page.

- 2) 30 days after the receipt of notice if any recipient requested the additional 20 days to prepare for the hearing.<sup>23</sup>

See BIA Guidelines §B.6 - Time Limits and Extensions.

Michigan law allows the court to grant additional time as necessary to conform with due process requirements.<sup>24</sup>

#### Improper Jurisdiction

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.

#### Tribal Intervention

MCR 3.807(B)(3); MCR 3.905(D); MCR 5.402(E)(4)

ICWA §1911(c) makes it clear that, in any state court proceeding involving an Indian child's foster care or parental rights, both the child's Indian custodian and the child's tribe have a right to intervene at *any* point in the proceedings. Sometimes a tribe will intervene, but then opt not to appear at any hearing or seek a transfer. The ICWA applies throughout a case even if no tribal representative intervenes, appears, or requests a transfer. See this guide's *TRANSFER TO TRIBAL COURT* section.

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<sup>23</sup> The waiting periods for the tribe, the parents, and (if applicable) the custodian must all expire before proceedings may continue.

<sup>24</sup> MCL 712A.17.

## **Transfer to Tribal Court**

### **MCR 3.807(B), MCR 3.905(C), MCR 5.402(E)**

The following Michigan Court Rules provide guidance on how and when to transfer a case to tribal court:

MCR 3.807(B) – Adoptions

MCR 3.905 – Child Protective Proceedings and Status Offenses

MCR 5.402(E) – Guardianships

Pursuant to ICWA §1911(b), 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.

#### **I. Petitions to Transfer**

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 BIA Guidelines §C.1 and Commentary – Petitions Under 25 U.S.C. Section 1911(b) for Transfer of Proceeding. SCAO recommends that state courts close a case only after they receive notification from the tribe that its court has formally accepted the case.

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. Good Cause**

Section 1911(b) of the 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). 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 also INDIAN CHILD CUSTODY PROCEEDINGS, 44 Fed. Reg. 67,584, 67,590 (Nov. 26, 1979).

Some examples of good cause as outlined in the BIA Guidelines include the following situations:

- 1) The Indian tribe does not have a tribal court.
- 2) The tribe failed to make a timely response to the original notice of hearing, and the proceedings were well advanced when the petition to transfer was received. The BIA Guidelines do not define "timely," so state courts must make that determination on a case by case basis. The BIA Guidelines do provide some guidance by acknowledging:

If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.... BIA Guidelines §C.1 Commentary.

This assumes that notice to the tribe was sent immediately upon identification of the appropriate tribe. Withholding notice to forestall a petition to transfer by the tribal court would violate the ICWA and negate good cause by "manufacturing" delay to prevent transfer.

- 3) The child is older than 12 years of age and objects to the transfer.
- 4) Requiring the parties or witnesses to present evidence in tribal court would cause undue hardship.<sup>25</sup>

***MCR 3.807(B)(2)(a), MCR 3.905(C)(1), and MCR 5.402(E)(3)(a) state explicitly that a perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.***

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<sup>25</sup> In order to prevent *forum non conveniens* from becoming an issue, the BIA Guidelines state that the tribal court may travel to the parties if the parties cannot travel to the tribal court. Tribal courts often conduct hearings at locations close to witnesses' residences or children's placements.

## Placement of Indian Children

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

### **I. Adoption Placement Options**

ICWA §1915(a) requires that when placing Indian children for adoption, state courts must, absent good cause to the contrary, give preference to potential adoptive parents in the following order:

- 1) A member of the child's extended family.<sup>26</sup>
- 2) Other members of the child's tribe.
- 3) Other Indian families, including single parent families.

See BIA Guidelines §F.1 and Commentary – Adoptive Placements.

In that same section, the BIA Guidelines and commentary also make the following points regarding adoption placements:

- 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 order a DHS caseworker to make that contact or inquiry.
- The preference of the Indian child or the parent must be considered.
- 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 the 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 §1915(b).

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<sup>26</sup> §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.

**Best Practices 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.

## **II. Foster Care Placement Options (MCR 3.965[B][12])**

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. (See footnote 24.)
  - 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., DHS).
  - 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.<sup>27</sup> See MCR 3.967(F).

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.

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 caseworkers 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 the ICWA because the placement followed an emergency removal or because no ICWA-compliant placement was initially available. Courts should make sure that DHS diligently and in good faith continues to search for an ICWA-compliant preference so that the child can be moved to that placement as soon as possible. If the

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<sup>27</sup> If the only option for an ICWA-approved placement is an institution, and the tribe does not approve of that placement, courts should encourage the tribe to pass a resolution amending its currently stated placement preferences. This will allow the court to comply with the ICWA by following the tribe's newly modified preference. Without the resolution, the court would have no other option but to place the child in the available institution.

child must be placed temporarily outside of the preferences established in the ICWA, the court should encourage the DHS to contact the child's tribe for assistance in locating an ICWA-compliant placement.<sup>28</sup> Finally, when the court orders a voluntary foster care placement, the court must give weight to the consenting parent's request for anonymity in applying the preferences. See Good Cause to Modify Placement Preferences section below for further discussion.

**Best Practices Tip:** As noted above in "Adoption Placement Options," 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.

### **III. Good Cause to Modify Placement Preferences for Either Foster Care or Adoption Placement (MCR 3.965[B][12] and MCR 3.967[F])**

"Good cause" to disregard the 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.<sup>29</sup>
- 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.<sup>30</sup>

See BIA Guidelines §F.3 and Commentary – Good Cause To Modify Preferences.

Caveat: Neither the court-perceived best interests of the child nor established bonding with a current custodian can constitute good cause to disregard the ICWA's placement preferences. If a child is initially placed outside of the placement preferences because no ICWA-compliant placement is available, but one becomes available later, bonding does not constitute good cause to leave the child in the initial placement.

The party requesting a deviation from the ICWA's preferences has the burden of establishing good cause.<sup>31</sup>

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<sup>28</sup> The tribe may determine that a tribal resolution changing the placement preferences is in order.

<sup>29</sup> Note that this example of "good cause" allows a court to honor a parent's request for anonymity by it relieving the court of the obligation to notify other family members and the tribe.

<sup>30</sup> A diligent search includes, at a minimum, contact with the tribe's social services personnel, a search of all county and state listings of available Indian foster homes, and contact with nationally-known Indian programs that have placement resources.

<sup>31</sup> Note the special circumstances surrounding the placement preferences and certain guardianship petitions discussed in the guardianship section below.

#### **IV. If Placement Preference Will Not Meet the ICWA Requirements**

If a diligent search for a foster family does not find an ICWA-approved placement, then the court may have to place the Indian child elsewhere in order to protect the child. Before ordering such a placement, a court should ascertain exactly what actions have been taken to ensure that all possible ICWA-approved placement options have been identified and evaluated. Regardless of whether a DHS caseworker is involved, courts should require answers to the following questions under oath:

- 1) Has someone contacted the tribe to determine if it knows of any family members or tribe-licensed foster homes or institutions capable of caring for the child?
- 2) Has someone looked for Indian families in the area who could provide a foster home? These do not have to be members of the child's own tribe.
- 3) Has DHS helped with the search for possible placements?
- 4) What national organizations have been asked to provide placement assistance?

If the court makes such inquiries on the record and concludes that all ICWA-preferred options have been pursued, the court may then state on the record that it finds the required "good cause" to depart from the ICWA's placement preferences.

#### **V. Court-Ordered Direct Placements and Their Effects on Title IV-E Funding**

As a general rule, "court-ordered" placements do not qualify for Title IV-E funding. These are placements where the court chooses the child's placement without bona fide consideration of DHS's recommendation. These "court-ordered direct placements" are distinct from those placements where the court merely specifies the child's placement in the court order to endorse or approve DHS's placement choice.

Neither of the preceding statements means that the court must always concur with DHS's recommendation in order for the child to be eligible for Title IV-E foster care payments. If DHS has the placement and care responsibility for a child, Title IV-E will cover a placement specifically ordered by a court *as long as the court hears the relevant testimony and works with DHS to make appropriate placement findings*. See Questions and Answers on the Final Rule, 65 FR 4020 (1/25/00), and 45 CFR 1356.21(g)(3).

**Best Practices Tip:** SCAO recommends that whenever possible, courts should do the following to ensure Title IV-E funding for an Indian child who is otherwise Title IV-E eligible:

- Require DHS to maintain care and custody of the child, and order the caseworker to follow the ICWA placements preferences unless those are changed by a tribal resolution.
- Work collaboratively with the caseworker to make sure that the ICWA placement preferences are followed.
- Ask the caseworker under oath if the tribe has a placement preference different from the one specified in the ICWA.

- Ask the caseworker under oath and on the record to describe in detail the caseworker's investigation of each ICWA-preferred placement and why, in the caseworker's opinion, none was appropriate.
- Order a direct placement only if, in the court's opinion, none of the options mentioned above will protect the child and comply with the ICWA.

## Adoption

### MCR 3.800, MCR 3.802, MCR 3.807

The following discussion of the ICWA's adoption provisions assumes that you have read several earlier sections in this guide. Those sections are listed below in hyperlink format so readers can readily refer to them while reading this section.

*ICWA FUNDAMENTALS*

*IDENTIFYING AN INDIAN CHILD OR INDIAN TRIBE; NOTIFICATION REQUIREMENTS*

*PLACEMENT OF INDIAN CHILDREN*

An adoption under the ICWA can be voluntary or involuntary.<sup>32</sup> 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.

In either scenario, if the tribe has a different placement preference, the court must honor that tribal preference. However, in the context of a parental request for anonymity, a tribe will not learn of a *voluntary* adoption. See the next section below for more details.

#### **I. Notice and Anonymity**

Unless a parent asks for anonymity, the court or agency must give notice of the proposed adoption to the child's extended family and the tribe. See BIA Guidelines §F.1 and Commentary – Adoptive Placements.<sup>33</sup> Although the ICWA does not expressly require notice of *voluntary* adoptions, the notice requirement is implicit because the tribe has the legal right under the ICWA to intervene at any time during the proceedings. Without notice of the proceedings, the tribe cannot invoke its right under the federal law.

The notice must state that family and tribal members will be given preference if any of them wish to adopt the child. See the BIA Guidelines §F.1 and Commentary – Adoptive Placements.

A parent's request for anonymity has priority over the ICWA notice and placement-preference provisions. For notice requirements with regard to anonymity requests by the

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<sup>32</sup> A voluntary adoption does not mean that the ICWA may be ignored. It means only that the Indian child's parent voluntarily consents to the termination of parental rights and subsequent adoption of the child. Certain parts of the ICWA apply to voluntary proceedings including the valid consent document discussed below. See *Empson-Laviolette v Crago*, 280 Mich App 620 (2008).

<sup>33</sup> The BIA Guidelines suggest that either the court or the agency may provide notice. The DHS is more likely than the court to have the names of the extended family. Therefore, it is critical that the DHS and court work jointly to determine the best method to provide notice in these situations.

parents in voluntary proceedings, see the Voluntary Proceedings subsection within the earlier *ICWA FUNDAMENTALS* section.

**Best Practices Tip:** If the proceeding is voluntary and a biological parent has requested anonymity, the court still may contact the Bureau of Indian Affairs' regional office if the court needs to confirm the child's tribal membership or eligibility for membership.

## **II. To Ensure a Valid Consent to Adoption**

The ICWA has specific requirements for valid consents to foster care placements and preadoptive placements. See *ICWA FUNDAMENTALS: VOLUNTARY PROCEEDINGS* earlier in this guide. SCAO recommends that courts ask, under oath and on the record, the following questions to ensure that the consent is valid and that the consequences of the consent are understood by the parents:

- 1) Is at least one parent a registered member of a federally-recognized tribe or band? If so, which parent and which tribe?
- 2) Is the child also eligible for membership in a federally-recognized tribe or band? If so, which tribe?
- 3) Is either parent or child a resident of or domiciled on the reservation?
- 4) Has the tribe received notice of these proceedings? Is the tribe represented here today?
- 5) Has the parent requested anonymity?
- 6) Is the child at least 10 days old?
- 7) Do the parents understand spoken and written English? Does either of them need an interpreter to help them understand the court proceedings or the written consent form?
- 8) Are the parents aware of the ICWA's placement preferences? Does their selection of an adoptive family (in private adoption cases) meet these preferences?
- 9) Do the parents know that they can withdraw consent to this adoption at any time prior to the final adoption order?
- 10) Do the parents know that in order to withdraw their consent, they must file a written document with this court?
- 11) Do the parents realize that if they decide to withdraw their consent after the adoption is finalized, they can do that only: (a) within two years of the final adoption order, and then only if (b) their consent was obtained through fraud or duress?
- 12) Have any circumstances surrounding these proceedings made the parents feel undue pressure to complete the adoption?

**Note that this consent differs from the consent required for adoptions under MCL 710.43.**

### **III. Revocation of Consent**

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*. This was emphasized by *In re Kiogima*, 189 Mich App 6 (1991). The court also distinguished consents to adoptions from consents to terminations of parental rights, where consent may be withdrawn at any time up to entry of the termination order.

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 the BIA Guidelines §E.4 and Commentary – Withdrawal of Consent to Adoption.

### **IV. Withdrawal of Consent Postadoption**

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. The 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.

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 BIA Guidelines §G.1 and Commentary – Petition To Vacate Adoption.

### **V. Adoption Vacated**

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.<sup>34</sup> The biological parents may waive their right to receive this notice, but they also may revoke that waiver at any time. See BIA Guidelines §G.1 and Commentary – Petition To Vacate Adoption.

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

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<sup>34</sup> 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.

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.<sup>35</sup>

#### **VI. Release by Parent Under MCL 710.29**

When a parent indicates to the court that they would like to release their parental rights under MCL 710.29, the court should set the matter for a hearing and if the release is for an Indian child, SCAO recommends that the court send notice to the tribe that a release of parental rights to an Indian child will be heard by the court; the tribe has a right to intervene; and the date, location, and time of the hearing where the release and subsequent termination of parental rights will be considered.

By providing notice and an opportunity to intervene, your court will ensure that the tribe's statutory rights under the ICWA are preserved.

#### **VII. Information Sharing – Request by Adopted Child**

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 adoptees can protect any rights flowing from their tribal relationships. See BIA Guidelines § G.2 and Commentary – Adult Adoptee Rights.

Adopted Indian children possess this right to discover their tribal origins even if the 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 do the following:

- 1) Work with the BIA, which can confidentially ask the tribe whether the child is eligible for membership. See BIA Guidelines §G.2 and Commentary – Adult Adoptee Rights; and
- 2) Release the biological parents' identity to the Indian tribe (but not to the adopted Indian child) with a request that the tribe keep that information confidential. See *In re Hanson*, 188 Mich App 392 (1991).

**Best Practices 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.

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<sup>35</sup> 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 later in this guide in the Foster Care and Termination of Parental Rights sections.

### **VIII. Stepparent Adoption**

If an Indian child's parent seeks a stepparent adoption by a new spouse, then the ICWA does apply. And in order to terminate a parent's rights, a valid consent must be obtained. 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 §1912 (d) and (f).

For more information on adoptions and the ICWA, see the Michigan Judicial Institute's Adoption Proceedings Benchbook chapter on ADOPTION PROCEEDINGS INVOLVING AN INDIAN CHILD.

## Foster Care

### See previous sections for specific court rule references.

This discussion of ICWA foster care rules assumes that you have read several earlier sections of this guide. Readers can use the hyperlinks below to readily refer to those earlier sections.

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*IDENTIFYING AN INDIAN CHILD OR INDIAN TRIBE; NOTIFICATION REQUIREMENTS*

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In addition, recall that ICWA §1903(1)(i) defines “foster care placement” more broadly than Michigan law does. In ICWA cases, it means “... any 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.”

#### **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. The court in *Empson-Lavolette v Crago*, 280 Mich App 620 (2008), held that the ICWA applies to guardianship proceedings because guardianships fit the definition of “foster care placement” in §1903(1)(i). Additionally, the court held that the child’s mother could revoke her consent to the guardianship pursuant to her authority under §1913 (b).<sup>36</sup>

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 BIA Guidelines §E.3 and Commentary – Withdrawal of Consent.

#### **II. New Placement**

ICWA §1916(b) requires compliance with the 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

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<sup>36</sup> The court also held that the ICWA preempts a stay of proceedings imposed pursuant MCL 722.26b(4) because federal law supersedes state law “if the state law stands as an obstacle to the accomplishment of the full objectives of Congress.” The stay allowed under state law prevents the child’s mother from invoking her rights under §1913(b), but ICWA preempts the stay, thereby allowing her to revoke her consent to the guardianship at any time.

Indian custodian. When the 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.

### **III. 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 Sections 1911, 1912, or 1913.

- Section 1911 lists the ICWA's requirements for jurisdiction, transfer of proceedings, and intervention.
- Section 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.
- Section 1913 governs the voluntary foster care placements and voluntary terminations of parental rights.

### **IV. Absent Without Legal Permission (AWOLP)**

If a child under the jurisdiction of a court runs from his or her placement, the court will place that child on the court's AWOLP docket and conduct periodic review hearings regarding the efforts to locate the child.<sup>37</sup>

SCAO recommends that as soon as a court learns that an AWOLP child is also an Indian child under the ICWA, the court or local DHS staff should immediately notify the Indian child's tribe. Primarily, the tribe has an interest in knowing that one of its members has run away from foster care placement. Additionally, the tribe may have resources for locating the child. Appendix A has the contact information for each federally recognized tribe in Michigan. The BIA web site has contact information for all federally recognized tribes in the United States.

[HTTP://WWW.BIA.GOV/IDC/GROUPS/XOIS/DOCUMENTS/TEXT/IDC002652.PDF](http://www.bia.gov/idc/groups/xois/documents/text/idc002652.pdf)

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<sup>37</sup> The court adds the child to the AWOLP docket once notified by DHS that the child ran from placement.

## **Guardianship**

### **MCR 5.109, MCR 5.125, MCR 5.402, MCR 5.404**

This section implicitly incorporates information from earlier sections of this guide. The hyperlinks below will allow readers to readily refer to that background material while reading this section.

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The 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 Michigan law. The Michigan Court of Appeals recently held that the ICWA does apply to guardianships, based on the ICWA’s definitions of “child custody proceedings” and “foster care placement.” See *Empson-Laviolette v Crago*, 280 Mich App 620 (2008).

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.”

The ICWA distinguishes between voluntary and involuntary proceedings. An example of an “involuntary guardianship” would be a juvenile guardianship under MCL 712A.19a or 19c, which a court may order during an abuse and neglect case. An example of a “voluntary guardianship” would be a consensual limited guardianship under MCL 700.5205 in Michigan’s Estates and Protected Individuals Code.

Because the ICWA views a guardianship as a “foster care placement,” this guide’s earlier *FOSTER CARE* section covers all the ICWA requirements for *juvenile guardianships under MCL 712A.19a or 19c*. Please refer to that section for further details.

### **Voluntary Guardianships under the ICWA**

If the Indian child’s parent is available to provide consent for a guardianship, the court should obtain the consent in compliance with §1913(a), thereby making the proceedings “voluntary.”<sup>38</sup> See the discussion of voluntary proceedings in the earlier *ICWA FUNDAMENTALS* section above. Consent can be sought with the notice of hearing.

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<sup>38</sup> That parent’s right to revoke his consent at any time must also be honored.

Voluntary guardianships, or petitions for limited guardianships, are explicitly covered by the ICWA. If the proceeding is voluntary, the United States Supreme Court in *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30 (1989) stated that the ICWA applies. Therefore, notice must be sent, placement preferences must be honored, and a valid consent document must be executed.

The committee discussed at length whether the parents of an Indian child have a constitutional right to make voluntary placement decisions on behalf of their children, as all non Indian parents do. A majority of the committee members believe that the state court may follow the parents' placement request.<sup>39</sup> Others believe that the tribe can challenge a parent's request for placement and if that happens, the court must give considerable weight to the tribe's objection, once again relying on the Court's reasoning in *Holyfield*.

Since this legal issue has not been resolved, SCAO recommends the following:

- Send notice to the tribe pursuant to the United States Supreme Court ruling in *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30 (1989).
- 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.

#### Petition for Guardianship (MCR 5.404)

If a court receives a Petition for Appointment of Guardian of Minor (PC 651) or a Petition for Appointment of Limited Guardian of Minor (PC 650), the court should do the following:

- 1) If item number 5 on the PC 651 or the second box in item 3 on the PC 650 is marked, indicating that the child is a member of an American Indian tribe, check to see if the tribe is listed on the petition.
- 2) If a tribe is listed, the court must ensure that all notices of court proceedings are sent to the tribe.
- 3) If no tribe is listed, the court should ask the petitioner to amend the petition to either identify the tribe or report that the child's tribal affiliation is unknown.

After a guardian is appointed, the court may also direct an LGAL, or a DHS or court employee pursuant to *MCL 700.5207*, to investigate the placement, including the child's tribal affiliation. This investigation will ensure that, in the future, proper notice of all

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<sup>39</sup> The appropriate investigation of the potential guardian under *MCL 700.5207* is still required.

court proceedings is sent to the parents and tribe. It will also allow the tribe to intervene and provide assistance to the family, which may rectify the situation that led to the need for the guardianship.

