9. RECOGNITION OF TRIBAL LAW

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. § 1903. Definitions

> **(2)** "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 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 . . . .

25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(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.

25 U.S.C. § 1915. Placement of Indian children

(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.

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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Frequently Asked Questions

9.1 Is a state required to defer to Indian social and cultural standards in placement and treatment assessments?

The Indian Child Welfare Act (ICWA) requires a state or private placement agency to place a child in a home that reflects the prevailing social and cultural standards of the tribal community. 25 U.S.C. § 1915(d). Although the ICWA sets out placement priorities for Indian children placed by state or county child welfare agencies, the law permits the tribe to alter those preferences by resolution and the state or county must abide by the resolution unless it does not represent the least restrictive alternative for the child. 25 U.S.C. § 1915(c). In determining what type of treatment services should be made available to the family to support reunification or prevent the removal of the child from the family, the state is required to utilize culturally-appropriate services. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,592 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts). For example, if a parent is in need of chemical dependency treatment the state or county must assure that the type of treatment the parent is provided is appropriate for the tribe and parent.

9.2 Who is a member of an extended Indian family?

The ICWA directs that extended family member be defined by reference to the law or custom of the tribe, so an examination of the tribe's code of laws or other resolutions passed by the tribal governing body is in order to assure that the tribe's definition of the term is utilized. In determining customary practices, inquiry should be made with the Tribal Child Welfare office or elders associated with the tribe. Relevant literature produced by tribal members or others associated with the tribe may be another source of information. In the absence of a governing tribal definition, the federal laws define the term as an adult

person who is a grandparent, sibling, aunt or uncle, niece or nephew, brother or sister-in-law, first or second cousin, or stepparent. This term should be distinguished from an Indian custodian who is any Indian person who has custody of an Indian child under custom and tradition of the tribe or state law, or who has been given custody by a parent. An Indian custodian need not have a blood or legal relationship with an Indian child. *See* 25 U.S.C. § 1903(6) (defining Indian custodian).

9.3 Is the extended Indian family relationship the same for all tribes?

No. ICWA explicitly recognizes under the definition of extended family member that each tribe's customs and laws must be adhered to in determining extended family members. 25 U.S.C. § 1903(2). In some tribes the extended family relationship may extend even to tribal members not related by blood or law to the child because of the societal obligations certain tribal members owe to children within the community.

Practice Tip:
Some states have defined this term in state ICWA laws and the practitioner may wish to refer to state law.

9.4 What law applies in a tribal forum?

The ICWA applies to state court proceedings, but does not apply to tribal court proceedings unless the tribal governing body has incorporated the provisions of the ICWA into tribal law. Most tribes have adopted their own procedural and substantive laws that apply to child welfare cases and many of these laws are similar to the requirements of ICWA, but this may not always be true. Some tribes have opted to handle child welfare cases through Wellness Courts (similar to drug courts) and others by traditional courts. Some of these courts may not be courts of record. In addition, some tribes may not have dispositional options such as terminations of parental rights and may instead rely upon guardianships and traditional adoptions. Traditional adoptions and the requirements therefor differ from tribe to tribe but generally involve adoptions that are not preceded by terminations of parental rights. In some situations, when the tribe operates its child welfare program with cooperative agreements with a state or county agency, the tribe may be required to adhere to certain state procedural requirements in order to obtain funding under the cooperative agreement. This may include requirements in Title IV-E, including those added by the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 673b, 678, 679b (2000). An example would be requiring findings that reasonable efforts have been made to prevent the removal of the child. Some states may attempt to impose the requirements of ASFA upon tribes through cooperative agreements in a manner that might conflict with ICWA, but at least one court has held that ASFA does not supersede ICWA . *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611.

Practice Tip:
When tribes enter into cooperative agreements with state or county governments in order to access Title IV-E foster care monies, tribes may negotiate the terms of a cooperative agreement to assure that the implementation of Title IV-E by the tribe is done in a manner that respects the tribe's customs and traditions, while still assuring compliance with minimum federal standards under Title IV-E.

