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## 16. PLACEMENT

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**Disclaimer:** *A Practical Guide to the Indian Child Welfare Act* is intended to facilitate compliance with the letter and spirit of ICWA and is intended for educational and informational purposes only. It is not legal advice. You should consult competent legal counsel for legal advice, rather than rely on the *Practical Guide*.

### 25 U.S.C. § 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.

**Disclaimer: The above provisions of the Indian Child Welfare Act are set forth to facilitate consideration of this particular topic. Additional federal, state or tribal law may be applicable. Independent research is necessary to make that determination.**



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#### **16.1 What are the preferred foster and adoptive placements?**

The policy section of the Indian Child Welfare Act (ICWA), § 1902, states that one of the primary purposes of the ICWA is to ensure the placement of Indian children “in foster and adoptive homes which will reflect the unique values of Indian culture.” Legislative history to § 1915 states that the section seeks “to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.” H.R. REP. NO. 95-1386, at 23 (1978). Section 1915 reflects this purpose by establishing an order of preference for foster and adoptive placement of an Indian child. Section 1915(a) establishes the following order of preference for adoptive placement of an Indian child:

- (1) A member of the Indian child's extended family;
- (2) Other members of the Indian child's tribe; or

- (3) Other Indian families.

Section 1915(b) establishes the following order of preference for foster care placement of an Indian child:

- (1) A member of the Indian child's extended family;
- (2) A foster home licensed, approved, or specified by the Indian child's tribe;
- (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (4) 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.

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There are additional preferences that apply to foster placements of an Indian child. The child must be placed in the least restrictive setting which most approximates a family and in which the child's special needs, if any, can be met. The Indian child must also be placed within reasonable proximity to his or her home, taking into account any special needs of the child.

### **Practice Tip:**

In most instances, Indian children should be placed in relative foster care or adoptive homes if Title IV-E funds are supporting the placement. Even for a child who does not meet the definition of an Indian child under ICWA, Title IV-E requires states to first look to relatives for foster care and adoptive placements for children. See also FAQ 19 Application of Other Federal Laws. The practitioner should be aware that placement with relatives satisfies the permanency requirements of the Adoption and Safe Families Act of 1997 (ASFA), 42 U.S.C. §§ 673b, 678, 679b (2000), and constitutes good cause not to proceed with termination of parental rights.

### **16.2 How is extended family defined?**

The ICWA defines "extended family member" for purposes of the Act as "defined by the law or custom of the Indian child's tribe." 25 U.S.C. § 1903(2). In the absence of a tribal law definition, the ICWA defines extended family member as "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." If a tribal law definition exists in writing, a copy may be submitted to an appropriate state agency or court as a public record of the tribe entitled to full faith and credit under § 1911(d), so long as the copy is prepared to conform with state evidence requirements for self-authentication.

The term extended family member under the ICWA applies primarily to the selection of appropriate placements for Indian children pursuant to the placement preferences of § 1915. The definition of extended family member under the ICWA includes both Indian and non-Indian relatives. Some tribal laws express a preference for extended family members who are members of the tribe.

### **16.3 How are non-Indians in general and non-Indian family members involved in placement?**

The ICWA treats non-Indian parents and extended family members the same as Indian family members, with regard to placement preferences, although a family member's ability to foster or maintain an Indian child's connection to his or her tribe or culture is an appropriate factor to consider in determining placement of the child.

The ICWA does not absolutely prohibit placement of an Indian child in a non-Indian home, although there is a strong preference for placement in an Indian home. Legislative history to § 1915 states that where possible, an Indian child should remain in the Indian community, but the section "is not to be read as precluding the placement of an Indian child with a non-Indian family." H.R. REP. NO. 95-1386, at 23 (1978). Placement in a non-Indian, non-extended family member home can occur under three circumstances. First, if the tribe has licensed the non-Indian home, that home is entitled to a preference for a foster or pre-adoptive placement. Second, placement of an Indian child with a non-Indian family can occur after a diligent search has been completed for families meeting the preference criteria and no suitable homes are available. Third, placement of an Indian child in a non-Indian family can occur if good cause not to follow the placement preferences of § 1915 is established to the satisfaction of the court, and pursuant to the ICWA.