#### Indian Child's Parent Cannot be Located (MCR 5.109)

The Indian child's parent may be at least temporarily unavailable (e.g., the child unilaterally moved in with neighbors or a friend's family). The ICWA is silent on how to apply the federal law in these situations. The ICWA committee that crafted this guide discussed several ways for a judge to handle such a situation. They include, but are not limited to, the following:

- 1) If a court believes that immediate approval of the guardianship is in the child's best interest and would assist both the guardianship petitioner and child with vital services (e.g., enrollment in school, provision of medical attention, etc.), the court may order a *temporary* guardianship and simultaneously order the petitioner to diligently search for the child's parents in order to identify them and the tribe. This legal arrangement allows the guardian to provide fully for the child while the tribal affiliation is investigated.<sup>40</sup>

The court may also order DHS or a court employee to investigate the guardianship pursuant to MCL 700.5207. The investigation should include a diligent inquiry about the child's possible Indian heritage and tribal affiliation, if unknown at the time of the guardianship petition. When the parents are located and the tribe identified, the court can schedule another hearing on the original petition to give the tribe an opportunity to appear with the child's parents. The court should consult the tribe on how best to preserve the Indian family because "active efforts" are still required for a guardianship.

- 2) If the child's parents or tribe do not appear at the hearing or are unwilling to assist in preserving this Indian family, then the court can either continue the guardianship or contact Child Protective Services (CPS) at DHS, if the circumstances of the case allow (i.e., the parents are unable to be found and have, essentially, abandoned the child).

**Best Practice Tip:** Once the tribal affiliation is known, the court should provide notice to the tribe and a new hearing on the guardianship petition as soon as possible. If the parents cannot be located, then CPS may be contacted so that caseworkers can provide the culturally-appropriate active efforts necessary to maintain the child's tribal ties. It also ensures that a thorough investigative protocol is followed with regard to the ICWA placement preferences.

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<sup>40</sup> The petitioner for a guardianship is usually best positioned to investigate the child's tribal affiliation, especially if the child's parents allowed the child to stay with the petitioner even before the petition was filed. Therefore, the guardian should work closely with the LGAL or DHS during the investigation.

## **Termination of Parental Rights**

### **MCR 3.977**

This section implicitly incorporates information from earlier sections of this guide. The hyperlinks below will allow readers to readily refer to that background material while reading this section.

*ICWA FUNDAMENTALS*

*IDENTIFYING AN INDIAN CHILD OR INDIAN TRIBE; NOTIFICATION REQUIREMENTS*

*PLACEMENT OF INDIAN CHILDREN*

#### **I. Revocation of Consent to a 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 BIA Court Guidelines §E.4 and Commentary – Withdrawal of Consent to Adoption.

#### **II. Termination of Parental Rights and Stepparent Adoptions**

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 custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Before seeking a termination of parental rights, the petitioner must have made the same types of “active efforts” described in more detail in section IX – Active Efforts above. For additional information please see the Involuntary Termination of Parental Rights subsection within the earlier *ICWA FUNDAMENTALS* section.

For a discussion on terminating parental rights in order to allow a stepparent adoption, please see the earlier Adoption section.

## **Emergency Removals & Protective Custody MCR 3.963, MCR 3.967, MCR 3.974(B)**

This section incorporates by reference information from earlier sections of this guide. The hyperlinks below will allow readers to readily refer to that background material while reading this section.

*ICWA FUNDAMENTALS*

*IDENTIFYING AN INDIAN CHILD OR INDIAN TRIBE; NOTIFICATION REQUIREMENTS*

*PLACEMENT OF INDIAN CHILDREN*

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.7 and Commentary – Emergency Removal of an Indian Child. The state court’s involvement should end as soon as the tribe is ready to take over the case.

**Best Practices Tip:** Courts may order the caseworker 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.

After removal, if the authorities learn of the child’s Indian heritage or tribal affiliation, then the child’s placement as a result of the emergency removal must adhere to the ICWA’s placement preferences. But when a child’s Indian heritage and tribal affiliation are unknown 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 identify the Indian child and give notice to the child’s tribe.

Whenever a known Indian child is removed from a parent or Indian custodian pursuant to the emergency removal provisions of state law, the law enforcement agency responsible for the removal should ask a DHS caseworker to *immediately* ascertain the residence and domicile of the child so that the appropriate tribe can be notified. See BIA Guidelines §B.7 and Commentary – Emergency Removal of an Indian Child. 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 all of the following information:

- 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 BIA Guidelines §B.7 – Emergency Removal of an Indian Child. The commentary accompanying that section of the BIA Guidelines states that, absent extraordinary circumstances, emergency removal should not continue for more than 45<sup>41</sup> 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.

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<sup>41</sup> The BIA Guidelines state that the emergency removal should not continue for more than 90 days. However, the American Indian Law Committee of the State Bar of Michigan recommended, and the Court agreed, that the maximum allowance should be no more than 45 days. This ensures more protection for Indian children and families.

## Conclusion

Please see Appendices A-G for additional ICWA resources.

Appendix A: Michigan tribal contact information and service area maps.

Appendix B: Recommended “active efforts” inquiries.

Appendix C: Various contacts, resources and information on ICWA and tribal issues

Appendix D: ICWA bench guide checklist.

Appendix E: Full text of the Indian Child Welfare Act.

Appendix F: BIA Guidelines for State Courts.

Appendix G: Flowcharts provided by the Native American Rights Fund and the National Resource Directory for Juvenile and Family Court Judges. The website for the Native American Rights Fund has several additional FLOWCHARTS that judges may find useful.  
[HTTP://WWW.NARF.ORG/ICWA/RESOURCES/FLOWCHARTS.HTM](http://www.narf.org/icwa/resources/flowcharts.htm)

If you have questions, recommended additions or changes to this Guide, please contact:

Child Welfare Services  
State Court Administrative Office  
P.O. Box 30048  
Lansing, MI 48909  
(517)-373-8036  
FAX (517)-373-8922  
[HTTP://COURTS.MICHIGAN.GOV/SCAO/SERVICES/CWS/CWS.HTM](http://courts.michigan.gov/scao/services/cws/cws.htm)

## Appendix A

### Tribal Contacts & Service Area Maps

#### Bay Mills Indian Community

##### **Tribal Court**

12140 West Lakeshore Drive  
Brimley, MI 49715  
906-248-3241

##### **Tribal Social Services**

12124 W. Lakeshore Drive  
Brimley, MI 49715  
906-248-3204

#### The Grand Traverse Band of Ottawa and Chippewa Indians

##### **Tribal Court**

2605 N.W. Bayshore Drive  
Peshawbestown, MI 49682  
231-534-7050

##### **Tribal Social Services**

2605 N.W. Bayshore Dr.  
Peshawbestown, MI 49682  
231-534-7681

#### Hannahville Indian Community

##### **Tribal Court**

N14911 Hannahville B1 Road  
Wilson, MI 49896  
906-723-2940

##### **Tribal Social Services**

N14911 Hannahville B1 Rd.  
Wilson, MI 49896  
906-466-2940

#### Nottawaseppi Huron Band of Potawatomi

##### **Tribal Court**

Pine Creek Reservation  
2221 1 ½ Mile Road  
Fulton, MI 49052  
269-729-5151

##### **Tribal Social Services**

2221 1 ½ Mile Rd  
Fulton, MI 49052  
269-729-5151

#### Keweenaw Bay Indian Community

##### **Tribal Court**

107 Beartown Road  
Baraga, MI 49908  
906-353-6623

##### **Tribal Social Services**

16429 Beartown Road  
Baraga, MI 49908  
906-353-4201

#### Lac Vieux Desert Band of Lake Superior Chippewa Indians

##### **Tribal Court**

P.O. Box 249 – Choate Road  
Watersmeet, MI 49969  
906-358-4577

##### **Tribal Social Services**

P.O. Box 249 - Choate Road  
Watersmeet, MI 49969  
906-358-4940

**Little River Band of Ottawa Indians**

**Tribal Court**

3031 Domres Road  
Manistee, MI 49660  
231-723-8288

**Tribal Social Services**

375 River St  
Manistee, MI 49660  
231-398-2242

**Little Traverse Bay Bands of Odawa Indians**

**Tribal Court**

7500 Odawa Circle  
Harbor Springs, MI 49740  
231-242-1400

**Tribal Social Services**

7500 Odawa Circle  
Harbor Springs, MI 49740  
231-242-1620

**Pokagon Band of Potawatomi Indians**

**Tribal Court**

P.O. Box 355  
58620 Sink Road  
Dowagiac, MI 49047  
269-783-0505

**Tribal Social Services**

58620 Sink Rd  
Dowagiac, MI 49047  
269-782-8998

**Saginaw Chippewa Indian Tribe**

**Tribal Court**

Public Safety Building  
6954 E. Broadway Road  
Mt. Pleasant, MI 48858  
989-775-4800

**Tribal Social Services**

7070 East Broadway Road  
Mt. Pleasant, MI 48858  
989-775-4909

**Sault Ste. Marie Tribe of Chippewa Indians**

**Tribal Court**

George K. Nolan Judicial Building  
2175 Shunk Road  
P.O. Box 932  
Sault Ste. Marie, MI 49783  
906-635-4963

**Tribal Social Services**

523 Ashmun Street  
Sault Ste. Marie, MI 49783  
1-800-726-0093

**Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake Tribe)**

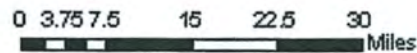
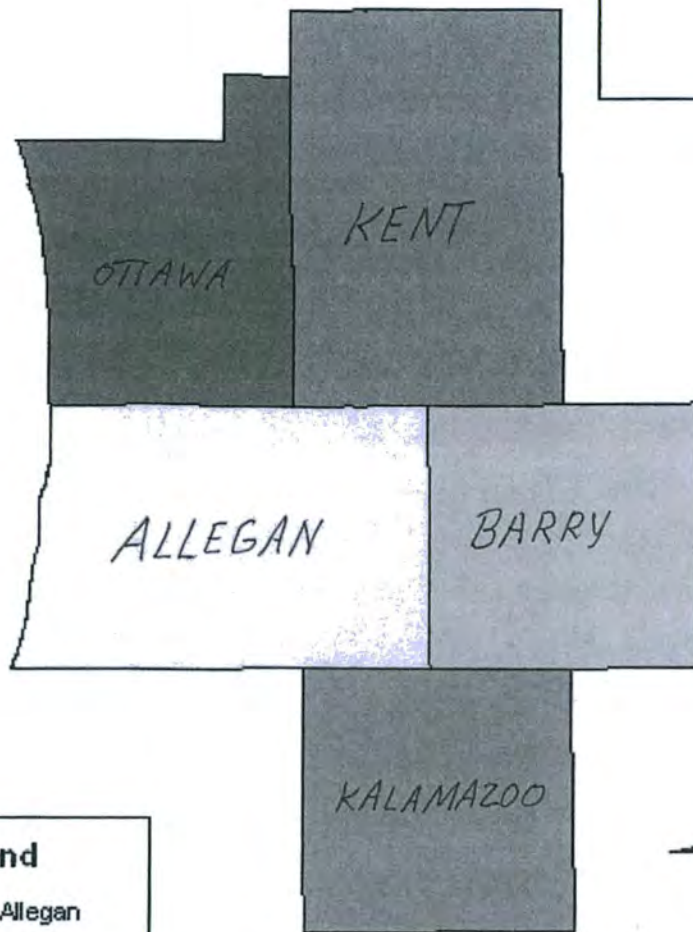
**Tribal Court**

P.O. Box 218  
1743 142nd Avenue  
Dorr, MI 49323  
616-681-0697

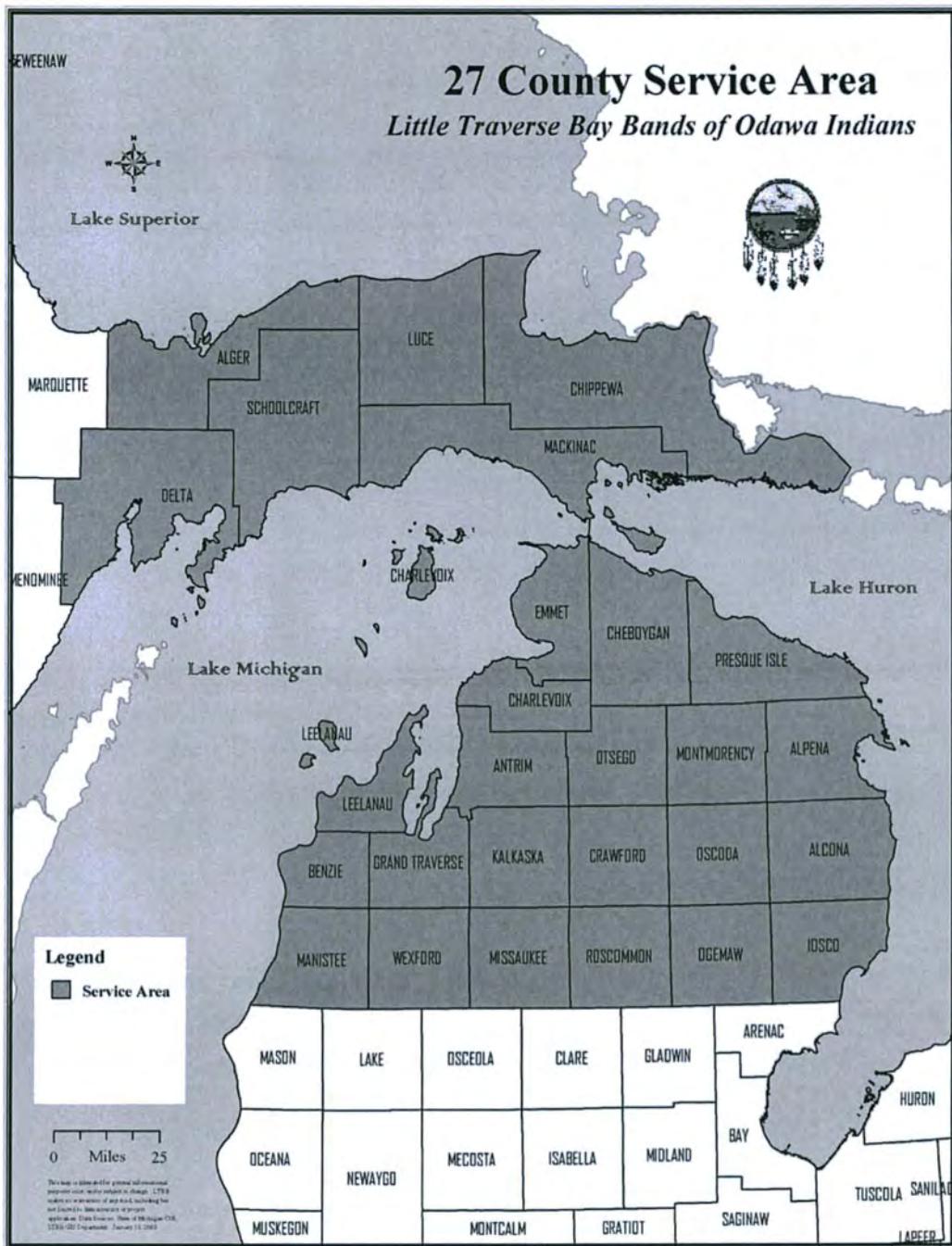
**Tribal Social Services**

P.O. Box 218  
Dorr, MI 49323  
616-681-0360

# Gun Lake Tribe Five County Service Area



\* MEGWETCH TO THE GUN LAKE TRIBE'S ENVIRONMENTAL  
DEPARTMENT FOR GRAPHIC © 2006



## Tribal Service Areas by County

### Bay Mills Indian Community

Chippewa

### Grand Traverse Band of Ottawa and Chippewa Indians

Antrim  
Benzie  
Charlevoix  
Grand Traverse  
Leelanau  
Manistee

### Hannahville Indian Community

Delta  
Menominee

### Keweenaw Bay Indian Community

Baraga  
Marquette

### Lac Vieux Desert Band of Lake Superior Chippewa Indians

Gogebic  
Iron  
Ontonagon

### Little River Band of Ottawa Indians

Kent  
Lake  
Manistee (Main Office: 375 River Street, Manistee, MI 49660)  
Mason  
Muskegon (Satellite Office: 1101 West Hackley, Muskegon, MI 49441)  
Newaygo  
Oceana  
Ottawa  
Wexford

### Nottawaseppi Huron Band of Potawatomi

Allegan  
Barry  
Branch  
Calhoun  
Kalamazoo  
Kent  
Ottawa

**Pokagon Band of Potawatomi**

Allegan  
Berrien  
Cass  
Van Buren

**Saginaw Chippewa Indian Tribe**

Arenac  
Clare  
Gladwin  
Gratiot  
Isabella  
Mecosta  
Midland  
Missaukee  
Montcalm  
Osceola

**Sault Ste. Marie Tribe of Chippewa Indians**

Alger  
Chippewa  
Delta  
Luce  
Mackinac  
Marquette  
Schoolcraft

## Appendix B

### Judicial Questions / Active Efforts Determination

Here are some questions that a court might ask to ascertain whether a CPS or foster care caseworker has made the “active efforts” required by the ICWA.

- 1) Have you contacted the child’s tribe to ensure that all possible services are offered to this child and the family?
- 2) Have you contacted the child’s tribe to ascertain how that tribe defines “active efforts”?
- 3) How does the current case service plan take into account the cultural needs of this child and the family?
- 4) Does the tribe have a mentor or the equivalent of a state Court Appointed Special Advocate who will help the child?
- 5) What steps have you taken to ensure that the family keeps each appointment and can access the services required by their case service plan?
- 6) What steps have you taken to ensure that the family and child will benefit from those services?
- 7) Describe, in detail, the active efforts made prior to removal and placement of the child(ren). Explain why those efforts were unsuccessful.
- 8) If active efforts were not made, explain why that was not possible.
- 9) Is the child placed according to the ICWA placement preferences? If not, why? What efforts are being made to place the child in an ICWA compliant placement? Does the child’s tribe have a different order of placement preferences?
- 10) Did the child’s tribe seek to intervene at any time during this case? If so, what types of intervention were requested, and what occurred as a result of the request?
- 11) Has the child’s tribe participated in providing or delivering services for the child and family? If so, what services were developed or provided by the tribe?
- 12) Who identified and retained the expert witness in this case?
- 13) Have you contacted the expert witness? If so, what information did you provide to the expert witness? If not, explain what circumstances prevented interaction with the expert witness.
- 14) Were the Indian child’s ancestry verification and the notifications about court hearings accomplished according to ICWA guidelines? If not, what prevented you from complying with those ICWA guidelines?

- 15) Was the Indian child invited to attend the hearing or to provide testimony in some other way? If not, why not?