9.5 Are tribes subject to the minimum federal standards established by the ICWA for state court proceedings?

Usually not. Although if the tribe has incorporated ICWA into its tribal code or the tribe operates its child welfare system under a cooperative agreement with a state that includes a requirement that the tribe comply with ICWA or other federal standards, the tribe may have contracted to comply with ICWA. It should be noted that the jurisdictional provisions of ICWA, § 1911(a) and § 1911(b), do apply and govern the extent of tribal jurisdiction over Indian children.

9.6 How are terms defined under ICWA and when is it appropriate to utilize tribal law to define ICWA terms?

There are four different sources for definitions under ICWA. The federal law defines certain terms under § 1903. For example, an Indian child is defined at § 1903, as is the term "parent" and Indian child's tribe. Other definitions are omitted in the federal law so a person would have to look at the Bureau of Indian Affairs (BIA) Guidelines. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) (guidelines for state courts). Examples of undefined terms include "good cause" for denying a transfer of jurisdiction. This term is not defined in the federal law but the BIA Guidelines give several examples of what that agency considers to be good cause. Another source of definitions can be found in federal and state court decisions. For example, in the United States Supreme Court decision *Mississippi*

Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), the Court defined the term "domicile" under § 1911(a) and stated that the definitions should be uniform and not differ from state to state. As the result of this need for uniformity it is generally not appropriate to utilize state law definitions of terms in the ICWA unless those definitions promote uniformity. In some situations it is appropriate to look to tribal law and customs to determine the meaning of a term. For example, to determine if a person qualifies as an "Indian custodian" it must be determined if that person has custody under state or tribal customary or written law. Similarly, although federal law defines the term "extended family member" it is necessary to look to tribal law to determine how that term is utilized to assess the customs and practices of a particular tribe. Another example is the term "ward," which is not defined under federal law and therefore it would be appropriate to look to tribal law to assess whether a child has been made a "ward" of a tribal court. The bottom line is that Congress intended to assure that state courts, when applying ICWA in its courts, do so cognizant of tribal values and customs regarding childrearing practices and it is appropriate to look to tribal law to define those values and customs absent a definitive answer in the statute itself.

9.7 What does full faith and credit mean and how does it affect ICWA proceedings?

The general term "full faith and credit" means that one government must accept and enforce the laws and court decisions of another government, if that other government had the authority to enact such laws and to enter that order. For example, if a person is married in one state, that marriage must be honored in all other states. ICWA requires states and tribes to give full faith and credit to the public acts and records and judicial proceedings of tribes with regard to child custody proceedings. If a tribe has records indicating that a child is a member of that tribe, other states and tribes must recognize that record for purposes of ICWA. Similarly if a tribal court with jurisdiction enters an order pertaining to a child custody proceeding, such as placing the child into the custody of an aunt or uncle, other states and tribes must honor that order.

9.8 What is the doctrine of comity and does it apply to ICWA proceedings?

Comity is another legal principle that permits states and tribes to honor each other's orders. It generally refers to the principle that one court, out of respect for another court system, will honor that court's orders to assure an orderly and fair administration of justice. In the ICWA context, for example, if a state court were to conduct a trial and find that a minor child were abused and neglected under state law and then that case were transferred to a tribal court, the tribal court may honor that order under the principle of comity. Comity differs from full faith and credit because comity is generally a product of the judicial system, while full faith and credit is required under the Constitution or law. For comity to apply, the enforcing court must find that the issuing court had subject matter and personal jurisdiction, the system by which the decision was reached was a fair process, and the order does not violate the public policy of the enforcing court.

9.9 Does a state have to abide by a tribal court order related to an ICWA proceeding?

Under § 1911(d), state courts and state agencies must respect and enforce tribal court decisions in child custody proceedings under the court's jurisdiction. For example, if a tribal court permits the adoption of an Indian child and the record of that adoption is sent to a state agency, that agency must honor the adoption decree and amend a birth record if requested by the tribe.