### **16.4 What is good cause not to follow the Act's preferences?**

Section 1915 of the ICWA states for both adoptive (§ 1915(a)) and foster care (§ 1915(b)) placements that the listed preferences shall be given with regard to the placement of an Indian child "in the absence of good cause to the contrary." This term is not defined in the ICWA. In legislative history to an earlier draft of the bill that became the ICWA, the Senate Committee on Indian Affairs stated that the term "good cause for refusal" was designed to provide state courts with a degree of flexibility in determining the disposition of a placement proceeding involving an Indian child. S. REP. NO. 95-597, at 17 (1977). The Bureau of Indian Affairs (BIA) Guidelines cite this legislative history in interpreting good cause as set forth in § 1915. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) (guidelines for state courts).

The burden of proof for showing good cause not to follow the ICWA's placement preferences is on the

party who is opposing compliance with the preferences. Indian Child Custody Proceedings, 44 Fed. Reg. at 67,594. This burden must be met by clear and convincing evidence. *In re S.E.G.*, 507 N.W.2d 872, 878 (Minn. Ct. App. 1993), *rev'd on other grounds*, 521 N.W.2d 357 (Minn. 1994). The BIA Guidelines state that the state courts must follow strict procedures and meet stringent requirements to justify any result contrary to § 1915's placement preferences. Indian Child Custody Proceedings, 44 Fed. Reg. at 67,586.

The BIA Guidelines set out a list of three factors that may, either singly or together, constitute good cause not to follow the placement preferences in appropriate cases. *Id.* at 67,594.

These three factors are:

- (1) The request of the biological parents or the child when the child is of sufficient age;
- (2) The extraordinary physical or emotional needs of the child as established by testimony of qualified expert witnesses; or
- (3) The unavailability of suitable homes that meet the preference criteria.

Parental preference is discussed in response to another question in this section. The BIA Guidelines state that the wishes of an "older child" are important in making an effective placement. Regarding extraordinary physical or emotional needs, the BIA Guidelines state that "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." Extraordinary emotional or physical needs must be established by a qualified expert witness. *S.E.G. I*, 507 N.W.2d 872. The unavailability of suitable homes is addressed in response to another question in this section.

Some state courts have applied criteria other than those listed by the BIA as good cause not to follow the placement preferences of the ICWA. *In re F.H.*, 851 P.2d 1361 (Alaska 1993). Other state courts have rejected these same factors, such as bonding, as inappropriate factors to constitute good cause under the ICWA. *S.E.G. I*, 507 N.W.2d 872. There has been a tendency to attempt to expand the category of extraordinary physical or emotional needs to include a much broader range of physical or emotional circumstances than the narrow category contemplated by the BIA in its Guidelines. *See, e.g., Seminole Tribe of Fla. v. Dep't of Children & Families*, 959

So. 2d 761 (Fla. Dist. Ct. App. 2007); *In re F.H.*, 851 P.2d 1361; *In re B.G.J.*, 111 P.3d 651, 659 (Kan. Ct. App. 2005), *aff'd*, 133 P.3d 1 (Kan. 2006). Good cause is one of the main areas of continuing litigation under the ICWA, and there is continuing development in the law.

### **16.5 Can a tribe alter the order of placement preference, and if so, how is this accomplished?**

Yes. Section 1915(c) of the ICWA allows an Indian tribe to establish a different order of placement preference for foster care placements and adoptive placements than those set out in § 1915(a) and (b). The tribe effects this change in placement preference order by resolution. When the tribal resolution is received by the agency or court effecting the placement of an Indian child, the agency or court shall follow the changed order of preference so long as the placement is the least restrictive setting appropriate to the particular needs of the child as provided in § 1915(b). Tribal input on placements of tribal children can also be the subject of a state-tribal child welfare agreement pursuant to § 1919 of the ICWA.

Many tribes have established an order of preference for placement of tribal children in their juvenile or family law codes. Since these codes are enacted by resolution of the tribal governing body and are public acts of the tribe, they may satisfy the requirements of this section, but see the practice tip below.