## Appendix C

### Resources

Director Midwest Regional Office  
Bureau of Indian Affairs  
5600 American Boulevard West  
Suite 500  
Bloomington, MN 55437-1464  
Phone: (612) 713-4400

Michigan Agency  
Bureau of Indian Affairs  
2901.5, I-75 Business Spur  
Sault Ste. Marie, MI 49783  
Phone: (906) 632-6809

**Bureau of Indian Affairs - Guidelines for State Courts; Indian Child Custody Proceedings:** [HTTP://WWW.TRIBAL-INSTITUTE.ORG/LISTS/STATE\\_GUIDELINES.HTM](http://www.tribal-institute.org/lists/state_guidelines.htm)

**Federally Recognized Tribes in Michigan with Links to Tribal Statutes:**  
[HTTP://COURTS.MICHIGAN.GOV/SCAO/SERVICES/TRIBALCOURTS/TRIBAL.HTM](http://courts.michigan.gov/scao/services/tribalcourts/tribal.htm)

**Bureau of Indian Affairs -- Tribal Leaders Directory:**  
[HTTP://WWW.BIA.GOV/IDC/GROUPS/XOIS/DOCUMENTS/TEXT/IDC002652.PDF](http://www.bia.gov/idc/groups/xois/documents/text/idc002652.pdf)

**A Practical Guide to the Indian Child Welfare Act – Frequently Asked Questions Index:** [HTTP://WWW.NARF.ORG/ICWA/FAQ/INDEX.HTM](http://www.narf.org/icwa/faq/index.htm)

**National Indian Child Welfare Association:** [HTTP://WWW.NICWA.ORG/](http://www.nicwa.org/)

**National American Indian Court Judges Association:** [HTTP://WWW.NAICJA.ORG/](http://www.naicja.org/)

**Michigan Department of Human Services – ICWA Field Guide (Native American Affairs):** [HTTP://MICHIGAN.GOV/DOCUMENTS/DHS/ICWA\\_FIELDGUIDE\\_6-2012\\_390313\\_7.PDF](http://michigan.gov/documents/dhs/icwa_fieldguide_6-2012_390313_7.pdf)

**Michigan Department of Human Services – Policy and Procedure Manuals (Native American Affairs):** [HTTP://WWW.MFIA.STATE.MI.US/OLMWEB/EX/HTML/](http://www.mfia.state.mi.us/olmweb/ex/html/)

**Michigan Department of Human Services – Services and Delivery Systems for Native Americans in Michigan:** [HTTP://WWW.MICHIGAN.GOV/DHS/0,1607,7-124-5452\\_7124\\_7209---,00.HTML](http://www.michigan.gov/dhs/0,1607,7-124-5452_7124_7209---,00.html)

**Urban Indian Organizations in Michigan**

- 1) North American Indian Association of Detroit** ([WWW.NAIADETROIT.ORG](http://www.naiadetroit.org))  
22720 Plymouth Road  
Detroit, MI 48239-1327  
Tel. (313) 535-2966  
Fax (313) 535-8060
  
- 2) American Indian Health and Family Services of Southeastern MI, Inc.**  
([WWW.AIHFS.ORG](http://www.aihfs.org))  
4880 Lawndale  
Detroit, MI 48210  
Tel. (313) 846-3718  
Fax (313) 846-0150
  
- 3) American Indian Services, Inc.**  
1110 Southfield Road  
Lincoln Park, MI 48146  
Tel. (313) 388-4100  
Fax (313) 388-6566
  
- 4) South Eastern Michigan Indians, Inc.** ([www.semii.itgo.com](http://www.semii.itgo.com))  
26641 Lawrence St.  
Centerline, MI 48015  
Tel. (586) 756-1350  
Fax (586) 756-1352
  
- 5) Nokomis Learning Center**  
5153 Marsh Road  
Okemos, MI 48864-1198  
Tel. (517) 349-5777  
Fax (517) 349-8560
  
- 6) Native American Family Services**  
671 Davis Street NW Suite 103,  
Grand Rapids, MI 49504  
Tel. (616) 451-6767

## Appendix D

### ICWA CHECKLIST

- 1) Is this an Indian child? Did DHS conduct a thorough investigation of the child's Indian heritage to affirm or negate the child's membership in or eligibility for membership in a federally recognized tribe?
- 2) Has the Indian tribe been identified?
- 3) Has the Indian tribe been notified?
- 4) Did DHS contact a tribe in the local, county or general area?
- 5) Does the Indian tribe have exclusive jurisdiction?
- 6) Was the removal from the home or Indian parent done according to the emergency removal statute in Michigan? (MCL 712A.14)
- 7) If so, was the tribe **identified**, **notified**, and **contacted** during the removal process or before the first court hearing after the emergency removal and temporary placement?
- 8) When the court took jurisdiction of the child, was the "qualified expert witness" properly "qualified" under Michigan Rules of Evidence? [Note that the preceding sentence uses the word "qualified" both as an adjective with a special ICWA meaning and as a verb with a special MRE meaning.]
- 9) Did the Indian tribe request that the case be transferred to its court after notification of the proceedings? If so, was that done immediately?
- 10) Will the child be placed outside of the parent's home?
- 11) Does the Indian tribe have placement preferences that differ from the ICWA requirements?
- 12) Will the placement of the child be different from what the ICWA and the tribe prefer?
- 13) If so, has good cause for this alternative placement been established on the record?
- 14) Were active efforts to preserve the family provided? Were those efforts documented on the record?
- 15) How involved have the parents and tribe been with the team decision making process and the creation of the permanency plan for the child and family?
- 16) Has the Indian child's parent consented to the foster care placement or termination of parental rights?
- 17) Does the consent meet the ICWA requirements?
- 18) Did the consent document contain everything required by the ICWA?
- 19) Was consent withdrawn? If so, was it done timely and in accordance with the ICWA?

## Appendix E

### The Indian Child Welfare Act 25 USC 1901 - 1963

UNITED STATES CODE TITLE 25  
- INDIANS CHAPTER 21 -  
INDIAN CHILD WELFARE

#### **CHAPTER 21 - INDIAN CHILD WELFARE**

§ 1901. Congressional findings.

§ 1902. Congressional declaration of policy.

§ 1903. Definitions.

#### **SUBCHAPTER I - CHILD CUSTODY PROCEEDINGS**

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings.

§ 1912. Pending court proceedings.

§ 1913. Parental rights; voluntary termination.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations.

§ 1915. Placement of Indian children.

§ 1916. Return of custody.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court.

§ 1918. Reassumption of jurisdiction over child custody proceedings.

§ 1919. Agreements between States and Indian tribes.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child.

§ 1922. Emergency removal or placement of child; termination; appropriate action.

§ 1923. Effective date.

#### **SUBCHAPTER II - INDIAN CHILD AND FAMILY PROGRAMS**

§ 1931. Grants for on or near reservation programs and child welfare codes.

§ 1932. Grants for off-reservation programs for additional services.

§ 1933. Funds for on and off reservation programs.

§ 1934. "Indian" defined for certain purposes.

#### **SUBCHAPTER III - RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES**

§ 1951. Information availability to and disclosure by Secretary.

§ 1952. Rules and regulations.

#### **SUBCHAPTER IV - MISCELLANEOUS PROVISIONS**

§ 1961. Locally convenient day schools.

§ 1962. Copies to States.

§ 1963. Severability.

#### **§ 1901. Congressional findings**

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds -

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power to regulate commerce with Indian tribes and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

#### **§ 1902. Congressional declaration of policy**

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

#### **§ 1903. Definitions**

For the purposes of this chapter, except as may be specifically provided otherwise, the term -

(1) "child custody proceeding" shall mean and include - (i) "foster care placement" which shall mean any 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; (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child

relationship; (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as 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 eighteen 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) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), 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;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;

(9) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "Reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "Tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

**§ 1911. Indian tribe jurisdiction over Indian child custody proceedings**

(a) Exclusive jurisdiction. An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

**§ 1912. Pending court proceedings**

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary:

Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the

presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

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.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, 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.

**§ 1913. Parental rights; voluntary termination**

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

**§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations**

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

**§ 1915. Placement of Indian children**

**(a) Adoptive placements; preferences**

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

**(b) Foster care or preadoptive placements; criteria; preferences**

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with - (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

**(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences**

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, that where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

**(d) Social and cultural standards applicable**

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the

parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

**§ 1916. Return of custody**

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

**§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court**

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

**§ 1918. Reassumption of jurisdiction over child custody proceedings**

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things: (i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying

the persons who will be affected by the reassumption of jurisdiction by the tribe; (ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe; (iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and (iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

#### **§ 1919. Agreements between States and Indian tribes**

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

#### **§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception**

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child

to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

**§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child**

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

**§ 1922. Emergency removal or placement of child; termination; appropriate action**

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. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

**§ 1923. Effective date**

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

**§ 1931. Grants for on or near reservation programs and child welfare codes**

**(a) Statement of purpose; scope of programs**

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to -

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes; (2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children; (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; (4) home improvement programs; (5) the employment of professional and other trained personnel to assist the tribal court in the

disposition of domestic relations and child welfare matters; (6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs; (7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and (8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act (42 U.S.C. 620 et seq., 1397 et seq.) or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

#### **§ 1932. Grants for off-reservation programs for additional services**

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to - (1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs; (2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children; (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and (4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

#### **§ 1933. Funds for on and off reservation programs**

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title  
Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

**§ 1934. "Indian" defined for certain purposes**

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

**§ 1951. Information availability to and disclosure by Secretary**

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show: (1) the name and tribal affiliation of the child; (2) the names and addresses of the biological parents; (3) the names and addresses of the adoptive parents; and (4) the identity of any agency having files or information relating to such adoptive placement. Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

**§ 1952. Rules and regulations**

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

**§ 1961. Locally convenient day schools**

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such

report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

**§ 1962. Copies to the States**

Within sixty days after November 8, 1978, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter.

**§ 1963. Severability**

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

## Appendix F

### The BIA Guidelines for State Courts

#### A. POLICY

1. Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in any individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

2. In any child custody proceedings where applicable state or other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

#### A. Commentary

The purpose of this section is to apply to the Indian Child Welfare Act the canon of construction that remedial statutes are to be liberally construed to achieve their purposes. The three major purposes are derived from a reading to the Act itself. In order to fully implement the Congressional intent the rule shall be applied to all implementing rules and state legislation as well. Subsection A.(2) applies to canon of statutory construction that specific language shall be given precedence over general language. Congress has given certain specific rights to tribes and Indian children. For example, the tribe has a right to intervene in involuntary custody proceedings. The child has a right to learn of tribal affiliation upon becoming 18 years old. Congress did not intend 25 U.S.C. 1921 to have the effect of eliminating those rights where a court concludes they are in derogation of a parental right provided under a state statute. Congress intended for this section to apply primarily in those instances where a state provides greater protection for a right accorded to parents under the Act. Examples of this include State laws which: impose a higher burden of proof than the Act for removing a child from a home, give the parents more time to prepare after receiving notice, require more effective notice, impose stricter emergency removal procedure requirements on those removing a child, give parents greater access to documents, or contain additional safeguard to assure the voluntariness of consent.

## **B. PRETRIAL REQUIREMENTS**

### **B.1. Determination That Child Is an Indian**

a. When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's identity to become publicly known.

b. i. The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive. ii. Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

c. Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following: i. Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child. ii. Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child. iii. The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child. iv. The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community. v. An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

### **B.1. Commentary**

This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria. Cohen, Handbook of Federal Indian Law 133 (1942). Because of the Bureau of Indian Affairs' long experience in determining who is an Indian for a variety of purposes, its determinations are also entitled to great deference. See, e.g., *United States v Sandoval*, 231 U.S.28, 27 (1913). Although tribal verification is preferred, a court may want to seek verification from the BIA in those voluntary placement cases where the parent has requested anonymity and the tribe does not have a system for keeping child custody matters confidential. Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 U.S.C. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless.

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative. *United States v. Brocheau*, 597 F. 2nd 1260, 1263 (9th Cir. 1979) The guidelines also list several circumstances which shall trigger an inquiry by the court and petitioners to determine whether a child is an Indian for purposes of this Act. This listing is not intended to be complete, but it does list the most common circumstances giving rise to a reasonable belief that a child may be an Indian.

#### B.2. Determination of Indian Child's Tribe

a. Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.

b. The court shall send the notice specified in recommended guideline B.4. to each such tribe. The notice shall specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.

c. In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:

- i. length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
- ii. child's participation in activities of each tribe;
- iii. child's fluency in the language of each tribe;
- iv. whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
- v. residence on or near one of the tribe's reservation by the child's relatives;
- vi. tribal membership of custodial parent or Indian custodian;
- vii. interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these guidelines; and
- viii. the child's self identification.

d. The court's determination together with the reasons for it shall be set out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.

e. If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even though the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

### B.2. Commentary

This guideline requires the court to notify all tribes that are potentially the Indian child's tribe so that each tribe may assert its claim to that status and the court may have the benefit of the views of each tribe. Notification of all the tribes is also necessary so the court can consider the comparative interest of each tribe in the child's welfare in making its decision. That factor has long been regarded an important consideration in making child custody decisions. The significant factors listed in this section are based on recommendations by tribal officials involved in child welfare matters. The Act itself and the legislative history make it clear that tribal rights are to be based on the existence of a political relationship between the family and the tribe. For that reason, the guidelines make actual tribal membership of the child conclusive on this issue. The guidelines do provide, however, that previous decisions of a court made on its own determination of the Indian child's tribe are not invalidated simply because the child becomes a member of a different tribe. This provision is included because of the importance of stability and continuity to a child who has been placed outside the home by a court. If a child becomes a member before a placement is made or before a change of placement becomes necessary for other reasons, however, then that membership decision can be taken into account without harm to the child's need for stable relationships. We have received several recommendations that the "Indian child's tribe" status be accorded to all tribes in which a child is eligible for membership. The fact that Congress, in the definition of "Indian child's tribe," provided a criterion for determining which is the Indian child's tribe, is a clear indication of legislative intent that there be only one such tribe for each child. For purposes of transfer of jurisdiction, there obviously can be only one tribe to adjudicate the case. To give more than one tribe "Indian child's tribe" status for purposes of the placement preferences would dilute the preference accorded by Congress to the tribe with which the child has the more significant contacts. A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe had proved unsuccessful. So long as the special rights of the Indian child's tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act. Determination of the Indian child's tribe for purposes of this Act shall not serve as any precedent for other situations. The standards in this statute and these guidelines are designed with child custody matters in mind. A different determination may be entirely appropriate in other legal contexts.

### B.3. Determination That Placement Is Covered by the Act

a. Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.

b. Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.

c. Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

### B.3. Commentary

The purpose of this section is to deal with some of the questions the Department has been receiving concerning the coverage of the Act. The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child—whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses. Placements based on status offenses (actions that are not a crime when committed by an adult), however, are usually premised on the conclusion that the present custodian of the child is not providing adequate care or supervision. To the extent that a status offense poses any immediate danger to society, it is usually also punishable as an offense which would be a crime if committed by an adult. For that reason status offenses are treated the same as dependency proceedings and are covered by the Act and these guidelines, while other juvenile delinquency placements are excluded. While the Act excludes placements based on an act which would be a crime if committed by an adult, it does cover terminations of parental rights even where they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed. The Act excludes from coverage an award of custody to one of the parents "in a divorce proceeding." If construed narrowly, this provision would leave custody awards resulting from proceedings between husband and wife for separate maintenance, but not for dissolution of the marriage bond within the coverage of the Act. Such a narrow interpretation would not be in accord with the intent of Congress. The legislative history indicates that the exemption for divorce proceedings, in part, was included in response to the views of this Department that the protections provided by this Act are not needed in proceedings between parents. In terms of the purposes of this Act, there is no reason to treat separate maintenance or similar domestic relations proceedings differently from divorce proceedings. For that reason the statutory term "divorce proceeding" is construed to include other domestic relations proceedings between spouses. The Act also excludes from its coverage any placements that do not deprive the parents or Indian custodians of the right to regain custody of the child upon demand.

Without this exception a court appearance would be required every time an Indian child left home to go to school. Court appearances would also be required for many informal caretaking arrangements that Indian parents and custodians sometimes make for their children. This statutory exemption is restated here in the hope that it will reduce the instances in which Indian parents are unnecessarily inconvenienced by being required to give consent in court to such informal arrangements. Some private groups and some states enter into formal written agreements with parents for temporary custody (See e.g. Alaska Statutes § 47.10.230). The guidelines recommend that the parties to such agreements explicitly provide for return of the child upon demand if they do not wish the Act to apply to such placements. Inclusion of such a provision is advisable because courts frequently assume that when an agreement is reduced to writing, the parties have only those rights specifically written into the agreement.

#### B.4. Determination of Jurisdiction

a. In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section B.7. of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.

b. If the Indian child has previously resided or been domiciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Sections B.7. of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.

#### B.4. Commentary

The purpose of this section is to remind the state court of the need to determine whether it has jurisdiction under the Act. The action is dismissed as soon as it is determined that the court lacks jurisdiction except in emergency situations. The procedures for emergency situations are set out in Section B.7.

#### B.5. Notice Requirements

a. In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.

b. In any involuntary Indian child custody proceeding, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:

- i. The name of the Indian child.
- ii. His or her tribal affiliation.
- iii. A copy of the petition, complaint or other document by which the proceeding was initiated.
- iv. The name of the petitioner and the name and address of the petitioner's attorney.
- v. A statement of the right of the biological parents or Indian custodians and the Indian

child's tribe to intervene in the proceeding.

- vi. A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them.
- vii. A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.
- viii. The location, mailing address and telephone number of the court.
- ix. A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.
- x. The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.
- xi. A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

c. The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which the notice was received to prepare for the proceeding.

d. The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.

e. Notice may be personally served on any person entitled to receive notice in lieu of mail service.

f. If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

g. If the court or a petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau of Indian Affairs personnel arrange to have the notice explained to that person in the language that he or she best understands.

#### B.5. Commentary

This section recommends that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian. If anyone asserts that the child is an Indian or that there is reason to believe the child may be an Indian, then the court shall contact the tribe or the Bureau of Indian Affairs for verification. Refer to section B.1. and B.2. of these guidelines. This section specifies the information to be contained in the

notice. This information is necessary so the persons who receive notice will be able to exercise their rights in a timely manner. Subparagraph (xi) provides that tribes shall be requested to assist in maintaining the confidentiality of the proceeding. Confidentiality may be difficult to maintain-especially in involuntary proceedings. It is reasonable, however, to ask tribal officials to maintain as much confidentiality as possible consistent with the exercise of tribal rights under the Act. The time limits are minimum ones required by the Act. In many instances, more time may be available under state court procedures or because of the circumstances of the particular case. In such instances, the notice shall state that additional time is available. The Act requires notice to the parent or Indian custodian. At a minimum, parents must be notified if termination of parental rights is a potential outcome since it is their relationship to the child that is at stake. Similarly, the Indian custodians must be notified of any action that could lead to the custodians' losing custody of the child. Even where only custody is an issue, noncustodial parents clearly have a legitimate interest in the matter. Although notice to both parents and Indian custodians may not be required in all instances by the Act or the Fourteenth Amendment to the U.S. Constitution, providing notice to both is in keeping with the spirit of the Act. For that reason, these guidelines recommend notice be sent to both. Subsection (d) requires filing the notice with the court so there will be a complete record of efforts to comply with the Act. Subsection (e) authorizes personal services since it is superior to mail services and provides greater protection or rights as authorized by 25 U.S.C. 1921. Since serving the notices does not involve any assertion of jurisdiction over the person served, personal notices may be served without regard to state or reservation boundaries. Subsections (f) and (g) provide procedures to increase the likelihood that rights are understood by parents and Indian custodians.

#### B.6. Time Limits and Extensions

- a. A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional twenty days from the date upon which notice was received to prepare for participation in the proceeding.
  
- b. The proceeding may not begin until all of the following dates have passed:
  - i. ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;
  - ii. ten days after the parent or Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;
  - iii. thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding;and
  - iv. Thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.
  
- c. The time limits listed in this section are minimum time periods required by the Act. The court may grant more time to prepare where state law permits.

#### B.6. Commentary

This section attempts to clarify the waiting periods required by the Act after notice has

been received of an involuntary Indian child custody proceeding. Two independent rights are involved-the right of the parents or Indian custodians and the right of the Indian child's tribe. The proceeding may not begin until the waiting periods to which both are entitled have passed. This section also makes clear that additional extensions of time may be granted beyond the minimum required by the Act.

#### B.7. Emergency Removal of an Indian Child

a. Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.

b. When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:

- i. The name, age and last known address of the Indian child.
- ii. The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.
- iii. Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.
- iv. The tribal affiliation of the child and of the parents and/or Indian custodians.
- v. A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.
- vi. If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.
- vii. A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

c. If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case-whichever is earlier.

d. Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

### B.7. Commentary

Since jurisdiction under the Act is based on domicile and residence rather than simple physical presence, there may be instances in which action must be taken with respect to a child who is physically located off a reservation but is subject to exclusive tribal jurisdiction. In such instances the tribe will usually not be able to take swift action to exercise its jurisdiction. For that reason Congress authorized states to take temporary emergency action. Since emergency action must be taken without the careful advance deliberation normally required, procedures must be established to assure that the emergency actions are quickly subjected to review. This section provides procedures for prompt review of such emergency actions. It presumes the state already has such review procedures and only prescribes additional procedures that shall be followed in cases involving Indian children. The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end. State action shall also end as soon as the tribe is ready to take over the case. Subsection (d) refers primarily to the period between when the petition is filed and when the trial court renders its decision. The Act requires that, except for emergencies, Indian children are not to be removed from their parents unless a court finds clear and convincing evidence that the child would be in serious danger unless removed from the home. Unless there is some kind of time limit on the length of an "emergency removal" (that is, any removal not made pursuant to a finding by the court that there is clear and convincing evidence that continued parental custody would make serious physical or emotional harm likely), the safeguards of the Act could be evaded by use of long-term emergency removals. Subsection (d) recommends what is, in effect, a speedy trial requirement. The court shall be required to comply with the requirements of the Act and reach a decision within 90 days unless there are "extraordinary circumstances" that make additional delay unavoidable.

### B.8. Improper Removal From Custody

a. If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

b. If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

### B.8. Commentary

This section is designed to implement 25 U.S.C. § 1920. Since a finding of improper removal goes to the jurisdiction of the court to hear the case at all, this section provides that the court will decide the issue as soon as it arises before proceeding further on the merits.

## **C. REQUESTS FOR TRANSFER TO TRIBAL COURT**

### C.1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.

#### C.1. Commentary

Reference is made to 25 U.S.C. 1911(b) in this title of this section deals only with transfers where the child is not domiciled or residing on an Indian reservation. So that transfers can occur as quickly and simply as possible, requests can be made orally. This section specifies that requests are to be made promptly after receiving notice of the proceeding. This is a modification of the timeliness requirement that appears in the earlier version of the guidelines. Although the statute permits proceedings to be commenced even before actual notice, those parties do not lose their right to request a transfer simply because neither the petitioner nor the Secretary was able to locate them earlier. Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions. The Department received a number of comments objecting to any timeliness requirement at all. Commenters pointed out that the statute does not explicitly require transfer requests to be timely. Some commenters argued that imposing such a requirement violated tribal and parental rights to intervene at any point in the proceedings under 25 U.S.C. § 1911(c) of the Act. While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention. Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request. Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

### C.2. Criteria and Procedures for Ruling on 25 U.S. C. § 1911(b) Transfer Petitions

a. Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to such transfer, the tribal court

declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

b. If the court believes or any party asserts that good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer. The petitioners shall have the opportunity to provide the court with their views on whether or not good cause to deny transfer exists.

