
5. INTERVENTION

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

(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.

25 U.S.C. § 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

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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5. INTERVENTION

5.1 What is intervention?

Intervention is a procedure that allows a third person not part of a suit, but who claims to have a legal interest in the suit, the opportunity to participate in a legal proceeding to protect the claimed interest. BLACK'S LAW DICTIONARY (6th ed. 1990).

5.2 What is intervention under ICWA and does it differ from intervention under state law?

The Indian Child Welfare Act (ICWA) § 1911(c) expressly grants an Indian custodian and an Indian child's tribe the legal right to intervene in a foster care placement or a termination of parental rights proceeding. This right is mandatory and can be exercised at any point in such proceeding. See *In re Baby Girl A.*, 282 Cal. Rptr. 105 (Ct. App. 1991) (certified for partial publication).

Practice Tip: A party may be permitted to intervene in a pre-adoptive or adoptive proceeding under state intervention law, but there is no mandatory right to do so under ICWA. See *In re J.R.S.*, 690 P.2d 10 (Alaska 1984).

5.3 Why is intervention important?

Legislative history shows that state child welfare systems were ignorant of Indian culture and childrearing practices and, therefore, were more likely than not to make ill-informed decisions regarding termination, removal and placement of Indian children. *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the Subcomm. on Indian Affairs & Pub. Lands of the H. Comm. on Interior & Insular Affairs*, 95th Cong. 191-92 (1978). See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34-35 (1989). Intervention is a procedure that allows Indian custodians, Indian parents and tribes to participate in foster care or termination proceedings to educate state courts of tribal cultural and social standards, thereby, allowing a court to make a more informed decision and adhere to the spirit and intent of the act. Tribal participation also ensures that state courts not only protect the best interest of the child as defined by ICWA but also protect the continued existence and integrity of Indian tribes. With regard to intervention rights of Indian custodians, it is necessary because foster care placements and/or termination of parental rights proceedings may forever alter the custodial rights of the Indian custodian and Congress believed it important that

Indian custodians be treated similarly as parents in child custody proceedings.

5.4 Who can intervene under ICWA and state law?

Section 1911(c) grants Indian custodians and the Indian child's tribe, and § 1912(a) grants Indian parents, the right to notice and to intervene in foster care placement and termination of parental rights proceedings. Also, any tribe that can demonstrate a connection with the Indian child may be allowed to intervene under state intervention procedures, but it is not mandated by the Act. See *Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67,587 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts).

5.5 What is *de facto* parent intervention?

De facto parent intervention is a judicially-created state procedural rule used in child custody and dependency cases, which allows an individual who is not the child's parent or legal custodian, but who has assumed the daily role of a *de facto* parent over substantial time, to intervene as a party to the case. At least one state, California, has applied the rule to an ICWA proceeding. In *In re Brandon M.*, 63 Cal. Rptr. 2d 671 (Ct. App. 1997), a non-Indian step-father of an Indian child petitioned the court to grant him *de facto* parental status to allow him to intervene in the ICWA proceeding and to have the Indian child placed in his custody. The mother challenged the petition, arguing that § 1915(b) of the ICWA only allows foster or pre-adoptive placement with the child's extended family. The court gave little weight to the seemingly unambiguous language of the Act and viewed the doctrine as adding minimally to the list of extended family members eligible for placement under § 1915(b). The court determined that there was no conflict between the application of the state rule and ICWA and furthermore, the ICWA did not preempt state law. The court held that the step-father was allowed to intervene under the state law *de facto* parent doctrine in the ICWA proceeding.

Practice Tip: Courts may allow a party to intervene under state rules of civil procedure, either by right or permissively.

5.6 Do grandparents have a right to intervene under ICWA and/or state laws?

No. Under ICWA grandparents have no right to intervene unless they are the child's Indian custodians. Their only recourse is to seek intervention under state law.