In many ICWA cases, a tribe will advocate a specific tribal placement for an Indian child who is the subject of a state child custody proceeding. The tribe has the most chance of success if it has selected a home that is interested in the specific child, is qualified to meet any special needs the child may have, and the tribe has performed a home study, and references support the home.

#### **Practice Tip:**

For tribes that intend to alter ICWA's placement preferences, it is important that the tribal governing body enact a tribal resolution or code explicitly referring to the ICWA placement preferences in state court proceedings in compliance with § 1915(c).

### **16.6 How does recruitment of Indian families play into placement?**

Recruitment of Indian foster and adoptive families is perhaps the most critical component necessary to

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implement the ICWA. If foster and adoptive families meeting the ICWA's placement preferences are not available, the ICWA's intent to maintain Indian children within their tribal culture and community cannot be fulfilled. Indian children can be placed outside the preference order of the ICWA only after a diligent search to find suitable homes meeting the preference criteria has been completed, and has been unsuccessful. The BIA Guidelines state that a diligent search to find a suitable family should include 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. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,595 (Nov. 26, 1979) (guidelines for state courts).

The primary problem with finding suitable Indian foster and adoptive homes is recruitment and funding. Grant money under Part II of the ICWA, §§ 1931-34, can be used by tribes for foster care and adoptive home recruitment. States must be continually aware of their responsibility to recruit Indian homes, and tribes must assist and encourage states to seek Indian foster and adoptive homes. Active recruitment and retention efforts are necessary because of Indian peoples' historical suspicion of involvement with state social services' agencies. The tribes and states should identify federal funding that can be used to recruit Indian homes. Some states have special funds available to assist recruitment of Indian homes.

**Practice Tip:**

The Multi-Ethnic Placement Act (MEPA), 42 U.S.C. §§ 622, 1996b (2000), places federal requirements on states to recruit a diverse pool of foster and adoptive homes that reflect the diversity of children in substitute care. See also FAQ 19.11 and 19.12, Application of Other Federal Laws.

States should be actively involved with tribes and urban Indian organizations to increase the pool of foster and adoptive homes for the placement of Indian children. Mainstream methods of recruiting Indian homes are rarely successful, necessitating the engagement of tribal governments and Indian urban organizations.

### 16.7 Does the Removal of Barriers to Inter-Ethnic Adoption provision in Title IV-E affect ICWA placements?

No. The provisions under this law, that were formerly under the Multi-Ethnic Placement Act (MEPA), 42 U.S.C. §§ 622, 1996b (2000), bar the delay or denial of placements based upon race. This law expressly exempts ICWA placements from its coverage. 42 U.S.C. § 674(d)(4) (2000). See also FAQ 19.11 and 19.12, Application of Other Federal Laws.

### 16.8 How do tribal values apply to placement?

One of the primary purposes of the ICWA is to foster or maintain the connections between an Indian child and his or her community, tribe and culture. This purpose is achieved by placing an Indian child who requires placement within his or her tribal community. Tribal values apply to placement since placement within the tribe or tribal community by definition fulfills the purposes of the ICWA. Legislative history of the ICWA documented the failure of state social services' agencies and state courts to view tribal values and conditions as legitimate, and concluded that many removals of Indian children and placement of those children in non-Indian homes occurred for inappropriate reasons.

Congress, in enacting the ICWA, declared that complying with the Act's provisions is in the best interests of the Indian child. Since the ICWA incorporates tribal values throughout its text—in preference for tribal court jurisdiction over Indian children, in granting preference to tribal policy decisions about placement preferences for Indian children, in defining adequate tribal courts according to tribal values—Congress in essence declared that complying with tribal values with regard to Indian children is in those children's best interests.

**Practice Tip:**

One of the many ways that tribes incorporate tribal values into placements is through use of customary adoptions. These adoptions do not entail the termination of parental rights. They have also been approved for federal subsidies under Title IV-E.