### C.2. Commentary

Subsection (a) simply states the rule provided in 25 U.S.C. § 1911(b). Since the Act gives the parents and the tribal court of the Indian child's tribe an absolute veto over transfers, there is no need for any adversary proceedings if the parents or the tribal court opposes transfer. Where it is proposed to deny transfer on the grounds of "good cause," however, all parties need an opportunity to present their views to the court.

### C.3. Determination of Good Cause to the Contrary

a. Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

b. Good cause not to transfer this proceeding may exist if any of the following circumstances exists:

- i. 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.
- ii. The Indian child is over twelve years of age and objects to the transfer.
- iii. The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
- iv. The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

c. Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

d. The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

### C.3. Commentary

All five criteria that were listed in the earlier version of the guidelines were highly controversial. Comments on the first two criteria were almost unanimously negative. The first criterion was whether the parents were still living. The second was whether an Indian custodian or guardian for the child had been appointed. These criteria were criticized as irrelevant and arbitrary. It was argued that children who are orphans or have no appointed Indian custodian or guardian are no more nor less in need of the Act's protections than other children. It was also pointed out that these criteria are contrary to the decision in *Wisconsin Potowatomies of the Hannahville Indian Community v. Houston*, 393 F. Supp. 719 (W.D. Mich 1973), which was explicitly endorsed by the

committee that drafted that Act. The court in that case found that tribal jurisdiction existed even through the children involved were orphans for whom no guardian had been appointed. Although there was some support for the third and fourth criteria, the preponderance of the comment concerning them was critical. The third criteria was whether the child had little or no contact with his or her Indian tribe for a significant period of time. These criteria were criticized, in part, because they would virtually exclude from transfers infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant previous contact with the tribe or the reservation. Some also argued that these criteria invited the state courts to be making the kind of cultural decisions that the Act contemplated should be made by tribes. Some argued that the use of vague words in these criteria accorded state courts too much discretion. The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more evenly divided and many of the critics were ambivalent. They worried that young teenagers could be too easily influenced by the judge or by social workers. They also argued that fear of the unknown would cause many teenagers to make an ill-considered decision against transfer. The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe is not advised. The circumstances under which it may be proper for the state court to take such considerations into account are set out in the revised subsection (iv). It is recommended that in most cases state court judges not be called upon to determine whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto-over transfer to tribal court. This reasoning does not apply, however, where there is no parent available to make that decision. The guidelines recommend that state courts be authorized to make such determinations only in those cases where there is no parent available to make it. State court authority to make such decisions is limited to those cases where the child is over five years of age. Most children younger than five years can be expected to adjust more readily to a change in cultural environment. The fifth criterion has been retained. It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives. The existence of a tribal court is made an absolute requirement for transfer of a case. Clearly, the absence of a tribal court is good cause not to ask the tribe to try the case. Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "The subsection is intended to permit a state court to apply a modified doctrine of forum non conveniens, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court. Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation. This problem may be alleviated in some instances by having the court come to the witnesses. The

Department is aware of one case under that Act where transfer was conditioned on having the tribal court meet in the city where the family lived. Some cities have substantial populations of members of tribes from distant reservations. In such situations some tribes may wish to appoint members who live in those cities as tribal judges. The timeliness of the petition for transfer, discussed at length in the commentary to section C.1., is listed as a factor to be considered. Inclusion of this criterion is designed to encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays. Long periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings. Almost all commenters favored retention of the paragraph stating that reservation socio-economic conditions and the perceived adequacy of tribal institutions are not to be taken into account in making good cause determinations. Some commenters did suggest, however, that a case not be transferred if it is clear that a particular disposition of the case that could only be made by the state court held especially great promise of benefiting the child. Such considerations are important but they have not been listed because the Department believes such judgments are best made by tribal courts. Parties who believe that state court adjudication would be better for such reasons can present their reasons to the tribal court and urge it to decline jurisdiction. The Department is aware of one case under the Act where this approach is being used and believes it is more in keeping with the confidence Congress has expressed in tribal courts. Since Congress has established a policy of preferring tribal control over custody decisions affecting tribal members, the burden of proving that an exception to that policy ought to be made in a particular case rests on the party urging that an exception be made. The rule is reflected in subsection (d).

#### C.4. Tribal Court Declination of Transfer

- a. A tribal court to which transfer is requested may decline to accept such transfer.
- b. Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.
- c. Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties.
- d. If the case is transferred the state court shall provide the tribal court with all available information on the case.

#### C.4. Commentary

The previous version of this section provided that the state court should presume the tribal court has declined to accept jurisdiction unless it hears otherwise. The comments on this issue were divided. This section has been revised to require the tribal court to decline the transfer affirmatively if it does not wish to take the case. This approach is in keeping

with the apparent intent of Congress. The language in the Act providing that transfers are "subject to declination by the tribal court" indicates that affirmative action by the tribal court is required to decline a transfer. The recommended time limit for a decision has been extended from ten to twenty days. The additional time is needed for the court to become apprised of factors it may want to consider in determining whether or not to decline the transfer. A new paragraph has been added recommending that the parties assist the tribal court in making its decision on declination by giving the tribal court their views on the matter. Transfers ought to be arranged as simply as possible consistent with due process. Transfer procedures are a good subject for tribal-state agreements under 25 U.S.C. § 1919.

#### **D. ADJUDICATION OF INVOLUNTARY PLACEMENTS, ADOPTIONS, OR TERMINATIONS OF PARENTAL RIGHTS**

##### D.1. Access to Reports

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. No decision of the court shall be based on any report or other document not filed with the court.

##### D.1. Commentary

The first sentence merely restates the statutory language verbatim. The second sentence makes explicit the implicit assumption of Congress - that the court will limit its considerations to those documents and reports that have been filed with the court.

##### D.2. Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

##### D.2. Commentary

This section elaborates on the meaning of "breakup of the Indian family" as used in the Act. "Family breakup" is sometimes used as a synonym for divorce. In the context of the statute, however, it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health. This section also recommends that the petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home for the child. The term "individual Indian care givers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed. One commenter recommended that detailed procedures and

criteria be established in order to determine whether family support efforts had been adequate. Establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not contemplate such a role for the courts and they generally lack the expertise to make such judgments.

#### D.3. Standards of Evidence

a. The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child/s continued custody with the child's parents or Indian custodian is likely to result in serious emotional or physical damage to the child.

b. The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

c. Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the casual relationship between the conditions that exist and the damage that is likely to result.

#### D.3. Commentary

The first two paragraphs are essentially restatement of the statutory language. By imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be shown that it is shown that it is dangerous for the child to remain with his or her present custodians. Evidence of that must be "clear and convincing" for placements and "beyond a reasonable doubt" for terminations. The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be-without any testing of the implicit assumption that only a family that conformed to that stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a

placement or termination under the standards imposed by Congress. The focus must be on whether the particular conditions are likely to cause serious damage.

#### D.4. Qualified Expert Witnesses

a. Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.

b. Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

i. A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

ii. Any 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 childrearing practices within the Indian child's tribe.

iii. A professional person having substantial education and experience in the area of his or her specialty.

c. The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

#### D.4. Commentary

The first subsection is intended to point out that the issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically two questions are involved. First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct.

The party presenting an expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by non-experts. The second subsection makes clear that knowledge of tribal culture and childrearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior - which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm. Indian tribes and Bureau of Indian Affairs personnel frequently know persons who are knowledgeable concerning the customs and cultures of the tribes they serve. Their assistance is available in helping to locate such witnesses.

## **E. VOLUNTARY PROCEEDINGS**

### E.1. Execution of Consent

To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

#### E.1. Commentary

This section provides that consent may be executed before either a judge or magistrate. The addition of magistrates was made in response to a suggestion from Alaska where magistrates are found in most small communities but "judges" are more widely scattered. The term "judge" as used in the statute is not a term of art and can certainly be construed to include judicial officers who are called magistrates in some states. The statement that consent need not be in open court where confidentiality is desired or indicated was taken directly from the House Report on the Act. A recommendation that the guideline list the consequences of consent that must be described to the parent or custodian has not been adopted because the consequences can vary widely depending on the nature of the proceeding, state law and the particular facts of individual cases.

### E.2. Content of Consent Document

- a. The consent document shall contain the name and birthday of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.
- b. A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through who the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.
- c. A consent to termination of parental rights or adoption shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

#### E.2. Commentary

This section specifies the basic information about the placement or termination to which the parent or Indian custodian is consenting to assure that consent is knowing and also to document what took place.

### E.3. Withdrawal of Consent to Placement

Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing, in the court where consent was

executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.

E.3. Commentary

This section specifies that withdrawal of consent shall be filed in the same court where the consent document itself was executed.

E.4. Withdrawal of Consent to Adoption

A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.

E.4. Commentary

This provision recommends that the clerk of the court be responsible for notifying the family with whom the child has been placed that consent has been withdrawn. The court's involvement frequently may be necessary since the biological parents are often not told who the adoptive parents are.

**F. DISPOSITIONS**

F.1. Adoptive Placements

a. In any adoptive placement of an Indian child under state law preference must be given (in the order listed below) absent good cause to the contrary, to placement of the child with:

- i. A member of the Indian child's extended family;
- ii. Other members of the Indian child's tribe; or
- iii. Other Indian families, including families of single parents.

b. The Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed so long as placement is the least restrictive setting appropriate to the child's needs.

c. Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

F.1. Commentary

This section makes clear that preference shall be given in the order listed in the Act. The Act clearly recognizes the role of the child's extended family in helping to raise children. The extended family should be looked to first when it becomes necessary to remove the child from the custody of his or her parents. Because of differences in culture among

tribes, placement within the same tribe is preferable. This section also provides that single parent families shall be considered for placements. The legislative history of the Act makes it clear that Congress intended custody decisions to be made based on a consideration of the present or potential custodian's ability to provide the necessary care, supervision and support for the child rather than on preconceived notions of proper family composition. The third subsection recommends that the court or agenda make an active effort to find out if there are families entitled to preference who would be willing to adopt the child. This provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities.

#### F.2. Foster Care or Preadoptive Placements

In any foster care or preadoptive placement of an Indian child:

- a. The child must be placed in the least restrictive setting which
  - i. most approximates a family;
  - ii. in which his or her special needs may be met; and
  - iii. which is in reasonable proximity to his or her home
  
- b. Preference must be given in the following order, absent good cause to the contrary, to placement with:
  - i. A member of the Indian child's extended family;
  - ii. A foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation;
  - iii. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
  - iv. An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.
  
- c. The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed so long as the criteria enumerated in subsection (a) are met.

#### F.2. Commentary

This guideline simply restates the provision of the Act.

#### F.3. Good Cause To Modify Preferences

- a. For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:
  - i. The request of the biological parents or the child when the child is of sufficient age.
  - ii. The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
  - iii. The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

b. The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.

### F.3. Commentary

The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph (I) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons. The wishes of an older child are important in making an effective placement. In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Paragraph (ii) recommends that such considerations be considered as good cause to the contrary. Paragraph (iii) recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources. Since Congress has established a clear preference for placements within the tribal culture, it is recommended in subsection (b) that the party urging an exception be made be required to bear the burden of proving an exception is necessary.

## **G. POST-TRIAL RIGHTS**

### G.1. Petition To Vacate Adoption

a. Within two years after a final decree of adoption of any Indian child by a state court, or within any longer period of time permitted by the law of the state, a parent who executed a consent to termination of parental rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such content was obtained by fraud or duress.

b. Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

### G.1. Commentary

This section recommends that the petition to vacate an adoption be brought in the same court in which the decree was entered, since that court clearly has jurisdiction, and witnesses on the issue of fraud or duress are most likely to be within its jurisdiction.

### G.2. Adult Adoptee Rights

a. Upon application by an Indian individual who has reached the age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and

provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

b. The section applies regardless of whether or not the original adoption was subject to the provision of the Act.

c. Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

#### G.2. Commentary

Subsection (b) makes clear that adoptions completed prior to May 7, 1979, are covered by this provision. The Act states that most portions of Title I do not "affect a proceeding under State law" initiated or completed prior to May 7, 1979. Providing information to an adult adoptee, however, cannot be said to affect the proceeding by which the adoption was ordered. The legislative history of the Act makes it clear that this Act was not intended to supersede the decision of state legislatures on whether adult adoptees may be told the names of their biological parents. The intent is simply to assure the protection of rights deriving from tribal membership. Where a state law prohibits disclosure of the identity of the biological parents, tribal rights can be protected by asking the BIA to check confidentiality whether the adult adoptee meets the requirements for membership in an Indian tribe. If the adoptee does meet those requirements, the BIA can certify that fact to the appropriate tribe.

#### G.3. Notice of Change in Child's Status

a. Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.

b. A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.

#### G.3. Commentary

This section provides guidelines to aid courts in applying the provisions of Section 106 of the Act. Section 106 gives legal standing to a biological parent or prior Indian custodian to petition for return of a child in cases of failed adoptions or changes in placement in situations where there has been a termination of parental rights. Section 106(b) provides the whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, such

placement is to be in accordance with the provisions of the Act - which requires notice to the biological parents. The Act is silent on the question of whether a parent or Indian custodian can waive the right to further notice. Obviously, there will be cases in which the biological parents will prefer not to receive notice once their parental rights have been relinquished or terminated. This section provides for such waivers but, because the Act establishes an absolute right to participate in any future proceedings and to petition the court for return of the child, the waiver is revocable.

#### G.4. Maintenance of Records

The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

#### G.4. Commentary

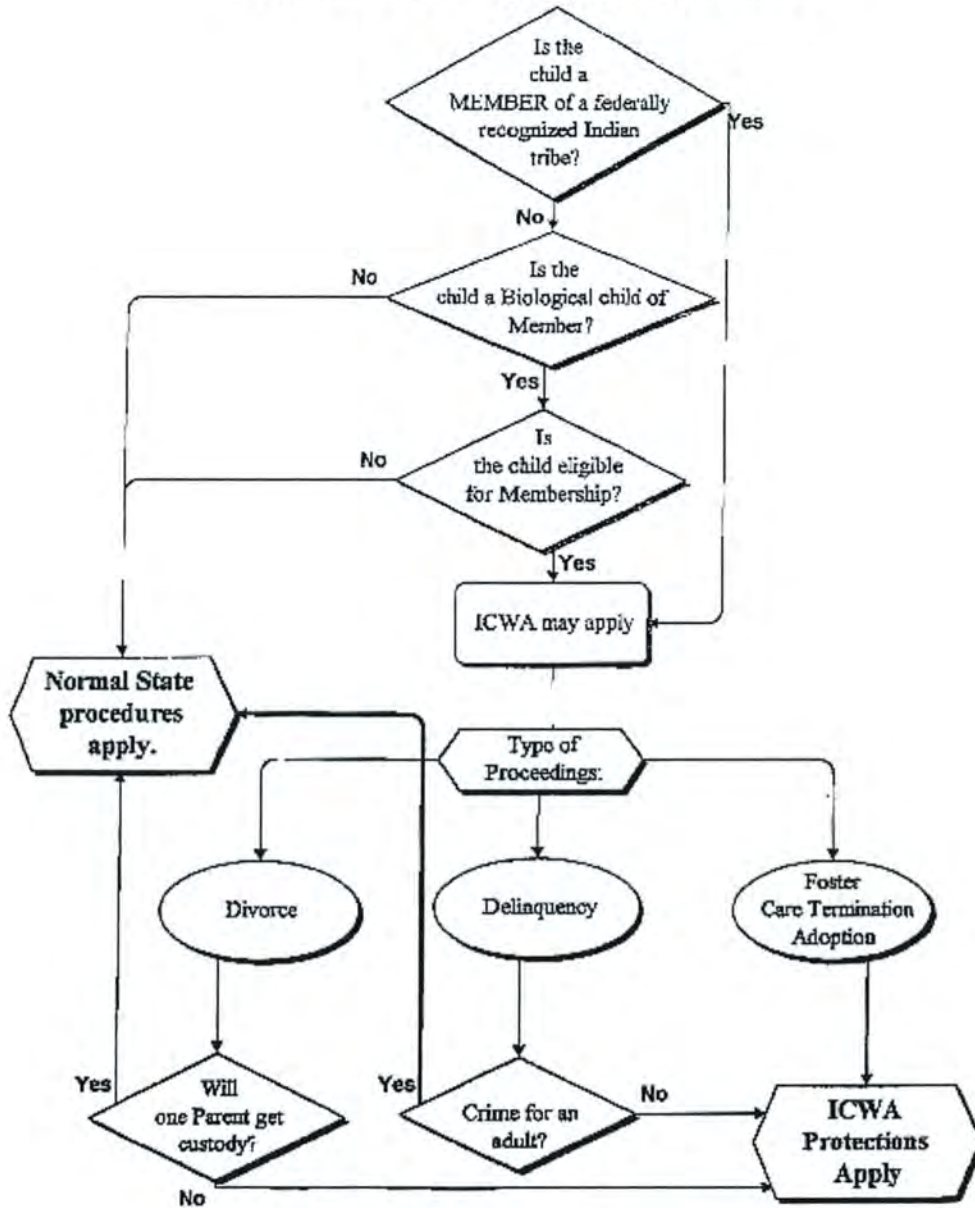
This section of the guidelines provides a procedure for implementing the provisions of 25 U.S. C. § 1915(e). This section has been modified from the previous version which required that all records be maintained in a single location within the state. As revised this section provides only that the records be retrievable by a single office that would make them available to the requester within seven days of a request. For some states (especially Alaska) centralization of the records themselves would create major administrative burdens. So long as the records can be promptly made available at a single location, the intent of this section that the records be readily available will be satisfied.

## Appendix G

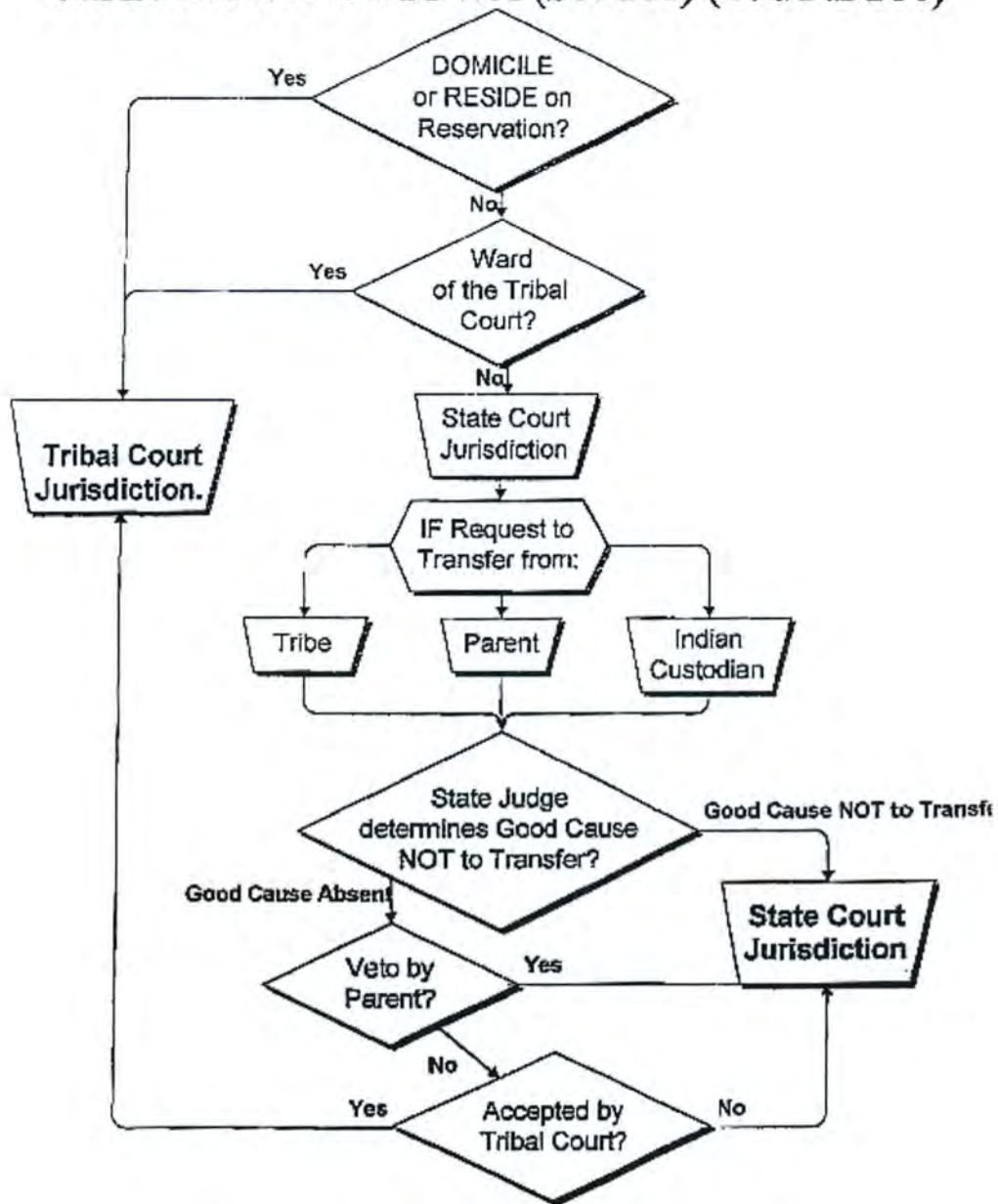
### FLOW CHARTS

The flow charts on the following pages were graciously provided by the **Native American Rights Fund** and the **National Resource Directory for Juvenile and Family Court Judges**, published by the National Council of Juvenile and Family Court Judges.