5.7 Is an attorney required to intervene in an Indian child proceeding?

No. The Act is silent on whether an attorney is required to intervene. An attorney can be helpful in an ICWA proceeding, but they are not mandated by the Act. The Oregon Court of Appeals held that due to economic and procedural barriers, requiring a tribe to obtain legal counsel effectively burdens the intervention rights of the tribe and "essentially den[ies] that right in many cases." *In re Shuey*, 850 P.2d 378 (Or. Ct. App. 1993). The court resoned that "[t]he state's interest in requiring attorney representation is not as substantial as the tribal interests in ICWA proceedings." *Id.* at 381. If it is economically feasible, an attorney versed in the ICWA should be consulted.

5.8 When can the right of intervention be exercised?

An Indian custodian or tribe can assert their right to intervene *at any time* during a foster care placement or termination of parental rights proceeding. 25 U.S.C. § 1911(c). There are no mandatory time lines preventing formal intervention and intervention can even occur on appeal. *See In re J.J.*, 454 N.W.2d 317, 331 (S.D. 1990).

5.9 In what types of child custody proceedings may an Indian custodian or an Indian child's tribe intervene as provided under ICWA?

Pursuant to § 1911(c) an Indian custodian or an Indian child's tribe may intervene in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child. The mandatory intervention right, however, does not extend to a preadoptive or adoptive placement proceeding, but may be permitted under state law. *See In re J.R.S.*, 690 P.2d 10, 15 (Alaska 1984).

5.10 How does one intervene?

An Indian custodian, parent or an Indian child's tribe intervenes in a case by filing a written motion with the court or by a verbal request made in open court. In the event a verbal request is made and

subsequently granted, the tribe or court should reduce the order to writing.

5.11 Can there be an objection to intervention? What if either parent objects?

Yes. A party to the case can object to an Indian custodian or tribe's requested intervention. The court will hold a hearing to determine whether the Indian custodian or tribe has a right to intervene. ICWA grants the tribe an explicit right to intervene and is not subject to or limited by a parent or Indian custodian's objection. 25 U.S.C. § 1911(c).

5.12 After intervention, what are the options, rights and responsibilities of the intervenor?

After a tribe, an Indian custodian or parent intervenes, the intervenor becomes a party to the case and is entitled to notice and service of all motions and filings. Furthermore, an intervenor is also permitted to view and access the previous court records and filings. The intervenor then may request a transfer, monitor and participate in the proceedings, or withdraw from the case.

Practice Tip:

The tribe may decide whether it wishes to intervene in a state court proceeding if it lacks the resources to participate in hearings. Some tribes feel that intervening in a state court case may harm their interests because they are submitting themselves to state laws and jurisdiction. In addition, a party that intervenes has legal obligations to cooperate with discovery requests (where the other parts obtain information from the tribe) and to file legal documents to support its position and oppose positions that are contrary to its wishes. Overall, the best position is to intervene to assure that the tribe's voice is heard, but tribes must be vigilant when they intervene to make sure that they adhere to court rules and procedures so they do not waive any rights they may have.

5.13 How does intervention relate to transfer? Do you have to do both?

The subject of tribal transfer of a state court proceeding is a federal right stemming from the ICWA. A tribe does not have to become a party to the state court proceedings and if any state law requires such, it is preempted by the ICWA. At the minimum, an official tribal representative may appear especially for the sole purpose of requesting transfer.

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If an Indian custodian or a tribe chooses to intervene to monitor the state proceeding, they are not required to request a transfer of the case to tribal court.

Practice Tip:

It is possible, in a case where the state court has made a determination that the child involved is an Indian child and made a determination of which tribe is the Indian child's tribe without intervention by that tribe, for the tribe to seek a transfer of jurisdiction without formally intervening. Some tribes may opt to do so because they are concerned about submitting themselves to the jurisdiction of a state court should their transfer motion be denied. ICWA does not technically require intervention before a transfer of jurisdiction is sought by the tribe, but some state laws may require the transfer request be made only by a party to the case. Certainly, intervention by the tribe is not required prior to a transfer of jurisdiction to a tribal court made upon motion of the parents or Indian custodian.