### 16.9 How do socio-economic conditions factor into placement?

The ICWA states that the standards to be applied in meeting the preference requirements of § 1915 of the ICWA "shall be the prevailing 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.” This standard displaces state regulations and requirements about what constitutes an adequate placement, for example, with regard to the physical condition of the structure where the child will be placed or how many people live in the home. It also displaces non-Indian perceptions about the propriety of the involvement of extended family members in raising an Indian child. Legislative history of the ICWA notes that under tribal custom and tradition, members of the Indian child’s extended family have definite responsibilities and duties in assisting in child-rearing, but that many non-Indian institutions look at custody of an Indian child by extended family members as prima facie evidence of parental neglect. H.R. REP. NO. 95-1386, at 10 (1978). Under ICWA case law, a state agency cannot refuse to approve placement of an Indian child within the tribal community because of preconceived notions about whether conditions within the tribal community are adequate. *In re M.E.M.*, 635 P.2d 1313 (Mont. 1981). If the tribal social services agency approves a specific placement, that should end the inquiry about the physical adequacy of the home.

#### **16.10 What happens when a placement is changed?**

The ICWA is involved whenever the placement of an Indian child is changed. Change of placement is covered by § 1916 of the ICWA. Whenever an Indian child is removed from a foster care placement for the purpose of further foster care or an adoptive placement, such placement shall be in accordance with the placement preference and other provisions of ICWA, unless the child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

If a final decree of adoption of an Indian child is vacated or set aside, or the adoptive parents voluntarily consent to termination of their parental rights to that child, a biological parent or Indian custodian whose parental rights have previously been terminated may petition for return of custody and the court shall grant such petition unless there is a showing, subject to the provisions of § 1912 of the ICWA, that return of custody would not be in the best interests of the child.

#### **16.11 What if a parent objects to a particular placement?**

The question that must be decided when the parent of an Indian child objects to a specific placement of an Indian child, say with a home that qualifies under the placement preferences, is whether such objection is appropriate in light of the ICWA’s intent to maintain or foster the child’s connection to his or her tribal culture.

#### **16.12 What is the legal significance of a parent expressing a preference for a particular placement or requesting anonymity?**

Section 1915(c) of the ICWA provides that, “where appropriate,” the preference of the Indian child or parent shall be considered in deciding a placement under § 1915(a) or (b). Legislative history of the ICWA states that parental preference should be given weight. The BIA Guidelines state that parental preference may constitute good cause to deviate from the placement preferences under ICWA.

When the bill was pending before Congress, the BIA recommended that a parental preference for a specific placement of an Indian child should control over all other considerations. Congress did not accept the BIA’s recommendation on this issue.

Case law gives varying weight to the request of parents who object to a particular placement. *Compare In re Baby Boy Doe (Baby Boy Doe II)*, 902 P.2d 477 (Idaho 1995) with *In re Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993). There is some authority that holds that when the tribe has modified the placement preference order under the ICWA or supports a specific placement, the tribe’s decision should control. *See In re Child of Indian Heritage (Indian Child II)*, 543 A.2d 925, 932 (N.J. 1988).

The ICWA allows a parent who is consenting to the placement of his or her child to request anonymity with regard to that placement. 25 U.S.C. § 1915(c) states that the court or agency shall give weight to a desire for anonymity in apply the Act’s placement preferences. Legislative history to this section states that while the court or agency should give weight to a parent’s desire for anonymity, that desire “is not meant to outweigh the basic right of the child as an Indian.” H.R. REP. NO. 95-1386, at 24 (1978). The BIA Guidelines seem to state that when a parent requests anonymity the tribe and extended family members are not entitled to notice. However, this does not relieve the state court from the obligation to comply with the placement preferences

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under ICWA. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594 (Nov. 26, 1979) (guidelines for state courts).

The hardest case is when the parent of an Indian child selects a non-Indian family as the permanent placement for that child and states that he or she does not want their child raised in an Indian environment, and the tribe has selected a home for that child that falls within the placement preferences of the ICWA. The court must balance the parent's request against the child's right to grow up as an Indian, the tribe's right to have the child grow up as a member of the tribal community, any qualified relative's right to placement preference, and any potential mitigating factors such as a non-qualifying family's willingness to educate the Indian child about his or her culture and to participate in tribal activities. The case law is fact-specific on this issue.