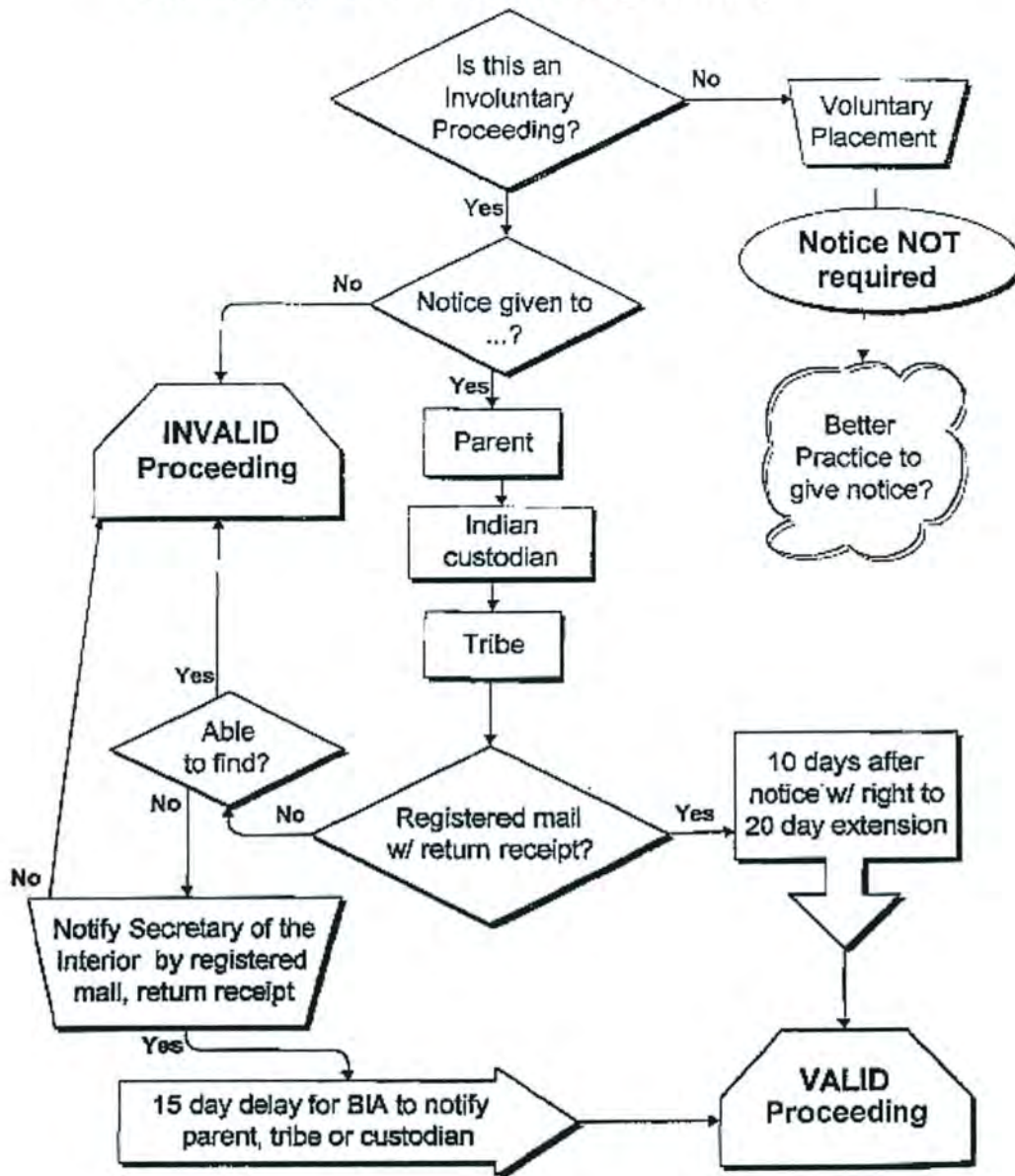
### Will the ICWA apply to this case?



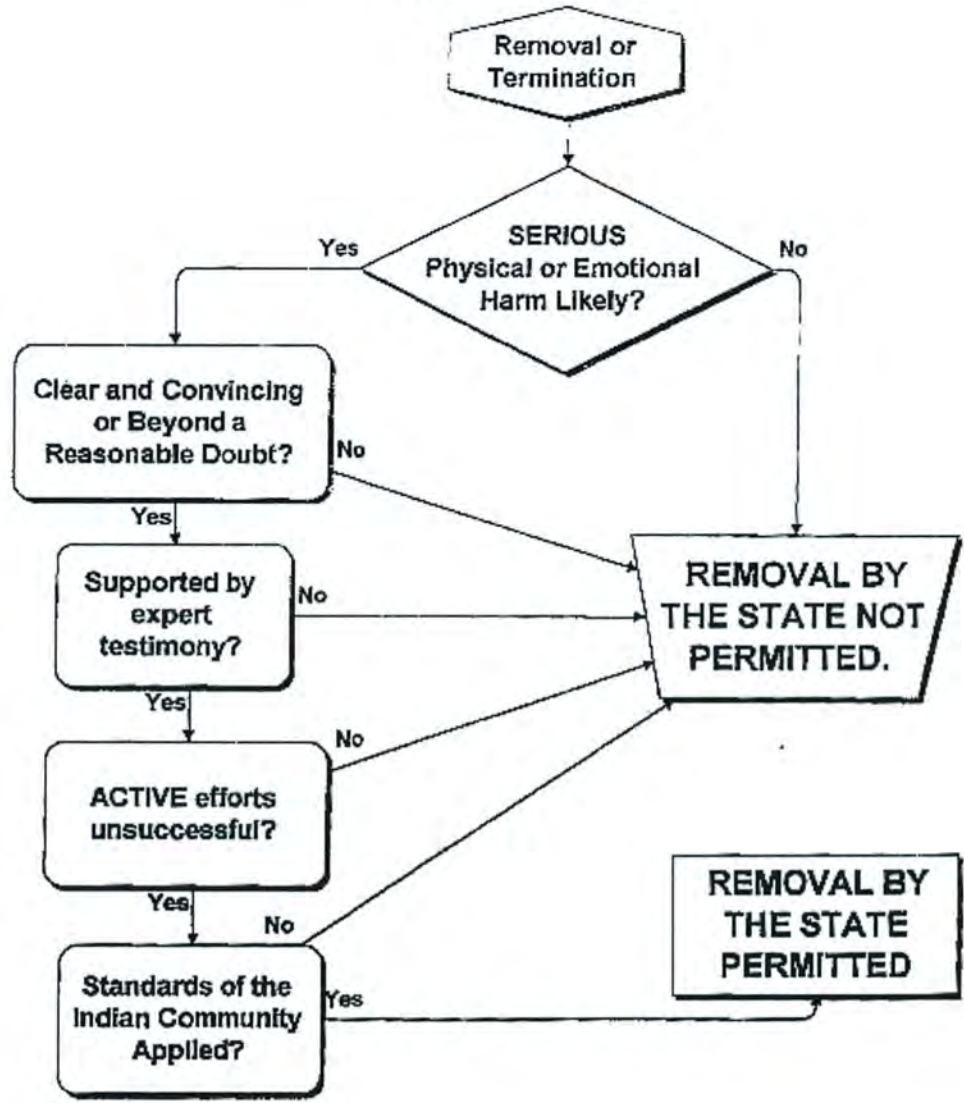
## Jurisdiction & the ICWA (Sec 101) (non PL 280)



## Notice Requirements of ICWA (Sec 102)

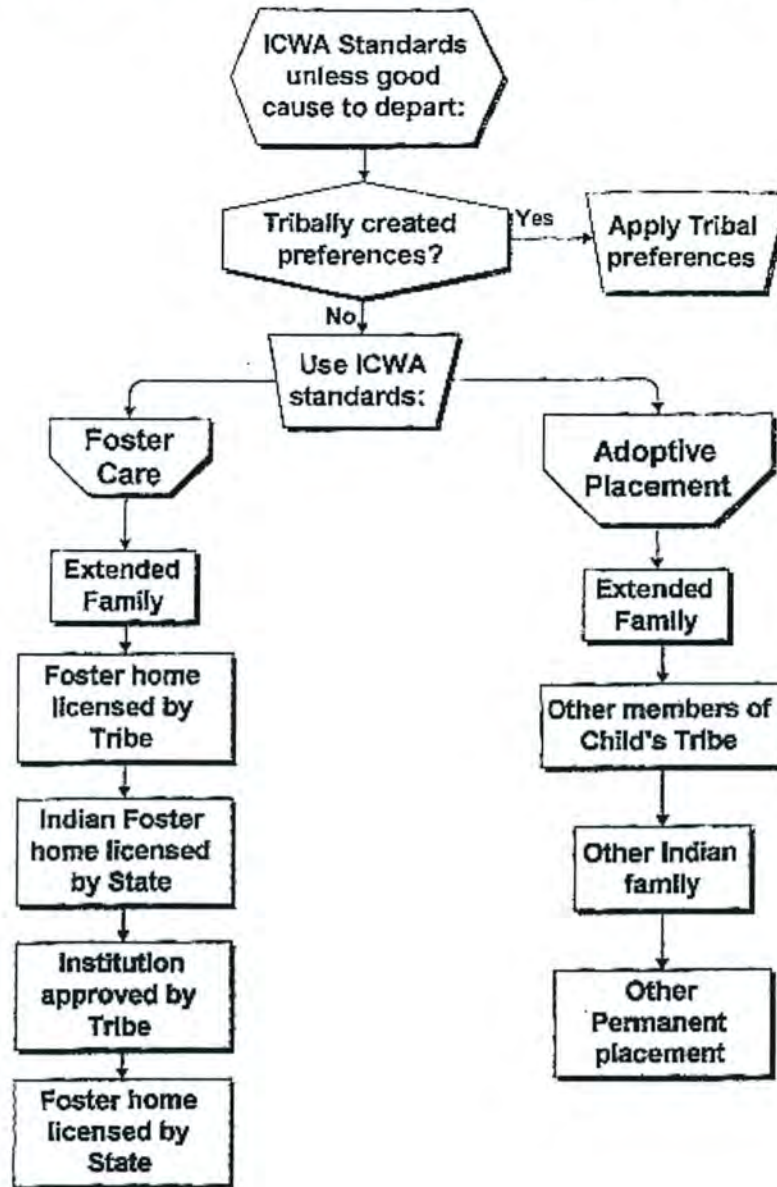


## Checklist for Removal or Termination (Sec 102)

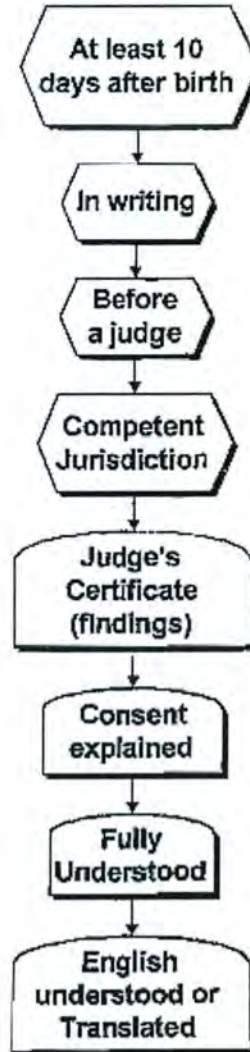


**Note:** The standards of the *Indian community* must be applied when determining whether or not to remove an Indian child. If they are not, the child cannot be removed.

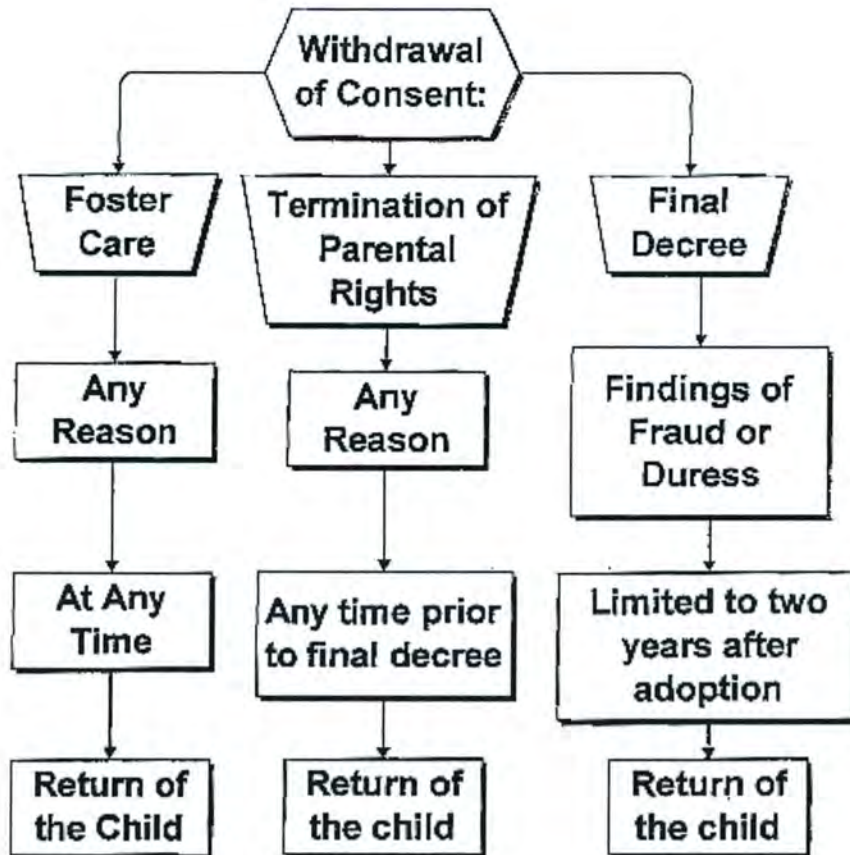
## Placement Preferences (Sec 105)



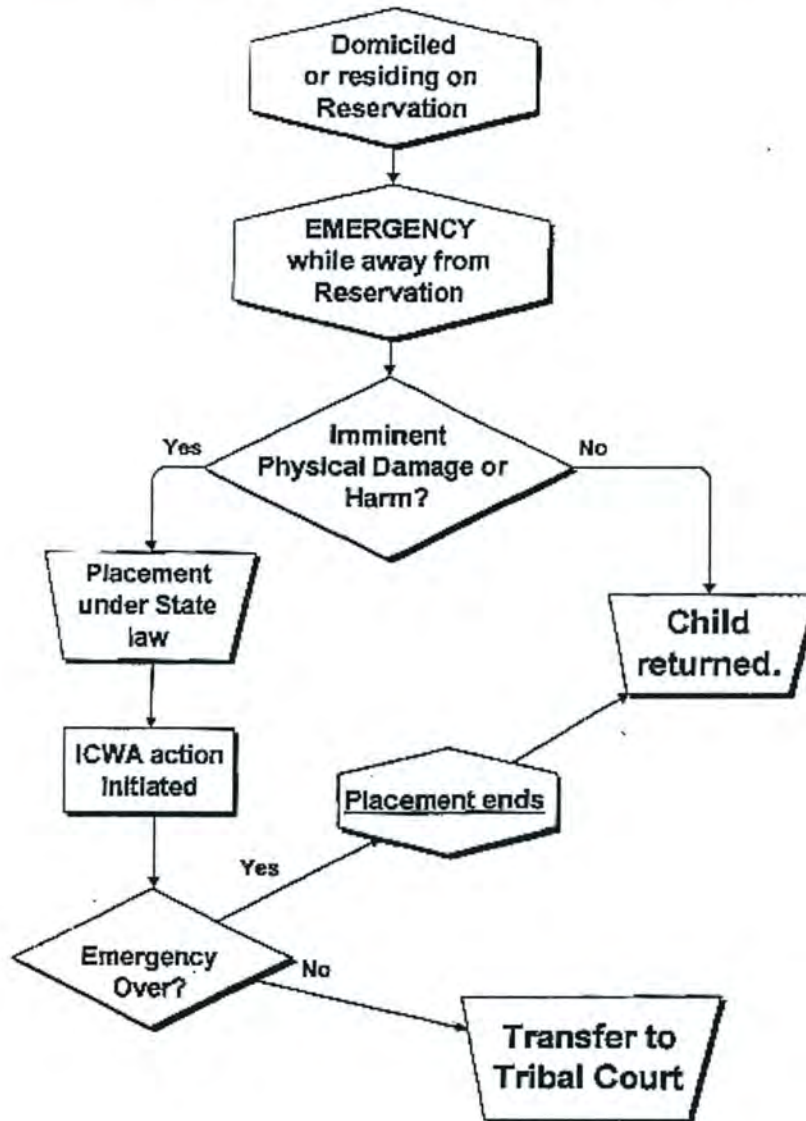
## Voluntary consent to TPR



## Withdrawal of Consent (sec 103)



## Emergency Removal (Sec 112)



“ACTIVE” VERSUS  
“REASONABLE” EFFORTS: THE  
DUTIES TO REUNIFY THE FAMILY  
UNDER THE INDIAN CHILD  
WELFARE ACT AND THE ALASKA  
CHILD IN NEED OF AID  
STATUTES

MARK ANDREWS\*

*In this Article, the author analyzes recent decisions of the Alaska Supreme Court pertaining to the duties imposed upon the Alaska Department of Health and Social Services to make efforts to reunify the family after a child is taken into State custody. The article analyzes the distinction between “active efforts” as required under the federal Indian Child Welfare Act and “reasonable efforts” as required under Alaska’s Child in Need of Aid statutes. The Article begins with a discussion of these statutory duties, and continues with a summary of the legal history and development of the two legislative “efforts” standards. The author argues that despite a few aberrations, the Alaska Supreme Court has consistently applied a single standard for both active and reasonable efforts.*

I. THE PARENT AND THE SYSTEM

When a state agency takes a child into custody as a result of abuse or neglect, the child’s parent has a set of rights unique in American law. The parent has a status similar to that of a defendant, and yet the parent is entitled to substantial help from the State before his or her parental rights are altered or lost. Before

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the State may permanently separate the parent and child, the State, through the Department of Health and Social Services, has a duty to try to reunify them. The substance of that duty is the subject of this Article.

The child's ethnicity changes the level of the State's duty. When the child in custody is an Indian, the State has an affirmative duty to make "active efforts" to reunify the family.<sup>1</sup> When the child is non-Indian, the State must make "reasonable efforts."<sup>2</sup> These two phrases, "active efforts" and "reasonable efforts," embody duties that touch on important rights of parents. However, differences between the two are rarely addressed. This Article will compare them, arguing that the Alaska Supreme Court has applied a central principle that unifies both standards.

In *R.J.M. v. State, Dep't of Health and Social Services*,<sup>3</sup> a decision that upheld the constitutionality of the child protection statutes against a challenge that they were void for vagueness,<sup>4</sup> one particular phrase by the court stands out: the statutes "limit[] intervention to cases in which the State can prove an ongoing, objectively demonstrated failure to provide basic parental care that reflects unwillingness to serve as a parent."<sup>5</sup> The Alaska Constitution is not the source of "efforts" requirements. However, *R.J.M.* articulated the rule that the court has actually applied in interpreting the statutory "efforts" requirements in children's cases. The court had earlier held that the right of a parent to the custody and companionship of his or her child is one of the most basic civil liberties.<sup>6</sup> Before parental rights are altered or lost, the trial court must assure itself that it is relying on accurate, objective information relevant to the question of this particular adult's willingness to parent this particular child; then the case may proceed safely to the serious judgment of whether parent and child must be separated.

The "efforts" finding thus becomes part of the picture that the court uses to compare parental conduct to the statute's requirements. Do the actions of the Department of Health and Social Services ("the Department") sufficiently reduce the possibility that a decision to alter a parent's rights will not be based upon subjective impressions, or on temporary or incidental behavior? Do the Department's actions reliably allow the court to predict future pa-

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1. 25 U.S.C. § 1912(d) (2000).

2. ALASKA STAT. § 47.10.086 (Michie 2000).

3. 973 P.2d 79 (Alaska 1999).

4. *R.J.M. v. State, Dep't of Health & Soc. Servs.*, 973 P.2d 79 (Alaska 1999).

5. *Id.* at 87.

6. *In re K.L.J.*, 813 P.2d 276, 279 (Alaska 1991).

rental behavior? The distinctions between "active" and "reasonable" efforts build upon these fundamental analytical principles.

The "efforts" requirements originate in federal law, but federal law does not define either of the two. Alaska has judicially adopted three substantive distinctions between the "active" and "reasonable" requirements. First, as the plain meaning of "active efforts" implies, the State must make an affirmative effort to offer programs and services to facilitate reunification; simply stating the need for the parent to take advantage of and making the parent aware of such services is insufficient. Second, "active efforts" is a more stringent standard than "reasonable efforts." Finally, there is a distinctly Indian character to active efforts; therefore, the State must search for reunification services uniquely offered by the Indian community itself.