9.10 Does a tribe have to abide by a state/federal court order related to an ICWA proceeding?

Nothing in the ICWA requires a tribal court or tribe to abide by a state court decision in a child custody proceeding. A tribe may wish to honor such an order under the principle of comity, especially if other members of the tribe reside within the state's jurisdiction and there may be other cases where the tribe will need the cooperation of the state to protect its children. Some federal laws such as 18 U.S.C. § 2265 (2000) (domestic violence protection orders) and 28 U.S.C. § 1738B (2000) (child support orders) require tribes to honor state court decisions. With regard to federal court decisions, although there are no laws mandating tribal court recognition of federal court decisions, many federal courts have held that tribes and their agencies must abide by federal court decisions, especially if federal funding is involved.

9.11 What are public acts, records and judicial proceedings as stated in § 1911(d)?

Public acts could include the Constitution, laws, tribal ordinances, and resolutions that tribes have enacted. An example would be if the tribe adopts an adoption placement preference law, the state, under §

1915, would be required to recognize this adoption placement preference and enforce it in proceedings involving children from that tribe. Records would include such things as enrollment or membership records, probate records establishing blood lines or other relationships, or any other record that is issued by a tribe that may be relevant to a child custody proceeding. Judicial proceedings would include tribal court orders, tribal court findings that a child is a member of or eligible for membership in a tribe, tribal court adjudications of paternity, and any other type of court order that may be relevant in a child custody proceeding.

9.12 Does a tribal court have to provide full faith and credit to another tribal court order?

The manner in which § 1911(d) was written by Congress, it does appear to require that tribes honor the public records and judicial orders of sister tribes pertinent to child custody proceedings to the same extent that tribes honor the records and court orders of "other entities." Therefore, if a child custody proceeding is commenced in a state court and one tribe intervenes and another tribe asserts that it has jurisdiction over the child because the child is a ward of its court and is able to produce a court order showing this, both the state and other tribe would have to give the order full faith and credit, provided the tribe grants full faith and credit to the orders of other entities. As a practical matter, this means that if Indian tribes recognize other state and tribal court orders as a matter of practice, they must also honor orders pertaining to child custody proceedings.

Practice Tip:
This issue may come up most often in situations where more than one tribe asserts that the child is a member or eligible for membership in that particular tribe and the issue becomes whether each tribe must abide by the other's determination. If at all possible, the two interested tribes should try to discuss the matter with the aim of resolution instead of airing their differences in a state forum.

9.13 Must the order/document be related to a child custody proceeding for full faith and credit to apply under ICWA?

It does appear that for full faith and credit to apply, the court order or record must be pertinent to a child custody proceeding. For example, a tribal court finding that someone is the father of a child involved in a state court child custody proceeding should be entitled to full faith and credit because it does pertain to the rights of the father in the child custody proceeding. However, if a tribal court had divorced the parents of an Indian child and awarded custody of the child to the mother, that order would not prevent a state court from removing the child from the mother if she and the child are residing in state court jurisdiction and the child is being neglected or abused. The divorce decree is excluded as a child custody proceeding under ICWA. That order could be recognized under the doctrine of comity, however.

9.14 Can a state court review a tribal court order to determine whether a tribal court had proper jurisdiction over the child proceeding?

Probably. Especially if the Indian child is within the state court's lawful jurisdiction. For example, if a state court child custody proceeding is commenced and the child is removed from the mother and the mother of the child then petitions the tribal court to award her the custody of the minor child and to remove the child from the state placement agency's custody, the state court would have to determine if the tribal court under its laws had jurisdiction to enter such an order. A state court would not have authority, however, to second-guess a tribe's public acts or records such as enrollment records. The extent to which a state court may have authority to review a tribal court decision may also depend on whether the tribe is asserting jurisdiction under § 1911(a) (exclusive jurisdiction) or § 1911(b) (concurrent jurisdiction). A state court's authority to second guess a tribal court's jurisdiction may be greater in the latter situation.