### **16.13 What happens when a placement is changed from a temporary to a permanent placement?**

When a placement is changed, § 1916(b) requires that the provisions of the ICWA, including notice, be followed in making the change of placement. This is easy to do when an Indian child is physically moved to another home when a temporary placement is changed to a permanent placement. It is less clear when a foster placement for an Indian child is later selected as the permanent placement for the child.

Other provisions of the ICWA, taken as a whole, require that any placement that is changed from a temporary to a permanent placement, whether the Indian child is physically moved or not, be treated as a new proceeding or phase of a case under the ICWA, triggering compliance with all applicable provisions of the Act. For example, when a state decides to move from foster care to a termination of parental rights proceeding, new notice must be sent to the Indian child's tribe pursuant to § 1912(a) of the ICWA. An Alaska case held that allowing foster parents to move across the country with an Indian child was de facto termination of parental rights, requiring compliance with permanency provisions of the ICWA. *D.H. v. State*, 723 P.2d 1274, 1276 (Alaska 1986).

### **16.14 How does tribal licensing approval apply to placement?**

The foster care placement preferences of the ICWA at § 1915(b) grant a preference for foster homes licensed, approved or specified by the Indian

child's tribe. If the Indian child's tribe has licensed, approved or specified a foster home for an Indian child, the Indian child must be placed in that home unless the state court determines that good cause exists not to do so.

Part II of the ICWA at § 1931(b) also ratifies the acceptability of tribal foster homes by stating that "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." This language means, for example, that a tribally-licensed foster home qualifies for Title IV-E funding that is allocated to states by the federal government, if the state places the child directly in the tribally-licensed home or the tribe and state have a Title IV-E Agreement between them or a state-tribal § 1919 agreement.

Many Indian tribes also license or approve adoptive homes for tribal children. Under the ICWA, an Indian child must be placed in such a home unless the state court determines that good cause exists not to comply with the ICWA's preference criteria. See also FAQ 16.4.

#### **Practice Tip:**

When tribes and states enter into an intergovernmental agreement, the state may want the tribe to follow state licensing standards, but this is not required by federal law. A majority of the agreements recognize the use of tribal licensing standards provided they do not conflict with federal law.

### **16.15 What about a placement inconsistent with the ICWA placement preferences?**

Two separate fact situations are raised by this question. Difficulties arise because the ICWA does not expressly provide for invalidation of a placement of an Indian child that has taken place in violation of the ICWA. *See* 25 U.S.C. § 1914. In a number of states, the ICWA has been enacted into state law, and state law may provide separate authority for invalidation of an placement inconsistent with the ICWA.

If an Indian child has been placed by a state agency or a state-licensed private agency in a placement inconsistent with the ICWA, the state court should be petitioned to revoke such placement and change the placement to one conforming to the placement preferences of the ICWA. The state court is required

to comply with the ICWA, and an inconsistent placement could be overturned by a state appellate court for violating the Act if a determination of good cause to avoid the placement preferences had not been made.

Section 1920 of the ICWA may also provide some assistance when an action is filed by the party who gained or kept custody of Indian child in violation of the law. If the unauthorized custodian petitions the state court for ratification of his or her custodial arrangement, the tribe has the right to intervene in that proceeding under § 1911(c) and can ask the court under § 1920 to decline jurisdiction and to place the child as recommended by the tribe—either back with the parent or Indian custodian from whose custody the child was removed, or in a placement that conforms with § 1915's preference order along with initiation of a proper ICWA child custody proceeding.

#### **16.16 How do interstate compacts affect placement?**

See FAQ 19.14, Application of Other Federal Laws, for an answer.

#### **16.17 How does the Adoption and Safe Families Act of 1997 affect placement?**

The Adoption and Safe Families Act of 1997 (ASFA), 42 U.S.C. §§ 673b, 678, 679b (2000), was enacted to facilitate the permanent placement and safety of children in foster care. Every state has enacted ASFA into its children's codes as a condition of receiving federal foster care funds. While at least two state supreme courts have now ruled that ASFA does not override the ICWA and that the states must comply with both ASFA and the ICWA, ASFA adds a layer of complexity to placement of an Indian child under the ICWA. *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611; *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007).