## II. THE SIGNIFICANCE OF THE "EFFORTS" REQUIREMENTS

In Alaska, the Department of Health and Social Services is the executive agency that assumes custody of abused or neglected children.<sup>7</sup> The Department must show the trial court at every important stage of an Alaska child dependency proceeding that the State is fulfilling its duty to make active or reasonable efforts.

Pursuant to the Indian Child Welfare Act ("ICWA")<sup>8</sup> the Department may not place an Indian child in foster care until the Department has made active efforts to provide "remedial services and rehabilitative programs designed to prevent the breakup of the Indian family."<sup>9</sup> Emergencies are the major exception; in such cases the agency may take a child into custody "under applicable state law" without first showing active or reasonable efforts.<sup>10</sup>

If the child is non-Indian, the Department must make reasonable efforts "designed to prevent out-of-home placement of the child or to enable the safe return of the child to the family home, when appropriate."<sup>11</sup> The "reasonable efforts" requirement is taken directly from federal law.<sup>12</sup> However, in contrast to the ICWA, other federal law does not impose the efforts requirement directly. Rather, the state plan for dependent children must in-

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7. See ALASKA STAT. § 47.05.060 (Michie 2000).

8. 25 U.S.C. §§ 1901-63 (2000).

9. *Id.* § 1912(d) (2000); see also *C.J. v. State, Dep't of Health & Soc. Servs.*, 18 P.3d 1214, 1217 (Alaska 2001).

10. 25 U.S.C. § 1922 (2000).

11. ALASKA STAT. § 47.10.086(a) (Michie 2000).

12. 42 U.S.C. § 671(a)(15) (1994).

clude reasonable reunification efforts in order for the State to qualify for federal funds.<sup>13</sup>

There is no federal requirement of active efforts findings at specific stages of the Indian child dependency case. However, Alaska court rules require “active efforts” findings at the same points where the Alaska statutes require “reasonable efforts” findings: at the temporary custody hearing, when the court approves an out-of-home placement, in a temporary disposition order after the child is adjudicated as a child in need of aid, at disposition, at permanency hearings, and in orders terminating parental rights.<sup>14</sup> In short, the Department must show that it is fulfilling the efforts tests at every significant stage of the proceeding.

The practical effect of requiring such findings is uncertain. A 1996 survey of children’s cases found that judicial officers touched only briefly upon the “efforts” issue, and usually checked the appropriate box on a form order rather than writing out separate findings.<sup>15</sup> In nearly five hundred cases reviewed for the study, fewer than one percent had a finding of “no reasonable efforts” at some point in the case.<sup>16</sup> The Department’s awareness that it must report its activities to the court may have made the agency more mindful of fulfilling its duties; appellate case law consistently shows that the Department makes a variety of reunification efforts before parental rights are terminated.

### III. ALASKA LAW IN THE 1970S: A “NO EFFORTS” STANDARD

#### A. Case Law Through 1976

Historically, the legislature, not the judiciary, has led the way in creating substantive rights and duties in child dependency cases. Before passage of federal legislation that mandated efforts to reunify families, no such requirement existed under Alaska law. The Alaska Supreme Court has never created an affirmative duty to reunify families in the absence of a statutory directive or court rule.

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13. 42 U.S.C. § 671(a)(15) (1994). The distinction between a substantive rule and a precondition for funding is important. *See, e.g., Suter v. Artist M.*, 503 U.S. 347 (1992) (stating that as an appropriations statute, 42 U.S.C. § 671 (1994), creates no private cause of action based on allegations of a failure to make reasonable efforts).

14. Child in Need of Aid (“CINA”) R. 10.1(a); 10.1(b); 15(f)(1),(2); 17(c); 17.2(f)(1); and (18)(c)(2)(A), (B), respectively.

15. TERESA W. CARNS ET AL., ALASKA JUDICIAL COUNCIL, IMPROVING THE COURT PROCESS FOR ALASKA’S CHILDREN IN NEED OF AID 98-100 (1996).

16. *Id.* at 100.

At the beginning of the 1970s, the overriding goal in child dependency proceedings was to rescue the child, which meant removal from the abusive home.<sup>17</sup> Family preservation and reunification concerns were essentially nonexistent. In 1971, the legislature strengthened protections for the child by enacting new legislation, but did not require family reunification efforts.<sup>18</sup> Under the new legislation, before an agency can petition to terminate parental rights, "it shall offer protective social services and pursue all other reasonable means of protecting the child."<sup>19</sup> The law created a provision for a voluntary agreement between the Department and the parent, whereby the parent could have the child placed in state custody and returned at any time.<sup>20</sup> However, the law created no Departmental duty to reunify the child with the parent.

In a 1971 case, *In re E.M.D.*,<sup>21</sup> the Alaska Supreme Court limited the Department's ability to institutionalize a child to only those situations involving categories of civil custody authorized by state statute. The court noted that "benevolent social theory . . . does not furnish justification for dispensing with constitutional safeguards."<sup>22</sup> Despite the limited nature of the ruling, it set a tone the supreme court has followed since: the Department will be held to its powers and duties as defined by statute. Despite a judicial reluctance to create rights in the family or duties for the Department, the court is willing, within the boundaries of the statutes, to examine Departmental actions closely and to give substantive meaning to the rights and duties created there.

Reunification, however, was not a legislative goal at this time. Departmental attempts to reunify parent and child were the result of stipulation, not legislation or court decision.<sup>23</sup> In the 1976 case of *In re E.J.(T.)*, the supreme court left open the possibility that the trial court could impose a duty to reunify as a matter of discretion.<sup>24</sup>

*In re E.J.(T.)* highlights the differences between child dependency cases in the 1970s and today. Today, a case plan must be aimed toward reunification, even if it is unlikely to succeed. *In re E.J.(T.)*, however, observed "that a rehabilitation program is not a common practice in the trial courts absent approval by a represen-

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17. *See id.* at 2.

18. ALASKA STAT. § 47.17.030 (Michie 2000).

19. *Id.* § 47.17.030(d) (Michie 2000).

20. *Id.* § 47.10.230 (repealed 1996) (current version at § 47.14.100(c)).

21. 490 P.2d 658 (Alaska 1971).

22. *Id.* at 660 (citation omitted).

23. *See In re S.D., Jr.*, 549 P.2d 1190, 1201-02 (Alaska 1976); *see also In re B.J.*, 530 P.2d 747, 748 (Alaska 1975).

24. *In re E.J.(T.)*, 557 P.2d 1128, 1132 (Alaska 1976).

tative of the State.”<sup>25</sup> In *In re E.J.(T.)*, both the State and the guardian ad litem opposed such a plan,<sup>26</sup> and it was neither adopted by the trial court nor required by the supreme court.<sup>27</sup>

In the same year that *In re E.J.(T.)* was decided, perhaps signaling dissatisfaction with the existing child dependency system, the Alaska Supreme Court referred favorably to the idea of reunification efforts: “Children should, if at all possible, be maintained in their homes with society providing the supportive services necessary to keep the family together.”<sup>28</sup> The court offered an inventory of such services, including “homemaker training, child care, job placement, income supplements, alcohol rehabilitation, psychological counseling, and psychiatric therapy.”<sup>29</sup> The court cited and quoted at length the family preservation and reunification statutes of four other states.<sup>30</sup> As will be seen, when the Alaska legislature defined “reasonable efforts” in 1998, its definition reflected the supreme court’s 1976 inventory of services.<sup>31</sup>

#### B. 1976 Legislative Changes

In 1976 the Alaska State Legislature took a tentative step toward recognizing the value of family preservation.<sup>32</sup> The new state policy removed the child from her parents “only as a last resort.”<sup>33</sup> However, the statute created no affirmative duties for the Department to fulfill before removal. The law outlined only general purposes, gave no specific directives to the executive agencies and created no sanctions for failure to follow the statute.

The Alaska Supreme Court interpreted this new provision no more expansively than the general provisions of the statute. In the 1981 case of *E.A. v. State, Dep’t of Health and Social Services*<sup>34</sup> the court acknowledged that Alaska Statutes section 47.05.060 required the State to “preserve and strengthen the family ties.”<sup>35</sup> But in keeping with the generalized nature of the Department’s duties, the court noted that the Department fulfilled its obligation to pre-

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25. *Id.* at 1132-33.

26. *Id.* at 1133.

27. *Id.*

28. *In re S.D., Jr.*, 549 P.2d at 1199.

29. *Id.* at 1199 n.29.

30. *Id.* (citing the statutes of California, Minnesota, Colorado and Vermont).

31. ALASKA STAT. § 47.10.990(9) (Michie 2000); see *In re S.D. Jr.*, 549 P.2d at 1199 n.29.

32. ALASKA STAT. § 47.05.060 (Michie 2000).

33. *Id.*

34. 623 P.2d 1210 (Alaska 1981).

35. *Id.* at 1213 n.5.

serve the family "by offering counseling and supervision to E.A. on numerous occasions."<sup>36</sup> The court then remanded the case to determine whether there was clear and convincing evidence that E.A.'s conduct initially leading to termination proceedings would continue if the court decided against termination.<sup>37</sup> Thus, in 1981, the bare offer of services was sufficient; no further requirements stated that the services be actively promoted or reasonably related to the parents' problem.<sup>38</sup> The contrast between the standard under *E.A.* and the Department's duties today could scarcely be greater.

Thus, as the Indian Child Welfare Act was under consideration, Alaska law favored, but did not require, some set of efforts toward preserving the child's home.

#### IV. THE "EFFORTS" REQUIREMENTS TAKE SHAPE

##### A. Active Efforts

1. *The Indian Child Welfare Act of 1978 ("ICWA").* The ICWA<sup>39</sup> established an affirmative state duty to make active efforts to reunify Indian families. It addressed the high frequency of removal of Indian children from Indian homes, the many placements of those children with non-Indian families and the states' consistent failure to recognize and give credence to Indian cultural practices. Requiring active efforts to reunify Indian families, among other guarantees, was the cure.

The pertinent subsection of the ICWA states:

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.<sup>40</sup>

This requirement complemented congressional findings.<sup>41</sup> After recognizing both the importance of children to the "continued existence and integrity of Indian tribes"<sup>42</sup> and the federal trustee inter-

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36. *Id.*

37. *Id.* at 1213.

38. *E.A. v. State, Dep't of Health and Social Services* involved an Indian child, but the termination of parental rights became final before the effective date of the Indian Child Welfare Act.

39. 25 U.S.C. §§ 1901-63 (2000).

40. *Id.* § 1912(d).

41. *Id.* § 1901.

42. *Id.* § 1901(3).

est in protecting Indian children,<sup>43</sup> the United States Congress found

that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

that the States, exercising their recognized jurisdiction over Indian child custody proceedings . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.<sup>44</sup>

The next section of the statute states the federal purpose, in light of these problems: “[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families.”<sup>45</sup> The requirement of active efforts promoted this policy.

2. *Active Efforts Defined.* The Alaska Supreme Court has held that “no pat formula” distinguishes active from non-active efforts.<sup>46</sup> The Indian Child Welfare Act does not define active efforts. However, state court rulings have drawn three distinctions between the “active” and “reasonable” standards.

First, an active efforts standard requires that the State provide services. Congress had observed the general lack of state efforts to provide even those reunification services that were nominally available. As one remedy to preserve Indian families, Congress expected that such services would actually be made available. The House Interior and Insular Affairs Committee reported:

[25 U.S.C. section 1912(d)] provides that a party seeking foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide assistance designed to prevent the breakup of Indian families. The Committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a federal requirement in that regard with respect to Indian children and families.<sup>47</sup>

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43. *Id.*

44. *Id.* § 1901(4)-(5).

45. *Id.* § 1902.

46. *A.A. v. State*, 982 P.2d 256, 261 (Alaska 1999).

47. H.R. REP. NO. 95-1386, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N 7530, 7545, *quoted in* *K.N. v. State*, 856 P.2d 468, 476 (Alaska 1993).

The Alaska Supreme Court followed this legislative history in *A.M. v. State*<sup>48</sup> ("A.M. I") and adopted this definition:

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 that 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.<sup>49</sup>

The court has reaffirmed this standard several times.<sup>50</sup>

The Alaska Supreme Court has disapproved of Departmental claims that it satisfies its "active efforts" duty when the agency writes a case plan and encourages the parent to follow it.<sup>51</sup> In *A.M. I* the parent was incarcerated and the chance of fulfilling the case plan was low.<sup>52</sup> The court noted, "The State simply claims that, by preparing a reunification plan and encouraging [the father] to seek services available within the institution, it fulfilled its duty of making active efforts to provide remedial services."<sup>53</sup> The court refused to hold that this effort constituted active efforts.<sup>54</sup>

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48. 891 P.2d 815 (Alaska 1995) ("A.M. I"), *appeal after remand*, 945 P.2d 296 (Alaska 1997) ("A.M. II"), *overruled in part on other grounds by In re S.A.*, 912 P.2d 1235, 1241 (Alaska 1996), *legislatively overruled on other grounds by* 1998 Alaska Sess. Laws ch. 99 § 1(b)(2)(B), *and later appeal sub nom. N.A. v. State*, Div. of Family & Youth Servs., 19 P.3d 597 (Alaska 2001).

49. *Id.* at 826 n.12 (quoting CRAIG DORSAY, THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES MANUAL 157-58 (1984)). Dorsay quoted a letter from attorney Bert Hirsch, one of the drafters of the ICWA.

50. *N.A. v. State*, Div. of Family & Youth Servs., 19 P.3d 597, 602-03 (Alaska 2001); *C.J. v. State*, Dep't of Health & Soc. Servs., 18 P.3d 1214, 1219 n.17 (Alaska 2001); *A.A. v. State*, Dep't of Health & Soc. Servs., 982 P.2d 256, 261 (Alaska 1999).

51. *A.M. I*, 891 P.2d at 826-27.

52. *Id.*

53. *Id.* at 827.

54. *Id.* The court's response to such testimony in the context of "reasonable efforts" is uncertain. When the court reviewed similar testimony in the context of "reasonable efforts," it seemed inclined to accept identification and referral as actions that supported the reasonableness of the Department's efforts. *M.W. v. State*, Dep't of Health & Soc. Servs., 20 P.3d 1141, 1146 (Alaska 2001). However, earlier case law also approved Departmental actions that consisted of nothing but the offer of service. *E.A. v. State*, 623 P.2d 1210 (Alaska 1981). Alaska law has undergone a radical change on this issue since then.

The second distinction that the Alaska Supreme Court has drawn between active and reasonable efforts is that “active efforts” is the higher standard. For example, when interpreting the former Child in Need of Aid (“CINA”) Rules, the court held that “active efforts” is a “more stringent” burden than “reasonable efforts.”<sup>55</sup> After passage of the 1998 revisions to Alaska CINA statutes, the court continued to cite the “more stringent protections of ICWA”<sup>56</sup> and referred to the “high standards of ICWA.”<sup>57</sup>

The final distinction that the court has drawn between active and reasonable efforts is that active efforts have a distinctly Indian character. The year after the passage of the ICWA, the Bureau of Indian Affairs (“BIA”) developed the meaning of “active efforts.”<sup>58</sup> Active efforts began to include a search for help from within the Indian culture.<sup>59</sup> Active efforts “shall take into account the prevailing social and cultural conditions and the way of life of the Indian child’s tribe. They shall involve and use the available resources of the extended family, the tribe, Indian social services agencies, and individual Indian care givers.”<sup>60</sup> The BIA extended “individual Indian care givers” to include traditional healers and other tribal members who have special skills “that can be used to help the child’s family succeed.”<sup>61</sup>

This essentially Indian character of active efforts has not been extensively developed in Alaska case law. However, the Alaska Supreme Court has cited tribal efforts to reunify when listing the

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55. *E.M. v. State*, Dep’t of Health & Soc. Servs., 959 P.2d 766, 768 (Alaska 1998) (interpreting former CINA Rule 15(g)).

56. *C.J. v. State*, Dep’t of Health & Soc. Servs., 18 P.3d 1214, 1217 (Alaska 2001).

57. *Id.* at 1219; *see also* *M.W.*, 20 P.3d at 1146 n.18 (imposing a “higher ‘active efforts’ requirement”).

58. The BIA did not publish these guidelines as regulations because the agency did not intend to make them binding. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979). The Alaska Supreme Court, however, has reviewed the guidelines for assistance when interpreting the ICWA. *See, e.g.*, *L.G. v State*, Dep’t of Health & Soc. Servs., 14 P.3d 946, 952, 954-55 (Alaska 2000); *Adoption of N.P.S.*, 868 P.2d 934, 936 (Alaska 1994); *Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989) (per curiam); *Matter of Parental Rights of T.O.*, 759 P.2d 1308, 1309-10 (Alaska 1988) (per curiam); *D.E.D. v. State*, 704 P.2d 774, 779 n.8 (Alaska 1985); *D.A.W. v. State*, 699 P.2d 340, 342 (Alaska 1985) (per curiam).

59. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

60. *Id.* at 67,592.

61. *Id.*

services that comprised "active efforts" toward unifying a parent and child.<sup>62</sup>

3. *Applying the Federal Standard.* The application of the active efforts standard to specific cases has shown the Alaska Supreme Court's insistence on accurate information about the parent's willingness and ability to care for the child. Notwithstanding this insistence, the court frequently has found that the Department has provided active efforts. Where the parent has shown an unwillingness to accept parental duties, courts have found that the Department has met the active efforts standard.

For example, *Matter of J.W.*<sup>63</sup> indirectly addressed the Department's duty to make active efforts by addressing the corresponding question of the parent's duty to cooperate with the Department. In particular, the court held that a parent's unwillingness to participate in rehabilitation may be considered when determining the sufficiency of the State's active efforts.<sup>64</sup> The Department may not assume, however, that a lack of willingness exists until active efforts to provide remedial and rehabilitative services have been made.<sup>65</sup>

In *Matter of J.W.*, parental rights were terminated after the child had been in custody for about five years.<sup>66</sup> Over a two-year period, the Division of Family and Youth Services ("DFYS") contacted the parent, who was addicted to alcohol, and provided services aimed at helping him overcome his alcoholism.<sup>67</sup> DFYS took steps to supplement the father's treatment while incarcerated and to facilitate his treatment after release.<sup>68</sup> DFYS continued to help by transporting him to meetings of Alcoholics Anonymous and referring him to a Native sobriety group. Before the father was released from a halfway house, DFYS also contacted a substance abuse officer who was assigned to the apartments where the father was planning to live.<sup>69</sup> After the father was released and subsequently relapsed, social workers tried several times to contact him.<sup>70</sup> Additionally, they continued to do such things as set up

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62. *N.A. v. State, Div. of Family & Youth Servs.*, 19 P.3d 597, 603 (Alaska 2001) (citing services offered by a tribal organization).

63. 921 P.2d 604 (Alaska 1996).

64. *Id.* at 610.

65. *Id.* at 609.

66. *Id.* at 605-06.

67. *Id.* at 609-10.

68. *Id.* at 610.

69. *Id.*

70. *Id.*

telephone visitation between the father and his children.<sup>71</sup> The Department reduced its efforts after two years, but the court felt this reduction was justified because the parent had shown an unwillingness to participate in remedial efforts.<sup>72</sup>

Even on these facts, the court expressed some disapproval of DFYS's efforts, suggesting that "arguably" their actions were not sufficiently active to satisfy the ICWA.<sup>73</sup> The court pointed out that DFYS only initiated contact with the father after one of his children asked about him.<sup>74</sup> DFYS did not follow up on the father's treatment program and failed to contact the treatment center.<sup>75</sup> In other words, DFYS "simply relied on the court system" to assure the follow-through.<sup>76</sup> Moreover, the social workers never contacted the state district attorney's office or the local city attorney's office regarding the father's compliance.<sup>77</sup> When the father left the program, DFYS did not obtain a discharge summary, nor did it make an attempt to coordinate efforts with the city regarding the father's failure to complete treatment.<sup>78</sup> These efforts violated the unifying principle—the Department's inaction threatened the ability of the court to determine what the parent could or could not do toward rebuilding his household. However, despite its apparent doubts, the Alaska Supreme Court affirmed the lower court's findings of reasonable and active efforts.<sup>79</sup>

In *D.H. v. State, Dep't of Health and Social Services*<sup>80</sup> the court concluded that Departmental efforts to assist a mother to enroll in and complete drug rehabilitation satisfied the active efforts requirement.<sup>81</sup> After the child was taken into custody, the Department tried to help the mother "in her expressed desire to participate in a substance abuse treatment program. This effort included various evaluations and programs, all of which [the mother] left prior to completion."<sup>82</sup> The supreme court concluded that "the State's attempts to assist [the mother] in enrolling and completing drug rehabilitation programs" qualified as active efforts under the

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71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. 929 P.2d 650 (Alaska 1996).

81. *Id.* at 650.

82. *Id.* at 652.