9.15 Can a state court review a tribal court order determination of whether a child is Indian under the ICWA?

No. It is clear under ICWA that tribal determinations, including tribal court determinations, of membership or eligibility for membership are entitled to full faith and credit and cannot be questioned. This is true even if it is demonstrated later that the determination may have been erroneous. For example, in a state court case from South Dakota, *In re J.J.*, 454 N.W.2d 317 (S.D. 1990), the court held that it had to honor one tribe's assertion of membership even if that defeated the rights of another tribe.

9.16 How are tribal court orders and documents authenticated to conform to the state's recognition of foreign judgments?

This depends upon the law of each state. Most states accept tribal records and even affidavits without foundational testimony but a few states have denied the admission of affidavits asserting tribal membership, for example, because they were considered hearsay under state law. *Quinn v. Walters* (*Quinn II*), 881 P.2d 795 (Or. Ct. App. 1994).

Some states require the document to be self-authenticating, which means that the official custodian of the record (tribal secretary for tribal records and the tribal court clerk for tribal court records) must certify on the document that it is a true and accurate copy of the original on file with that office. At a minimum, the document should bear some certification from the tribe indicating that it is an accurate copy of the original record. Other courts may require the official custodian of the record to come to court and testify that the document is a true and accurate copy.

9.17 Does a state court have to abide by a tribal resolution altering the placement preference provisions for foster care and adoptive placements of Indian children?

Yes. § 1915 of ICWA states that a tribe may alter the placement preferences by resolution and that such is binding upon the state court. Such a resolution replaces the placement preferences of ICWA. However, a limited number of state courts have refused to implement tribal resolutions barring non-Indians from adopting children from that tribe and have failed to treat such resolutions as resolutions within the meaning of § 1915. *In re Laura F.*, 99 Cal. Rptr. 2d 859 (Ct. App. 2000) (certified for partial publication). These decisions ignore the spirit of ICWA that encourages tribes to make decisions regarding placements of their children and have those decisions honored in state fora. Because this policy is a federal one, it should trump any state policy in conflict with it.

9.18 Is a tribal court order decreeing that a child is a member or eligible for membership in a particular tribe binding upon a state court?

Yes. § 1911(d) states that the state court must honor any tribal court order from a judicial proceeding in a child custody proceeding. If an Indian tribal court makes that kind of determination, that order is binding upon the state court and cannot be questioned.

9.19 Can a tribal court issue a decree finding that a child is a member of the tribe for ICWA purposes only, and is that decision binding upon a state court?

This is a much more controversial question than simply having the tribal court determine membership or eligibility for membership. If tribal law permits a tribal court to make determinations that certain children are eligible for membership for ICWA purposes only, then such determinations should be binding upon state courts. For example, some Indian tribes that are related to Canadian First Nations may desire to permit their tribal courts to provide protections for their Canadian relatives involved in state court proceedings by permitting the tribal court to make such a finding. If, however, tribal law directs that only the tribal council can make membership decisions, it is unlikely that a tribal court can make such a ruling.

9.20 If a tribal court has issued an order regarding a child prior to a state court asserting jurisdiction over the child, is that child a ward of the tribal court?

It depends upon whether that order issued by the tribal court was part of a child custody proceeding. If it was, or the tribal court has explicitly declared the child a ward of the tribal court, then that declaration deprives the state court of jurisdiction. Some tribal courts may have exercised jurisdiction over a private custody dispute between the parents and that type of exercise of jurisdiction, however, may not deprive a state court of jurisdiction later when the child is being neglected or abused within state court jurisdiction.

9.21 Does a tribal court order awarding custody to a non-parent of a child make that non-parent an Indian custodian for ICWA purposes?

No. An Indian custodian as defined under federal law must be an Indian person. 25 U.S.C. § 1903(6). However, such an order would be entitled to full faith and credit in the state court because it is the placement of a child with a person where the parent cannot regain custody upon demand and is therefore a child custody proceeding under ICWA.

9.22 If a state agency pays for tribal court placements in child welfare cases, does the tribal court have to abide by state laws and regulations enacted pursuant to the Adoption and Safe Families Act or must the state defer to tribal law?