ASFA may affect the placement of an Indian child in one of three ways. First, ASFA moves children in foster care toward permanency placement on a faster schedule than previously existed. ASFA requires that a state court conduct a permanency hearing for a child within twelve months after the child enters foster care. ASFA also requires that the state conduct concurrent permanency planning even before that time. These requirements mean that an Indian child in the state court system is going to be moved toward permanent placement fairly quickly, in order to satisfy federal requirements. The time period that

parents have to reform their conduct and obtain reunification with their child is shortened. A tribe must start planning for a permanent placement for an Indian child soon after the child enters foster care. It is important for the tribe to seek and obtain a permanent placement alternative for the child that conforms with the ICWA's placement preferences, or the state will be forced by ASFA requirements to start considering non-conforming placement options.

Second, ASFA restricts placement options by imposing licensing restrictions on placements for a child. All placement options, including relatives, must meet the same licensing requirements, while before ASFA, relative placements were not required to meet all aspects of the state's licensing scheme. Most importantly, potential custodians must now pass a criminal background check, and are disqualified if they have been convicted of any of a broad list of crimes. These requirements have the potential to disqualify many potential preference placements under the ICWA. Each state is required to establish its own licensing scheme and requirements under ASFA, and state regulations and statutes must be consulted to ensure that a potential placement under the ICWA will qualify under ASFA restrictions. It is not entirely certain how the ICWA's statement that tribal licensing shall be deemed equivalent to state licensing or approval for purposes of qualifying for assistance under a federally assisted program meshes with ASFA's strict disqualification requirements for homes that do not meet the statutory and regulatory criteria.

The third interaction between ICWA and ASFA reinforces the policies of the ICWA. ASFA requires that the state proceed with termination of parental rights of a foster child within a stated period of time, unless a compelling reason exists. Placement of a child with a relative is such a compelling reason under ASFA that excuses having to proceed with termination of parental rights. Compliance with the placement preferences of § 1915 of the ICWA therefore satisfies the permanency requirements of ASFA.

One option for responding to ASFA issues is to transfer the proceeding to tribal court. ASFA does not apply to Indian tribes, only to states. If a proceeding is transferred to tribal court, the tribal court does not have to follow the strict termination of parental rights time line imposed by ASFA. In addition, Indian tribes are not subject to the licensing restrictions of ASFA, as enacted by each state, so an Indian child can be placed in a home that might otherwise be disqualified under state law, for example because of a

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criminal violation committed while a juvenile. Be aware, however, that if the tribe contracts with the state pursuant to Title IV-E for foster care funding for tribal foster homes, those homes must meet state requirements, including qualifying for licensing under ASFA.

### **16.18 What happens if a party challenges placement?**

If placement of an Indian child is contested, the state court must hold a good cause hearing to determine whether good cause exists to avoid the placement preferences of the ICWA. *See In re M.*, 832 P.2d 518 (Wash. Ct. App. 1992); *Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979) (guidelines for state courts). The burden of proof is on the party urging that an exception to the placement preferences is necessary, since Congress has established a clear preference for placements within the tribal culture. *Indian Child Custody Proceedings*, 44 Fed. Reg. at 67,595. The burden must be met by clear and convincing evidence. *In re S.E.G.*, 507 N.W.2d 872, 878 (Minn. Ct. App. 1993), *rev'd on other grounds*, 521 N.W.2d 357 (Minn. 1994). An expert witness is required to support a deviation from the placement preferences, specifically if good cause is asserted based on the extraordinary emotional or physical needs of an Indian child.

Under § 1920, if a custodian who is contesting a change of placement improperly obtains or retains custody of an Indian child and petitions the court for custody, the court shall dismiss the proceeding and return the child to the custody of the parent or Indian custodian.