ICWA.<sup>83</sup> The court also received favorably the Department's arguments that it made active and reasonable efforts by placing the child in relatives' homes so the mother could stay with the child.<sup>84</sup>

In *E.M. v. State, Dep't of Health and Social Services*,<sup>85</sup> the trial court found "huge, almost embarrassing efforts" to provide help to the parents.<sup>86</sup> The supreme court found that the Department had provided adequate remedial services and rehabilitative programs by arranging visits with the children and also by offering the parents counseling, a Male Awareness Program, urinalysis, money and bus passes.<sup>87</sup>

A parent's incarceration affects the level of services that the Department must offer, but it does not excuse the Department from making active efforts. In *A.M. I*,<sup>88</sup> the court responded to a parent's incarceration in two ways. First, the court found that incarceration is a legitimate consideration when the Department and the trial court consider what services are possible.<sup>89</sup> Second, the court found that incarceration must be distinguished from a parental unwillingness to cooperate.<sup>90</sup> Without expressly stating the nature of the distinction, the court in a later case assumed that because a prisoner is much less able to take advantage of services, the Department's burden of making active efforts is reduced,<sup>91</sup> but the court pointed out that incarceration does not eliminate entirely the duty to provide active efforts.<sup>92</sup> The court also held that the length of the sentence is related to the minimum level of services that will constitute active efforts.<sup>93</sup> The unstated implication was that the longer the sentence, the lower the Departmental burden.

The Department has no duty to provide active efforts to the father until paternity is established and its own delay in identifying the father does not mean that the Department has failed to make active efforts.<sup>94</sup> Under the ICWA, "parent" does not include an unwed father where paternity has not been acknowledged or es-

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83. *Id.* at 655.

84. *Id.* at 655 n.15.

85. *E.M. v. State, Dep't of Health & Soc. Servs.*, 959 P.2d 766 (Alaska 1998).

86. *Id.* at 769.

87. *Id.* at 770 n.6.

88. *A.M. I*, 891 P.2d 815, 827 (Alaska 1995).

89. *Id.*

90. *Id.*

91. *A.A. v. State*, 982 P.2d 256, 261 (Alaska 1999).

92. *Id.*

93. *Id.* at 263.

94. *Id.* at 261.

tablished.<sup>95</sup> For example, in *A.A. v. State*, the father did not acknowledge paternity before the blood test established it, and so the Department owed him no duty of active efforts.<sup>96</sup> The court upheld the finding of active efforts, but disapproved of the Department's failure to arrange a case plan, calling its efforts "relatively passive."<sup>97</sup> The lack of a plan was made irrelevant because of the father's history of unwillingness to participate in any treatment and his history of violent behavior while incarcerated.<sup>98</sup>

In *N.A. v. State*,<sup>99</sup> the supreme court found active efforts where the Department worked with several different programs to evaluate and provide treatment for the parent's addiction and mental health problems.<sup>100</sup> The supreme court listed many services that the Department provided over several years before parental rights were terminated.<sup>101</sup> *N.A.* is an excellent illustration in which the Department provided sufficient services to ensure the trial court that the proposed termination of parental rights was based upon objective information about a particular parent's willingness to parent a particular child.<sup>102</sup>

4. *The Court's Current Discontent.* In three 2001 decisions, the court showed more dissatisfaction with the Department's efforts. The court found for the parent in one case, and in the second, two Justices dissented from a ruling in favor of the Department. In the third decision, the court extended the duty of active efforts to private petitioners in adoption cases where an Indian child is involved.

The court found a lack of active efforts in *C.J. v. State, Dep't of Health and Social Services*.<sup>103</sup> However, the court found several interrelated problems, and it is difficult to isolate the absence of ac-

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95. 25 U.S.C. § 1903(9) (2000).

96. *A.A.*, 982 P.2d at 262.

97. *Id.*

98. *Id.*

99. *N.A. v. State*, Div. of Family & Youth Servs., 19 P.3d 597 (Alaska 2001).

100. *Id.* at 603 (stating that the "state's efforts were more than active; they were exemplary").

101. *Id.* at 598-99.

102. In 2001, the court again addressed the situation where the parent faced addiction and mental health problems and found that the Department had made active efforts by its detailed attention to these problems over a period of years. *V.S.B. v. State, Dep't of Health & Soc. Servs.*, 2001 WL 1635939, Op.No. 5517 (Alaska Dec. 21, 2001), *amended on other grounds by V.S.B. v. State, Dep't of Health & Soc. Servs.*, 2002 WL 227310, Op.No. 5537 (Alaska Feb. 15, 2002).

103. 18 P.3d 1214 (Alaska 2001).

tive efforts as the factor that ultimately persuaded the court. The court found a departmental failure to prove several elements of 25 U.S.C. section 1912, as well as a lack of expert testimony, a failure to show that negative parental conduct would likely continue and an agency failure to make active efforts at reunification.<sup>104</sup>

The primary focus of the court was on the absence of any serious Departmental inquiry about the parent's true situation. The children were taken into custody in Alaska, but the parent lived in Florida and was trying to establish a household there.<sup>105</sup> The Department seemed satisfied to let Florida authorities handle the case. As a result, at the Alaska trial on the petition to terminate parental rights, the Department's witnesses offered only unsupported hearsay reports from the Florida social workers about what the parent was doing or failing to do.<sup>106</sup> Firsthand information about the parent was absent, and the court refused to find that statutory standards had been met.<sup>107</sup>

The Department's failure to obtain reports directly from the parent or to seek confirmation of the Florida reports affected the expert witness testimony and the determination of active efforts. The expert witness offered only generalizations about the effect of parental absence on a child and failed to address the particular situation of these children and this specific parent.<sup>108</sup> As a result of the witness's failure to discuss the specific facts of the case, the testimony was found insufficient to meet the standards of the ICWA.<sup>109</sup> Additionally, the Department's failure to inquire about the parent's situation in Florida was compounded by the court's finding that the Department made only "minimal efforts."<sup>110</sup> Although the court did not suggest what services might have been offered, it expressed clear dissatisfaction with the efforts made.

The facts of *T.F. v. State, Dep't of Health and Social Services*<sup>111</sup> divided the court. Here, the issue was the balance between the duty of the Department to make active efforts and the duty of the parent to cooperate with those efforts. On several levels, the opinion throws uncertainty into a fairly settled and consistent set of interpretive rules.

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104. *Id.* at 1217-19.

105. *Id.* at 1216.

106. *Id.* at 1218-19.

107. *Id.* at 1219.

108. *Id.* at 1218.

109. *Id.*; 25 U.S.C. § 1912(d) (2000).

110. *C.J. v. State, Dep't of Health & Soc. Servs.*, 18 P.3d 1214, 1219 (Alaska 2001).

111. 26 P.3d 1089 (Alaska 2001).

The facts were not in doubt, but their interpretation was sharply contested. The majority paid special attention to which party was responsible for each delay that occurred throughout the termination proceedings.<sup>112</sup> The decision to assign merit and blame to virtually every step in the case produced a meticulous recitation of the facts that is difficult to outline. The major events are summarized as follows: the Department took twin girls from their mother a few days after their birth in July 1999.<sup>113</sup> In early August, the Department learned that the putative father, T.F., was incarcerated. The agency moved for a paternity test, which the court ordered for October 13, 1999.<sup>114</sup> By that date, however, the father had fled custody.<sup>115</sup>

The father returned to police custody on November 7, 1999,<sup>116</sup> and the Department filed its petition to terminate parental rights on November 15, 1999.<sup>117</sup> The father appeared for the paternity test on December 28, 1999, and the confirming results arrived February 29, 2000.<sup>118</sup> In an exchange where two opinions seldom agreed on the significance of certain facts, both the majority and the dissent concluded that the duty to make active efforts was triggered by the determination that T.F. was indeed the father.<sup>119</sup>

On March 1, 2000, the social worker wrote to the father, informing him that the girls were his biological children, and the father then asked for visitation.<sup>120</sup> Three weeks before the termination trial, the social worker, the father's attorney and the father met, and prepared a case plan.<sup>121</sup> While incarcerated, the father began taking classes in parenting and fetal alcohol syndrome.<sup>122</sup> The social worker supervised several visits between the father and the twins.<sup>123</sup> Despite these efforts on the father's part, the superior court terminated his parental rights at a trial in April 2000.<sup>124</sup> The

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112. *Id.* at 1090-92.

113. *Id.* at 1090.

114. *Id.* at 1091.

115. *Id.*

116. *Id.*

117. *Id.* at 1090.

118. *Id.* at 1091.

119. *Id.* at 1095, 1097.

120. *Id.* at 1091.

121. *Id.* at 1095.

122. *Id.*

123. *Id.* at 1091.

124. *Id.* at 1092.

supreme court upheld the trial court finding that the Department had made active efforts.<sup>125</sup>

The majority reiterated its previous ruling that a Departmental delay in determining paternity was not itself a violation of the active efforts requirement.<sup>126</sup> The majority saw the father's failure to appear for the first paternity test as an intentional refusal to cooperate and, in its implications, virtually dispositive. The overall principle of *T.F.* is that, in advancing the goal of protecting children, the court will require the parent to cooperate with active efforts before it finds fault with a Departmental failure to act.

The dissent, however, criticized the majority's decision as "one strike and you're out."<sup>127</sup> The majority denied that the analogy to criminal law was appropriate, but it did not deny that its ruling had serious consequences for the father. Further, the majority did not see this rule as punitive: "Rather, it is driven by the policy of protecting children in need of aid."<sup>128</sup> Custody by either parent was likely to result in serious harm to the children, and further delay in the case would have been "detrimental to their welfare and best interests."<sup>129</sup>

The majority approved of the Department's active efforts. The Department scheduled two paternity tests, attempted to contact the father during his absence, supervised three visits with his children, contacted his probation officer to make sure that he was enrolled in appropriate classes and met with him to discuss his case.<sup>130</sup> In relation to previous children's cases, this list is fairly modest and illustrates the extent to which incarceration and non-cooperation reduce the Department's duty to the parent.

The dissent reasoned as follows: because the ICWA imposes a duty of active efforts and requires that those efforts be found unsuccessful, sufficient time must be allowed for those efforts to fail or succeed.<sup>131</sup> The only active effort that failed was the Department's attempt to allow the father to establish paternity by setting up the October 1999 paternity test. Thus the question was whether

125. *Id.* at 1093-94.

126. *See id.* at 1092 (citing *A.A. v. State*, 982 P.2d 256, 262 (Alaska 1999)).

127. *Id.* at 1099.

128. *Id.* at 1095.

129. *Id.* (citing the superior court opinion) (internal quotations omitted).

130. *Id.* at 1095 n.28. The paternity tests thus played two roles. The scheduling of the tests satisfied the active efforts requirement because it was designed to locate a father; then the test results, once positive, created a new set of Department duties, this time to a specific man.

131. *Id.* at 1098.

that failure, in and of itself, relieved the Department of any further duty to make additional efforts.<sup>132</sup>

The dissent argued that the Department had not fulfilled its duty to make active efforts.<sup>133</sup> The father was responsible for a three-week delay when he absconded from custody, but the Department delayed in scheduling a second paternity test for seven weeks after he returned.<sup>134</sup> The dissent argued that “[t]he underlying idea of subsection 1912(d) is that troubled and situationally unfit parents should receive rehabilitative services so that they may be able to fulfill traditional parental roles. In the process of receiving rehabilitative services, some false starts and setbacks are to be expected.”<sup>135</sup> According to the dissent, treating one missed appointment as a discharge of the active duty requirement is inconsistent with the purposes of the ICWA.<sup>136</sup>

The dissent argued that the Department’s efforts did not meet the requirements of the ICWA.<sup>137</sup> The dissent described the extent of DFYS’s efforts: “What DFYS did was to formulate a case plan and arrange three visits between [the father] and the children.”<sup>138</sup> The case plan itself could not qualify as an effort toward reunification because its stated goal was adoption.<sup>139</sup> The dissent agreed that arranging for and monitoring the father’s attendance at prison classes might qualify as active efforts; however, these classes began so close to trial that they had no reasonable chance of success.<sup>140</sup> The dissent also pointed out that the trial court made no finding that active efforts as to the father had been unsuccessful.<sup>141</sup> Before parental rights may be terminated, the party seeking to create a foster care placement must satisfy the court that active efforts have been made to prevent the breakup of the Indian family.<sup>142</sup> The trial court found that the father had failed to cooperate, but this finding was directed at his failure to appear at a paternity test that was scheduled during the time he had absconded from custody.<sup>143</sup> The father cooperated at all times after his paternity was established,

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132. *Id.*

133. *Id.*

134. *Id.* at 1098-99.

135. *Id.*

136. *Id.*

137. *Id.* at 1097.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. 25 U.S.C. § 1912(d) (2000).

143. *T.F. v. State*, 26 P.3d 1089, 1097 (Alaska 2001).

and the trial court never found that these later efforts were unsuccessful.<sup>144</sup> The dissent argued the trial court failed to adequately consider these later efforts.

Under the ICWA, the party proposing the foster care placement must satisfy the court that active reunification efforts have been unsuccessful.<sup>145</sup> The majority's disregard of the "lack of success" issue is the question that creates the most uncertainty. The trial court found that, even assuming "the speediest possible recovery by the parents," the delay in permanent placement would be too long for the girls, who urgently needed a stable family.<sup>146</sup> That finding is the only one cited by the majority that would address the "lack of success" issue, even tangentially. The majority does not offer its reasoning for disregarding the absence of this finding. The unspoken rationale might run as follows: assume the "speediest possible recovery" finding is correct—more delay would result in irreparable harm. On this assumption, no level of parental success in fulfilling case plan requirements would ever be adequate because even the shortest amount of time leading to that success would still injure the child. Thus, even a successful parental outcome would still cause emotional and physical harm to the child; by the majority's definition, this is a lack of success at rehabilitation.

This line of reasoning is not explicitly stated in the court's opinion. However, if the trial court's failure to make an affirmative finding of a lack of success is covered by its finding that no parental recovery could ever be short enough, then such a train of assumptions and implications seems to be the only possible basis for making such a presumption valid. Yet the majority failed to articulate why it was willing to disregard the absence of a "lack of success" finding.

The dissent observed that the Department put this case on the fast track in response to the legislative changes of 1998.<sup>147</sup> But this speed prevented active efforts from succeeding. The dissent noted that "under ICWA lack of success is a precondition to termination. Termination cannot serve as the reason why active efforts fail to succeed."<sup>148</sup> Under the supremacy clause of the United States Constitution, "the requirements of ICWA must be observed even if

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144. *Id.* at 1097-98.

145. 25 U.S.C. § 1912(d). Other rights under the ICWA require a "determination . . . that continued custody . . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e)-(f).

146. *Id.* at 1092.

147. *Id.* at 1098; 1998 Alaska Sess. Laws ch. 99 (substantially revising ALASKA STAT. § 47.10.088 (Michie 2000)).

148. *T.F.*, 26 P.3d at 1098.

that means some slippage in the state statutory scheduling requirements.<sup>149</sup>

*T.F.* creates a great deal of uncertainty in Alaska child protection law. The court disregarded several earlier cases that had formed a fairly coherent set of interpretive rules. Before *T.F.*, when ruling under state law, the Alaska Supreme Court insisted that trial courts affirmatively make findings required by court rule.<sup>150</sup> Because the party proposing foster care must demonstrate the lack of success of reunification efforts to know whether the court was satisfied by the proof at trial, there must be some affirmative finding for the benefit of the parties and the appellate court.<sup>151</sup> The supreme court disregarded its previous findings requirement without explaining why it did so.

Before *T.F.*, the court held that the Department may not presume that efforts at reunification will be unsuccessful.<sup>152</sup> In *T.F.*, the supreme court upheld the trial court's finding that the Department made active efforts at reunification after only six weeks of such efforts.<sup>153</sup> *T.F.* does not negate prior Alaska case law, but rather dilutes it substantially. After *T.F.*, the Department is nominally forbidden to presume a lack of success but now may undertake active efforts on a schedule that effectively precludes any chance of success before trial.

*T.F.* is a throwback to the 1970's, when removing the child from abusive parents was the only goal of the system and family reunification generally was not an important consideration. In *T.F.*, nearly all factors that might raise doubt that the court's termination of parental rights was correct were subordinated to the goal of child protection.<sup>154</sup> This goal is legitimate, without question, but the ICWA also declares a policy of Indian family preservation.<sup>155</sup> The *T.F.* majority did not explain why the goal of reunification carries such little weight in relation to the goal of child protection.

The *T.F.* opinion does not fit the pattern that the Alaska Supreme Court had previously followed. Earlier opinions on the "efforts" issues could be joined by a single principle that the purpose

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149. *Id.*

150. *Matter of J.L.F.*, 828 P.2d 166, 172 (Alaska 1992). Later cases held that the requirement to make findings was met if the trial court directly addressed and resolved the issue.

151. 25 U.S.C. § 1912(d).

152. *A.M. I*, 891 P.2d 815, 826-27 (Alaska 1995).

153. *T.F. v. State*, 26 P.3d 1089, 1094 (Alaska 2001).

154. *Id.* at 1096.

155. 25 U.S.C. § 1912(2) (2000).

of the Department's efforts was to avoid a momentary and subjective picture of the parent and thus permit a decision that would reunify parent and child when circumstances allowed. *T.F.* calls that principle into doubt by emphasizing the negative factors of incarceration and parental noncooperation.

Near the end of 2001, the Alaska Supreme Court returned to its traditional interpretation that the ICWA requirements are present to protect the parent and that the trial court must directly and specifically address the question of future parental behavior. *D.J. v. P.C.*<sup>156</sup> applied the ICWA to private adoptions where the adoptee is an Indian child. The court noted that the duty to make active efforts extended to the private petitioner, the maternal grandmother, who was the child's Indian custodian.<sup>157</sup> The father, who disputed the adoption, was serving a jail sentence of twenty years for attempted murder.<sup>158</sup> The court reiterated earlier rulings that although incarceration may diminish the level of active efforts, incarceration does not eliminate the duty of the Department to make such efforts.<sup>159</sup> The supreme court addressed the trial court's generalized finding that because the father was incarcerated, the active efforts requirement had been met "to the extent necessary, under the circumstances of this case."<sup>160</sup> The supreme court indicated that such a finding was insufficient and required that the question of active efforts, and their success or failure, be specifically addressed in the trial court decision.<sup>161</sup>

5. *Confusion over the Degree of Cooperation.* The Alaska Supreme Court has taken a dim view of parents who fail to cooperate with their case plans and then argue a lack of active efforts.<sup>162</sup> A parent's unwillingness to cooperate with a case plan reduces the Department's duty to continue to provide such efforts.<sup>163</sup> By contrast, the parent's willingness to cooperate and to prepare for the

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156. 36 P.3d 663 (Alaska 2001).

157. *Id.* at 673.

158. *Id.* at 666.

159. *Id.* at 673 nn.53 & 54 (citing *A.A. v. State, Div. of Family & Youth Servs.*, 982 P.2d 256, 261 (Alaska 1999) and *A.M. I*, 891 P.2d 815, 827 (Alaska 1995).

160. *Id.*

161. *Id.*

162. *See, e.g.*, *N.A. v. State*, 19 P.3d 597, 603 (Alaska 2001) (citing earlier cases).

163. *A.M. I*, 891 P.2d at 827 (citing earlier cases).

return of the child are factors indicating that negative parental conduct is less likely to continue.<sup>164</sup>

However, the court has sent contrasting signals about cooperation and its relationship to the active efforts requirement. In *A.H. v. State, Dep't of Health and Social Services*<sup>165</sup> the father asserted on appeal that although the Department had made active efforts, those efforts were not reasonable because the programs offered were so stressful and intense that they caused the parents increasingly to "isolate themselves . . . from the services available to them."<sup>166</sup> Although prior decisions imply that if a parent concedes the larger question of active efforts, he or she will automatically lose on the narrower question of reasonable efforts, the supreme court in *A.H.* did not mention such a relationship between the two standards. Rather, the court recognized that the "reasonable efforts" issue was also present and required resolution.<sup>167</sup>

In *A.H.* at least fourteen different organizations offered to help the parents before the children were removed, and the parents received additional help after removal.<sup>168</sup> The father argued on appeal that the large array of services was very stressful and that "the intensity of [the family's] program schedule was not reasonable."<sup>169</sup> DFYS and other agencies had provided services to the father in the areas where there was some concern about his "parenting, domestic violence, and mental health."<sup>170</sup> The agencies coordinated their efforts so that all services occurred during three days each week.<sup>171</sup> The court's opinion implies that this level of intensity is not so stressful as to excuse participation in the Department's active efforts. The court concluded that this level of services, in relation to the father's willingness to accept them, was sufficient to demonstrate both reasonable and active efforts.<sup>172</sup>

By itself, the *A.H.* ruling is unremarkable. But *A.H.* appears to have implicitly overruled earlier case law. In *A.M. v. State* ("*A.M. II*"), the court wrote, "We have never suggested that the scope of the State's duty to make active remedial efforts should be affected by a parent's motivation or prognosis before remedial ef-

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164. *C.J. v. State, Dep't of Health & Soc. Servs.*, 18 P.3d 1214, 1218-19 (Alaska 2001).

165. 10 P.3d 1156 (Alaska 2000).

166. *Id.* at 1164.

167. *Id.* at 1160.

168. *Id.* at 1164.

169. *Id.*

170. *Id.* at 1164-65.

171. *Id.* at 1165.