5.14 Is notice required to inform an Indian custodian or an Indian child's tribe of their right to intervene?

Yes. Section 1912(a) requires notice be given to an Indian parent, Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right to intervene. *See also In re Kahlen W.*, 285 Cal. Rptr. 507 (Ct. App. 1991) (certified for partial publication). See also FAQ 4.16, Notice in Voluntary Proceedings.



** Access to the full-text of opinions and additional materials is at 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

United States Supreme Court

Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

Circuit Courts of Appeal

Kickapoo Tribe of Okla. v. Rader, 822 F.2d 1493 (10th Cir. 1987)

District Courts

Navajo Nation v. Superior Court, 47 F. Supp. 2d 1233 (E.D. Wash. 1999)

STATE CASES

Alabama

R.B. v. State, 669 So. 2d 187 (Ala. Civ. App. 1995)

S.H. v. Calhoun County Dep't of Human Res., 798 So. 2d 684 (Ala. Civ. App. 2001)

Alaska

In re F.H., 851 P.2d 1361 (Alaska 1993)

In re J.M., 718 P.2d 150 (Alaska 1986)

In re J.R.S., 690 P.2d 10 (Alaska 1984)

Arizona

Stephenson v. Nastro, 967 P.2d 616 (Ariz. Ct. App. 1998)

California

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)

In re Kahlen W., 285 Cal. Rptr. 507 (Ct. App. 1991) (certified for partial publication)

Colorado

In re A.N.W., 976 P.2d 365 (Colo. Ct. App. 1999)

J.C.T. v. Three Affiliated Tribes, 155 P.3d 452 (Colo. Ct. App. 2006)

Florida

In re T.D., 890 So. 2d 473 (Fla. Dist. Ct. App. 2004)

Iowa

In re J.W., 498 N.W.2d 417 (Iowa Ct. App. 1993)

Kansas

In re A.P., 961 P.2d 706 (Kan. Ct. App. 1998)

Minnesota

In re A.K.H., 502 N.W.2d 790 (Minn. Ct. App. 1993)

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Montana

In re A.G., 2005 MT 81, 326 Mont. 403, 109 P.3d 756

In re M.E.M., 725 P.2d 212 (Mont. 1986)

In re Riffle (Riffle I), 902 P.2d 542 (Mont. 1995)

In re T.A.G., 1999 MT 142N, 294 Mont. 556, 996 P.2d 885 (unpublished table decision) *available at* No. 97-524, 1999 WL 506107 (Mont. June 15, 1999)

In re W.L., 859 P.2d 1019 (Mont. 1993)

New Mexico

In re Ashley R., 863 P.2d 451 (N.M. Ct. App. 1993)

In re Begay, 765 P.2d 1178 (N.M. Ct. App. 1988)

North Dakota

In re A.B., 2005 ND 216, 707 N.W.2d 75

Ohio

In re Hortsmann, No. 2005AP020015, 2005 WL 1038857 (Ohio Ct. App. Apr. 29, 2005)

In re Sanchez, No. 98-T-0104, 1999 WL 1313630 (Ohio Ct. App. Dec. 23, 1999)

Oklahoma

Cherokee Nation v. Nomura, 2007 OK 40, 160 P.3d 967

In re Q.G.M., 808 P.2d 684 (Okla. 1991)

In re R.R.R., 763 P.2d 94 (Okla. 1988)

Oregon

In re Shuey, 850 P.2d 378 (Or. Ct. App. 1993)

South Dakota

In re J.J., 454 N.W.2d 317 (S.D. 1990)

Tennessee

In re Morgan, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997)

Vermont

In re G.F., 2007 VT 11, 923 A.2d 578

Washington

In re S.B.R., 719 P.2d 154 (Wash. Ct. App. 1986)

Wisconsin

In re Sengstock, 477 N.W.2d 310 (Wis. Ct. App. 1991)