### **16.19 How can one advocate for an exemption for a past-criminal history for relative placement?**

ASFA requirements enacted by each state require disqualification of potential placement options for listed reasons, including a long list of criminal law violations. Each state must enact its own foster care licensing process that conforms to ASFA. Indian tribes are supposed to be consulted under federal regulations as part of this state regulatory process. The waiver process varies from state-to-state, although statutory requirements imposed by the federal ASFA statute cannot be waived or avoided by a state. The tribe must advocate for an exemption for a past-criminal history for a relative placement with the state agency process. In addition, the tribe can negotiate for a more liberal waiver process as part of an inter-governmental agreement with the state where

the tribe is located. Finally, if jurisdiction is transferred to tribal court and Title IV-E is not implicated with regard to the potential placement, the tribe is free to establish its own licensing criteria and process that would allow relative placement despite potential criminal law issues.

### **16.20 Can voluntary adoption take place in tribal court?**

The answer to this question is dependent upon the law of each tribe. Some tribes do not believe in adoption under any circumstances and do not provide for adoption in tribal law. Other tribes have adoption ordinances that mirror state adoption laws. Some tribes have laws that permit adoption of tribal children, but only by tribal members or perhaps other Indians. The law of each tribe must be reviewed to determine the answer to this question.

In some cases, the permanent placement of an Indian child who is the subject of a state child custody proceeding can be facilitated by transferring the case to tribal court. Tribes and tribal courts are not subject to the ICWA unless the tribe in question has incorporated the ICWA into tribal law.

### **16.21 Can non-Indians adopt in tribal court?**

The answer to this question depends on the law of each tribe. Some tribes do not permit adoption under any circumstances. Some tribes' laws permit adoption only by tribal members or by Indian families. Some tribal laws permit adoption by any family, under specified conditions and procedures. The law of the tribe in question must be reviewed to determine the answer to this question.

### **16.22 Does ICWA apply to guardianships?**

Yes. The ICWA includes guardianship under the definition of foster care at § 1903(1)(i). Guardianships are included under the ICWA and require compliance with ICWA provisions.

ASFA added a new type of guardianship to the law when it was enacted in 1997. ASFA allows for "permanent guardianships" as one permanency option, as an alternative to adoption. The difference between regular guardianships and permanent guardianships is that a permanent guardianship stays in effect until age eighteen unless dissolved, and the parents lose the ability to petition the court to dissolve the guardianship based on changed circumstances. Only the agency (state or tribe) or the

court on its own motion may reopen a permanent guardianship.

There is an unresolved question about the status of permanent guardianships under the ICWA, since the ICWA distinguishes between temporary placements, including guardianships, and adoptive placements. A permanent guardianship fits more comfortably within the definition of a foster care proceeding. The ICWA is intended to cover all types of child custody proceedings, and the case law has included permanent guardianships within the purview of the ICWA. See *In re J.C.D.*, 2004 SD 96, 686 N.W.2d 647; *In re Q.G.M.*, 808 P.2d 684 (Okla. 1991).



**\*\* Access to the full-text of opinions and additional materials is at [www.narf.org/icwa](http://www.narf.org/icwa) \*\***

**The following list is representative of cases that discuss the topic. The list is not exhaustive. The practitioner should conduct independent research.**

### FEDERAL CASES

#### District Courts

*Doe v. Mann (Mann I)*, 285 F. Supp. 2d 1229 (N.D. Cal. 2003)  
*Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999)

### STATE CASES

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*In re Bernard A.*, 77 P.3d 4 (Alaska 2003)  
*C.L. v. P.C.S.*, 17 P.3d 769 (Alaska 2001)  
*D.H. v. State*, 723 P.2d 1274 (Alaska 1986)  
*In re F.H.*, 851 P.2d 1361 (Alaska 1993)  
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*J.S. v. State*, 50 P.3d 388 (Alaska 2002)  
*In re Keith M.W.*, 79 P.3d 623 (Alaska 2003)  
*L.G. v. State*, 14 P.3d 946 (Alaska 2000)  
*In re N.P.S.*, 868 P.2d 934 (Alaska 1994)  
*In re Sara J.*, 123 P.3d 1017 (Alaska 2005)  
*In re W.E.G.*, 710 P.2d 410 (Alaska 1985)

#### Arkansas

*Cutright v. State*, 97 Ark. App. 70 (Ct. App. 2006)