172. *Id.*

forts have commenced."<sup>173</sup> *A.H.* purported to rely on *A.M. II*, but in *A.H.* the court dropped the initial phrase, "[w]e have never suggested,"<sup>174</sup> from the above-quoted statement. The omission of the opening phrase reversed the meaning of the quote, which then read as follows: "the scope of the State's duty to make active remedial efforts should be affected by a parent's motivation or prognosis before remedial efforts have commenced."<sup>175</sup> It seems likely, however, that *A.H.*'s omission of part of the quote is an error. The Alaska Supreme Court has consistently recognized the duty of active efforts and has not excused such efforts in the absence of some attempt at reunification. *A.M. I* held, for example, that

to vary the scope of the State's ICWA duty based on subjective, pre-intervention criteria such as a parent's motivation or treatment prognosis might defeat the purpose of the active remedial efforts requirement, for it would enable the State to argue, in all doubtful and difficult cases, that it had no duty to make active remedial efforts.<sup>176</sup>

By contrast, the revised quote from *A.H.* implies that the adequacy of active efforts can be determined before such efforts begin. *A.H.* would stand alone in Alaska law if it created such a doctrine. Thus, it is highly likely that *A.M. I* still represents the court's thinking on its refusal to define the scope of active efforts without first offering the parent the opportunity to cooperate.<sup>177</sup>

## B. "Reasonable Efforts" Becomes Part of the Legal Landscape

1. *The Adoption Assistance and Child Welfare Act of 1980.* Much of today's child dependency law took shape in 1980 with the passage of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA").<sup>178</sup> The AACWA created both the goal of reunification of non-Indian children with the family and the "reasonable efforts" requirement:

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides

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173. 945 P.2d at 304 (quoting *A.M. I*, 891 P.2d 815, 827 (Alaska 1995)).

174. *Id.*

175. *A.H.*, 10 P.3d at 1164 n.25.

176. *A.M. I*, 891 P.2d at 827.

177. The court later relied on *A.M. I* when describing a petitioner's duty to the parent in private adoption cases. *D.J. v. P.C.*, 36 P.3d 663, 678, n.54 (Alaska 2001). The court's use of *A.M. I* further suggests that while incarceration affects the feasibility of different kinds of active efforts, a presumed lack of success, by itself, cannot reduce the scope of such efforts.

178. Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.).

that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.<sup>179</sup>

Federal funds could be used to design and operate a program to “help children remain with their families and where appropriate help children return to their families.”<sup>180</sup> AACWA required that the case plan include “a plan of services which will be provided in order to improve family conditions and facilitate returning the child to his home.”<sup>181</sup>

2. *AACWA Leaves the Active Efforts Requirements Untouched.* Although AACWA created a second “efforts” test, it did not affect the existing test under the ICWA.<sup>182</sup> In fact, AACWA made no reference to the ICWA. Thus, the two parallel “efforts” tests began. The absence of cross-references makes the two more difficult to compare but also makes clear that they are separate; one does not modify the other.<sup>183</sup>

Additionally, the only provision of AACWA that affected Indian parents was a later amendment that effectively strengthened the ICWA requirements.<sup>184</sup> In 1994, Congress amended AACWA to require that state plans for child welfare services “contain a description, developed after consultation with tribal organizations . . . in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act.”<sup>185</sup> The amendments did not alter the substantive requirements of the ICWA.

Furthermore, if a conflict existed between the requirements of these two child welfare laws, rules of statutory construction require that the ICWA would govern because, in the absence of some statement of congressional intent, a specific statute controls a gen-

179. *Id.* § 101, 94 Stat. 501-03 (current version at 42 U.S.C. § 671(a)(15)(Supp. 1999)).

180. S. REP. NO. 96-336, at 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1453.

181. H.R. CONF. REP. NO. 96-900, at 46 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1561, 1566.

182. DAVID SIMMONS & JACK TROPE, NAT’L INDIAN WELFARE ASS’N, INC., P.L. 105-89 ADOPTION AND SAFE FAMILIES ACT OF 1997: ISSUES FOR TRIBES AND STATES SERVING INDIAN CHILDREN 10-12, *available at* <http://www.muskie.usm.maine.edu/helpkids/newpub.html> (last visited Feb. 27, 2002).

183. For this analysis, I am indebted to the work of the National Indian Child Welfare Association (“NICWA”). This comparison of ICWA and AACWA tracks NICWA’s commentary on this issue. *See id.*

184. *See* Adoption Assistance and Child Welfare Act, Pub. L. No. 103-437, § 204, 108 Stat. 4398, 4456 (1994) (amended at 42 U.S.C. § 622(b) (Supp. 1999)).

185. 42 U.S.C. § 622(b)(ii) (Supp. 1999).

eral statute, regardless of which is enacted first.<sup>186</sup> Here, AACWA and its amendments deal with all children who are in state custody, regardless of ethnicity. The ICWA deals with Indian children specifically. Additionally, statutes intended for the benefit of Indians are liberally construed to accomplish that purpose.<sup>187</sup>

3. "Reasonable Efforts" in Alaska Law from 1980 to 1998. The phrase "reasonable efforts" was slow to appear in Alaska law. A comprehensive revision of the CINA Rules included the term for the first time only in 1987.<sup>188</sup> The first express reference to AACWA did not appear in the CINA Rules until a rule regarding temporary custody was amended in 1989.<sup>189</sup> The requirements of AACWA were not thoroughly woven into the CINA Rules until 1990, when the Alaska Supreme Court amended four rules to include reasonable efforts findings.<sup>190</sup>

Opinions after the 1990 rule change underscored the court's continued caution with the "reasonable efforts" requirement. Although the court has felt free to disapprove of departmental practices, the court has yet to overturn a judgment that found a failure to make reasonable efforts. This result contrasts with the court's review of "active efforts," where the court has overturned an order based on the Department's failure to make active efforts to reunify the family under the ICWA.<sup>191</sup>

The first opinion issued after the 1990 rule change held only that the trial court must make the findings required by the rule. In *J.L.F. v. State*,<sup>192</sup> the mother appealed a superior court decision terminating her parental rights, arguing that the Department's reunification plan was unreasonable.<sup>193</sup> The trial court, however, had not made any findings on whether the Department plan was reasonable, leaving no substantive issue for appellate review.<sup>194</sup> Thus, the supreme court noted that reunification efforts must be reason-

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186. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

187. *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918); *John v. Baker*, 982 P.2d 738, 752 (Alaska 1999).

188. Alaska Supreme Court Order 845 (eff. Aug. 15, 1987).

189. Alaska Supreme Court Order 914 (eff. Jan. 15, 1989).

190. Alaska Supreme Court Order 1010 (eff. Jan. 15, 1990).

191. *See C.J. v. State, Dep't of Health & Soc. Servs.*, 18 P.3d 1214 (Alaska 2001).

192. 828 P.2d 166 (Alaska 1992), *overruled on other grounds by In re S.A.*, 912 P.2d 1235 (1996).

193. *Id.* at 167, 171.

194. *See id.* at 172.

able and that the trial court must affirmatively find them as such; the court then remanded the case for a resolution of this issue.<sup>195</sup>

In *F.T. v. State, Dep't of Health and Social Services*<sup>196</sup> the supreme court addressed the implications of seemingly conflicting trial court findings on whether the State had met the "reasonable efforts" standard.<sup>197</sup> The trial court originally compared the Department's actions to the reasonable efforts requirements of former CINA Rule 15(g), which required such findings at the time of the child's removal from the home, and found that reasonable efforts had not been made.<sup>198</sup> Given the absence of a reasonable reunification plan, the trial court held that it could not reach the next question: whether the parent's harmful conduct was likely to continue.<sup>199</sup> The inference drawn by the trial court—that the absence of reunification efforts prevented a finding on the issue of likely future parental conduct—was not tested on appeal. However, the trial court ruling was sensible: the absence of Departmental efforts made it impossible to know what the parents would have done in the presence of such efforts. The trial court ordered that the Department work with the father on visitation and counseling.<sup>200</sup> Later, however, the trial court made the affirmative finding of reasonable efforts by the Department.<sup>201</sup> The supreme court upheld this finding and stated that "[t]here was no inconsistency between the orders because [the second] order can be read to reflect the State's efforts at promoting visitation in the wake of [the first] order."<sup>202</sup>

4. *The Adoption and Safe Families Act of 1997*. The Adoption and Safe Families Act of 1997 ("ASFA")<sup>203</sup> amended two titles of the Social Security Act and created the current federal framework for administration of child dependency cases. As in the case of AACWA, ASFA does not directly impose a duty of reasonable efforts, but rather the "reasonable efforts" requirement remains a precondition for federal funding. ASFA extensively changed the

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195. *Id.* In later cases, the court held that the requirement to make findings was met so long as the trial court directly addressed and resolved the issue. *See, e.g., R.R. v. State*, 919 P.2d 754, 755-56 (Alaska 1996); *In re T.W.R.*, 887 P.2d 941, 944-45 (Alaska 1994).

196. 922 P.2d 277 (Alaska 1996).

197. *Id.* at 281.

198. *Id.* at 279.

199. *Id.*

200. *Id.*

201. *Id.* at 279, 281.

202. *Id.* at 281.

203. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

wording of the reasonable efforts requirement and clarified several issues left unanswered by AACWA:

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—

provides that—

(A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, in making such reasonable efforts, the child's health and safety shall be the paramount concern;

(B) . . . reasonable efforts shall be made to preserve and reunify families—

(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and

(ii) to make it possible for a child to safely return to the child's home.<sup>204</sup>

As noted, "reasonable efforts" was not defined by AACWA in 1980, and federal law has not defined it since. The United States Department of Health and Human Services has issued a set of principles to help the states and Indian tribes develop services to children and families. Many of these principles are similar to the definition of "family support services" that appeared in the 1998 revision of the Alaska statutes.<sup>205</sup> These rules are only guidelines. In Alaska the substantive content of "reasonable efforts" finds its source entirely in state law. As in the case of AACWA in 1980, the ASFA is silent regarding the ICWA.

5. *1998 Revision of the Alaska Statutes.* Defining a reasonable efforts standard in Alaska has clearly posed a challenge. In 1996, the Alaska Judicial Council noted the difficulty of drafting a uniform standard for reasonable efforts: "[a] reasonable efforts finding necessarily depends upon resources available in a community, and other variables that militate against a universal standard for the findings."<sup>206</sup> Despite the size and complexity of this problem, Congress, the state legislature and the Alaska judiciary have created a discernible pattern of how the "efforts" requirements will be interpreted and what the requirements are intended to accomplish. Among other things, the 1998 Alaska law revisions require services

204. 42 U.S.C. § 671(a)(15) (Supp. 1999).

205. Compare 45 C.F.R. §§ 1355, 1356 (2000), with ALASKA STAT. § 47.10.990(9) (Michie 2000).

206. TERESA W. CARNS ET AL., IMPROVING THE COURT PROCESS FOR ALASKA'S CHILDREN IN NEED OF AID 98 (1999), available at <http://www.ajc.state.ak.us/Reports/cina96.pdf> (citations omitted) (last visited Feb. 27, 2002).

to be provided in each individual community,<sup>207</sup> a provision which goes a long way toward adapting the standard to a state with diverse communities.

In response to ASFA, the 1998 Alaska State Legislature substantially redrafted the state's child welfare and juvenile delinquency laws.<sup>208</sup> These amendments addressed many questions left unanswered in federal law. The 1998 revisions were so extensive that today there is much less disparity between departmental duties when the child in custody is an Indian and when the child is a non-Indian. The new duties under Alaska law are worded very differently from those in the ICWA, but the net effect is to move the standard of "reasonable efforts" much closer to that of "active efforts."

With the revisions, the statute now states:

[With certain exceptions] the department shall make timely, reasonable efforts to provide family support services to the child and to the parents or guardian of the child that are designed to prevent out-of-home placement of the child or to enable the safe return of the child to the family home, when appropriate . . . . The department's duty to make reasonable efforts under this subsection includes the duty to

- (1) identify family support services that will assist the parent or guardian in remedying the conduct or conditions in the home that made the child a child in need of aid;
- (2) actively offer the parent or guardian, and refer the parent or guardian to, the services identified under (1) of this subsection; the department shall refer the parent or guardian to community-based family support services whenever community-based services are available and desired by the parent or guardian; and
- (3) document the department's actions that are taken under (1) and (2) of this subsection.<sup>209</sup>

Within this broader duty, the statute further refines the individual terms:

"[R]easonable efforts" means, with respect to family support services required under [Alaska Statutes section] 47.10.086, consistent attempts made during a reasonable time period and time-limited services.<sup>210</sup>

"[R]easonable time" means a period of time that serves the best interests of the child, taking in account the affected child's

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207. ALASKA STAT. § 47.10.990(9) (Michie 2000).

208. 1998 Alaska Sess. Laws ch. 99.

209. ALASKA STAT. § 47.10.086(a) (Michie 2000).

210. *Id.* § 47.10.990(22).

age, emotional and developmental needs, and ability to form and maintain lasting attachments.<sup>211</sup>

"[F]amily support services" means the services and activities provided to children and their families, including those provided by the community, a church, or other service organization, both to prevent removal of a child from the parental home and to facilitate the child's safe return to the family; "family support services" may include counseling, substance abuse treatment, mental health services, assistance to address domestic violence, visitation with family members, parenting classes, in-home services, temporary child care services, and transportation.<sup>212</sup>

For the parent, the exercise of these rights requires a line-by-line and word-by-word analysis of the text of the statute. Have the efforts been consistent? Are the services community-based? Are the time periods reasonable in relation to what the Department expects the parent to accomplish?<sup>213</sup> The inventory of services echoes the hypothetical list of services that the Alaska Supreme Court offered in *In re S.D., Jr.* in 1976, the first opinion to suggest that there might be such a thing as reasonable efforts and what the standard might be.<sup>214</sup>

The Alaska Supreme Court amended the CINA Rules in 1999 to reflect the 1998 legislative changes; almost every rule was affected. As noted above, the trial court findings of reasonable efforts are required throughout the custody proceeding.<sup>215</sup> The 1998 statute revolutionized the nature of the affirmative duties owed to the parents. Twenty years earlier, the mere existence of case plans with duties to the parents was a rarity. Today the case plan itself is mandatory, and it is much clearer when the Department's duties arise and what they must specifically include.

6. *The Alaska Supreme Court and Reasonable Efforts Since 1998.* Since 1998, the Alaska Supreme Court's analysis continues to be what it has been: a straightforward comparison of the language of the statute with the actions of the Department. However, the legal context has changed dramatically. Where nothing existed before by which to evaluate the action of the Department, there is

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211. *Id.* § 47.10.990(23).

212. *Id.* § 47.10.990(9).

213. For more information pertaining to this question, see Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: the 1998 Changes to Alaska's Child in Need Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, in this edition of the Alaska Law Review.

214. 549 P.2d 1190, 1199 n.29 (Alaska 1976).

215. *See supra* note 14 and accompanying text.

now a comprehensive set of duties that the Department owes the parent and child. The court's opinions have reflected that change.

In each of the cases since 1998, the parent's lack of cooperation with the Department's efforts was virtually dispositive of the question of reasonable efforts. This response to a lack of cooperation fits the overall principle of straightforward comparison, as the parent's unwillingness to change his or her behavior demonstrates, as clearly as any evidence could, the unlikelihood that this parent will ever help create a reasonably stable household. Whatever the duty of "reasonable efforts" might include, a parent's challenge on appeal of the Department's actions will not survive the parent's refusal to cooperate.

In *A.B. v. State, Dep't of Health and Social Services*<sup>216</sup> the trial court found that reasonable efforts had been made, and the supreme court affirmed.<sup>217</sup> The court cited "DFYS's efforts in creating the case plan and offering [the mother] services that would help her achieve the objectives of that plan."<sup>218</sup> The opinion lists the specific help the Department offered: help with filling out housing applications, creating a case plan, arranging visitation and designing a treatment plan for substance abuse and mental health problems.<sup>219</sup> The mother either refused such help or failed to follow up on it.<sup>220</sup>

The mother argued that her failure to participate was based on a justifiable cause. She argued that "her failure to comply with her case plan was not fully voluntary because the failure was caused by her poverty and her homelessness."<sup>221</sup> The mother refused help in finding housing and did not offer evidence to show that it was her poverty that caused her to refuse housing.<sup>222</sup> The supreme court acknowledged that the mother was "extremely poor" during the relevant time period but also noted that the Department and other organizations gave the mother an opportunity for a stable lifestyle and that the mother declined those opportunities.<sup>223</sup>

When the parent fails to contact anyone connected with his child's case, the Department's efforts are reasonable when they consist of attempts to locate the parent, even if substantive services are not offered. The court has reviewed two such cases recently in

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216. 7 P.3d 946 (Alaska 2000).

217. *Id.* at 953.

218. *Id.*

219. *Id.* at 952-53.

220. *Id.* at 953.

221. *Id.* at 952.

222. *Id.*

223. *Id.*

*M.W. v. State, Dep't of Health and Social Services*<sup>224</sup> and *C.W. v. State, Dep't of Health and Social Services*.<sup>225</sup>

In *M.W.*, the father met with the social worker and discussed the case plan, including the need for the parents to visit the child.<sup>226</sup> The father said that he understood the plan.<sup>227</sup> He later objected to not getting a copy of the plan, but then admitted that receiving a copy might not have made a difference.<sup>228</sup> The father then made himself unavailable for one year by neither visiting nor speaking with the child.<sup>229</sup> The social worker testified concerning her extensive efforts to locate and contact the father during this time.<sup>230</sup> The supreme court found these efforts reasonable and held that when making a reasonable efforts finding, the trial court may consider the father's unwillingness to participate in his case plan.<sup>231</sup>

In *C.W.*, the social worker located the parent and met with him to discuss the case plan.<sup>232</sup> The father then moved, losing contact for over three years with both the social worker and his own lawyer.<sup>233</sup> His parental rights were subsequently terminated.<sup>234</sup> The father argued on appeal that the Department had failed to make reasonable efforts to accommodate his learning disability and his alcohol abuse in order to enable him to be reunited with his child.<sup>235</sup> The father also argued that the Department had failed to make reasonable efforts under the Americans with Disabilities Act of 1990 ("ADA") to avoid excluding him from the "services, programs, or activities of a public entity."<sup>236</sup>

The court found that the father's long absence undermined his arguments about reasonable efforts to provide services.<sup>237</sup> In determining whether the Department was diligent in its continuing attempts to locate the father, the court focused on whether the efforts to contact the father were reasonable and found that they

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224. 20 P.3d 1141 (Alaska 2001).

225. 23 P.3d 52 (Alaska 2001).

226. *M.W.*, 20 P.3d at 1143.

227. *Id.* at 1146.

228. *Id.*

229. *Id.* at 1143.

230. *Id.* at 1146.

231. *Id.* (citing *A.M. II*, 945 P.2d 296, 305-06 (Alaska 1997), which was decided under the ICWA).

232. *C.W. v. State, Dep't of Health & Soc. Servs.*, 23 P.3d 52, 53 (Alaska 2001).

233. *Id.* at 54.

234. *Id.*

235. *Id.*

236. 42 U.S.C. § 12,132 (2000); *C.W.*, 23 P.3d at 55 n.10.

237. *C.W.*, 23 P.3d at 56.

were.<sup>238</sup> Therefore, no further need existed to address the question of whether providing certain substantive services would have been reasonable.<sup>239</sup> As for the ADA claim, the court found that the father had failed to draw a connection between his learning disability and his abandonment of the children.<sup>240</sup> The disability claim had “no logical bearing” on the abandonment findings.<sup>241</sup> Moreover, the father had also failed to challenge the adequacy of the case plan at the first meeting with the social worker.<sup>242</sup> Thus, the court’s determination that the Department had met its burden of making reasonable efforts to reunify the family despite its not having provided substantive services was influenced greatly by the father’s absence and lack of cooperation in the proceedings.

#### V. CONCLUSION

On first review, the decisions of the Alaska Supreme Court that address the “efforts” requirements of the ICWA and of Alaska state law appear to be a fact-specific jumble of cases, virtually unrelated to each other. Generally, the court seems to be reinventing the wheel on each review of a CINA case. In fact, however, aside from *T.F. v. State, Dep’t of Health and Social Services*,<sup>243</sup> the Alaska Supreme Court has applied a single standard fairly consistently over the past quarter century: have the efforts of the Department objectively demonstrated an ongoing failure on the part of the parent to provide basic care that reflects unwillingness to serve as a parent? The court’s failure to succinctly articulate that standard has created an appearance of uncertainty where it does not exist.

Such a test would address each of the major questions that come before the trial court. The ICWA requires the testimony of an expert witness in order to terminate parental rights.<sup>244</sup> Is the expert testimony sufficient to show an “objective” failure by this parent, or is the testimony merely a collection of generalities or based on information exclusively from one source? Another question the trial court must consider is whether the history of parental conduct is sufficient to show an “ongoing” failure, or whether the period of time covered by the testimony is too brief to allow a reliable pre-

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238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *See id.* at 53.

243. 26 P.3d 1089 (Alaska 2001).

244. 25 U.S.C. § 1912(f) (2000).

diction of the future? These questions are relevant for every case.

For the future, the ruling in *T.F.*, in which the court did not consider the parent's overall cooperation and participation to as great an extent as it did in the other cases discussed, calls for clarification or reversal. The ruling interrupts a body of law that worked well to permit termination of parental rights when the facts so required, but also assured that accurate information about the parent would be put before the court.