No definitive answer to this question exists. If the cooperative agreement between the state and tribe or county and tribe stipulates that the tribe and its court will abide by ASFA, the tribe may have bound itself to comply. The Administration for Children and Families, the branch of the Department of Health and Human Services that deals with foster care and adoptive placement issues, has indicated in policy statements that states must assure adherence to ASFA standards by any entity with which they contract. However, a recent South Dakota Supreme Court decision has held that ASFA does not trump ICWA and thus calls into question the policy of many states to impose the ASFA requirements upon tribal placements and courts**.** *In re J.S.B., Jr.*, 2005 SD 3, 691 N.W.2d 611. The key is that tribes be vigilant to assure that laws that seem to promote termination of parental rights not be imposed upon them by contract if they do not support such laws. States do not need to compel tribes to file termination petitions in order to comply with Title IV-E if the tribal law supports other types of permanent orders such as permanent guardianships or customary adoptions not involving the termination of parental rights.

9.23 If tribal law or tradition does not permit terminations of parental rights, then is the state required to abide by that custom or practice?

Probably not. ICWA does not expressly state that states are prohibited from doing terminations if the tribal law prohibits it. Of course, if a tribe adopted a law prohibiting terminations of its children both on and off the reservation it would be an interesting legal issue whether the state would have to abide by that under full faith and credit. 25 U.S.C. § 1911(d). See also FAQ 19, Application of Other Federal Laws.

**** 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
Boozer v. Wilder, 381 F.3d 931 (9th Cir. 2004)
Native Village of Venetie I.R.A. Council v. Alaska (*Venetie II*), 944 F.2d 548 (9th Cir. 1991)
Native Village of Venetie I.R.A. Council v. Alaska (*Venetie I*), 918 F.2d 797 (9th Cir. 1990)

District Courts
Brown ex rel. Brown v. Rice, 760 F. Supp. 1459 (D. Kan. 1991)
Comanche Indian Tribe of Oklahoma v. Hovis (*Hovis I*), 847 F. Supp. 871 (W.D. Okla. 1994)
Doe v. Mann (*Mann I*), 285 F. Supp. 2d 1229 (N.D. Cal. 2003)
Navajo Nation v. District Court, 624 F. Supp. 130 (D. Utah 1985)

STATE CASES

Alaska
In re A.S., 740 P.2d 432 (Alaska 1987)

California
In re Laura F., 99 Cal. Rptr. 2d 859 (Ct. App. 2000) (certified for partial publication)

Colorado
In re A.G.-G., 899 P.2d 319 (Colo. Ct. App. 1995)

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

Louisiana
Owens v. Willock, 29-595 (La. App. 2 Cir. 2/26/97); 690 So. 2d 948

Minnesota
In re B.W., 454 N.W.2d 437 (Minn. Ct. App. 1990)
Gerber v. Eastman, 673 N.W.2d 854 (Minn. Ct. App. 2004)
In re R.I., 402 N.W.2d 173 (Minn. Ct. App. 1987)
In re S.N.R., 617 N.W.2d 77 (Minn. Ct. App. 2000)

Montana
In re Riffle (*Riffle II*), 922 P.2d 510 (Mont. 1996)

New Mexico
In re Megan S., 1996-NMCA-048, 121 N.M. 609, 916 P.2d 228

Oregon
Nelson v. Hunter, 888 P.2d 124 (Or. Ct. App. 1995)
Quinn v. Walters (*Quinn II*), 881 P.2d 795 (Or. Ct. App. 1994)

South Dakota
In re J.J., 454 N.W.2d 317 (S.D. 1990)
In re J.S.B., Jr., 2005 SD 3, 691 N.W.2d 611

Utah
Searle v. Searle, 2001 UT App 367, 38 P.3d 307

Wisconsin
In re Genevieve K., 2003 WI App 201, 267 Wis. 2d 280, 670 N.W.2d 559 (unpublished table decision) *available at* No. 03-1402, 2003 WL 21910691 (Wis. Ct. App. Aug. 12, 2003)