#### California

*In re Alexandria Y.*, 53 Cal. Rptr. 2d 679 (Ct. App. 1996)  
*In re Alicia S.*, 76 Cal. Rptr. 2d 121 (Ct. App. 1998)  
*In re Baby Girl A.*, 282 Cal. Rptr. 105 (Ct. App. 1991) (certified for partial publication)  
*In re Brandon M.*, 63 Cal. Rptr. 2d 671 (Ct. App. 1997)  
*In re Desiree F.*, 99 Cal. Rptr. 2d 688 (Ct. App. 2000)  
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*In re Hannah S.*, 48 Cal. Rptr. 3d 605 (Ct. App. 2006)  
*In re Jullian B.*, 99 Cal. Rptr. 2d 241 (Ct. App. 2000) (certified for partial publication)  
*In re Liliana S.*, 10 Cal. Rptr. 3d 553 (Ct. App. 2004)  
*In re Robert T.*, 246 Cal. Rptr. 168 (Ct. App. 1988)

#### Colorado

*B.H. v. X.H.*, 138 P.3d 299 (Colo. 2006)

#### Florida

*Seminole Tribe of Fla. v. Dep't of Children & Families*, 959 So. 2d 761 (Fla. Dist. Ct. App. 2007)

#### Idaho

*In re Baby Boy Doe (Baby Boy Doe II)*, 902 P.2d 477 (Idaho 1995)

#### Indiana

*In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988)

**Iowa**

*In re A.E.*, 572 N.W.2d 579 (Iowa 1997)  
*In re J.R.H.*, 358 N.W.2d 311 (Iowa 1984)  
*In re J.W.*, 528 N.W.2d 657 (Iowa Ct. App. 1995)

**Kansas**

*In re B.G.J. (B.G.J. II)*, 133 P.3d 1 (Kan. 2006)  
*In re B.G.J. (B.G.J. I)*, 111 P.3d 651 (Kan. Ct. App. 2005)

**Maryland**

*In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007)

**Minnesota**

*In re M.T.S.*, 489 N.W.2d 285 (Minn. Ct. App. 1992)  
*In re S.E.G. (S.E.G. II)*, 521 N.W.2d 357 (Minn. 1994)  
*In re S.E.G. (S.E.G. I)*, 507 N.W.2d 872 (Minn. Ct. App. 1993)  
*In re S.N.R.*, 617 N.W.2d 77 (Minn. Ct. App. 2000)

**Missouri**

*In re C.G.L. (C.G.L. II)*, 63 S.W.3d 693 (Mo. Ct. App. 2002)  
*In re C.G.L. (C.G.L. I)*, 28 S.W.3d 502 (Mo. Ct. App. 2000)

**Montana**

*In re A.G.*, 2005 MT 81, 326 Mont. 403, 109 P.3d 756  
*In re Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993)  
*In re C.H.*, 2000 MT 64, 299 Mont. 62, 997 P.2d 776  
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*In re L.F.*, 880 P.2d 1365 (Mont. 1994)  
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*In re Riffle (Riffle II)*, 922 P.2d 510 (Mont. 1996)

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*In re C.W.*, 479 N.W.2d 105 (Neb. 1992)

**New Jersey**

*In re Child of Indian Heritage (Indian Child II)*, 543 A.2d 925 (N.J. 1988)

**North Dakota**

*B.R.T. v. Executive Dir. of Soc. Servs. Bd.*, 391 N.W.2d 594 (N.D. 1986)

**Oklahoma**

*In re Baby Girl B.*, 2003 OK CIV APP 24, 67 P.3d 359  
*Duncan v. Wiley*, 657 P.2d 1212 (Okla. Ct. App. 1982)  
*In re J.T.*, 2002 OK CIV APP 2, 38 P.3d 245  
*In re N.L.*, 754 P.2d 863 (Okla. 1988)  
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## 16. PLACEMENT

### **Tennessee**

*In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. 1997)

### **Washington**

*In re Z.F.S.*, 51 P.3d 170 (Wash. Ct. App. 2002)

*In re M.*, 832 P.2d 518 (Wash. Ct. App. 1992)

