ARIZONA INDIAN CHILD WELFARE ACT (ICWA) GUIDE 2018

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Use of Links: *Users may navigate to content addressed in this Guide by using the control key to select a title in the table of contents. Links are provided within the text of this Guide to cited federal and state statutes, federal regulations, BIA guidelines, court cases, court rules, and Arizona Department of Child Safety policies and procedures. These links will be periodically updated. However, this is a guide to legal authority on ICWA to facilitate not replace individual research.*

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I. Introduction

Congress passed ICWA in 1978 in response to a history of destructive governmental practices that had decimated American Indian families and their tribes. In the era preceding the enactment of ICWA, over a quarter of all "Indian children" (a term defined in ICWA) were living in BIA-run institutions and other out-of-home placements, the majority of which were non-Indian. As a result, generations of Indian people lost touch with their cultural and spiritual roots. ICWA not only recognizes the central role of tribal courts in Indian child welfare matters but also heightens the standards governing state child welfare proceedings to prevent the unwarranted removal of Indian children from their families.

Judges and practitioners must understand the types of proceedings to which ICWA applies, the proper parties to an ICWA case, those parties' respective burdens of proof, and the benefits of collaborating with the Department of Child Safety (DCS, formerly the Arizona Department of Economic Security/Child Protective Services) and the child's tribe in ICWA cases. That knowledge will allow courts to apply ICWA correctly and uniformly throughout Arizona. This Guide will help judges, attorneys, state and tribal officials and other interested parties involved in juvenile proceedings in Arizona courts to understand ICWA concepts and how they interact with Arizona's laws governing child welfare, guardianships, and adoptions. The goal of this Guide is to facilitate the implementation of ICWA for the benefit of Indian children, families, and tribes.

A. Relevant References

This Guide is intended to help Arizona judges and practitioners interpret and apply the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963, the related federal regulations, 25 C.F.R. §§ 23.1–23.144 ("BIA Regulations"), and the less formal but more specific guidance provided by the U.S. Department of the Interior, Bureau of Indian Affairs (BIA) in its newly-revised Guidelines for State Courts and Agencies in Indian Child Custody Proceedings ("BIA Guidelines").[1] Unlike the previous BIA State Court Guidelines, the new BIA Regulations became effective after notice and comment and establish federal law that is binding on state courts. This Guide conforms to the Regulations in the use of the mandatory term "must" and the term "should," indicating a strong preference but not a mandate because these terms are used advisedly.[2]

The Arizona Rules of Juvenile Procedure cited and linked throughout this Guide incorporate by reference the provisions of ICWA, any amendments to ICWA, and the BIA Regulations. Ariz. R. P. Juv. Ct. 8(B). Arizona Department of Child Safety policies are also referenced and linked where appropriate. The ICWA statutes are attached as Appendix A. Unless the context requires a more complete citation, this Guide will cite individual sections of ICWA by their US Code section

[1] The 2016 ICWA Regulations supersede and replace the 1979 BIA Guidelines. The 1979 BIA Guidelines, published at 44 Fed. Reg. 67,584, were explicitly nonbinding but Arizona's courts frequently relied on them for guidance, *see, e.g.*, *Maricopa Cnty. Juv. Action No. JS-8287*, 171 Ariz. 104, 828 P.2d 1245 (App. 1991). The 2016 ICWA Regulations, governing "all proceedings and stages of a proceeding in which the Act is or becomes applicable," were promulgated by the Department of the Interior after notice and comment as binding regulations. *See* 25 C.F.R. 23.1. The 2016 BIA Guidelines, reiterate the BIA Regulations with illustrations and greater detail.

[2] When the BIA issued the proposed rule in 2015, it stated: "We welcome comments on all aspects of this rule. We are particularly interested in the use of 'should' versus 'must'." 80 Fed. Reg. 14880, 14882 (Mar. 20, 2015).

numbers (e.g., "ICWA § 1901" or simply "§ 1901"). A similar short form of citation will be used for the Regulations and the Guidelines (e.g., "ICWA Regulations § 23.101" and "BIA Guidelines A.1").

B. Terminology

ICWA itself uses the terms "Indian" and "Tribe". For consistency, this Guide uses the Act's terminology; Arizona state courts should do the same. The term "Indian" is a term of art in federal law that serves to differentiate between an individual's political relationship with his or her tribe and any ethnic or racial heritage (often described as "Native American"). *See Morton v. Mancari*, 417 U.S. 535 (1974); *Pima Cnty. Juv. Action No. S-903*, 130 Ariz. 202, 208, 635 P.2d 187, 193 (App. 1981). As a result, a child's status as an "Indian child" is a political designation for purposes of the Equal Protection Clause. *See S.S. v. Stephanie H.*, 241 Ariz. 419, 388 P.3d 569 (App. 2017), *cert. denied*, 138 U.S. 380 (2017).

II. Proceedings Covered by ICWA: Child Custody Proceedings Involving an Indian Child

The provisions of ICWA apply to any "child custody proceeding" involving an "Indian child," as defined by ICWA. Those terms have specific and unique meanings under ICWA that may differ from their ordinary usage, as discussed below. Note that the party asserting that ICWA applies to a proceeding has the burden of proving its applicability. *Maricopa Cnty. Juv. Action No. JS-7359*, 159 Ariz. 232, 235, 766 P.2d 105, 108 (App. 1998).[3]

A. How does ICWA Define "Child Custody Proceeding"?

ICWA defines "child custody proceeding" to include (i) "foster care placement," (ii) "termination of parental rights," (iii) "pre-adoptive placement," and (iv) "adoptive placement." ICWA § 1903(1). "Foster care placement," in turn, is defined as:

> [A]ny 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 Regulations define "custody" to mean "physical and/or legal custody under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law." ICWA Regulations § 23.2 (Custody). The Regulations further provide that "continued custody" means "physical or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past." *Id.* The Regulations also clarify that a biological mother has had custody of a child. *Id.* These provisions of the Regulations are

[3] *But see* discussion of ICWA Regulations § 23.107(b) providing presumptive application of ICWA when there is "reason to know" a child is an "Indian child" *infra* Section III(A).

significant in light of *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). *See* discussion *infra* Section III(D).

B. What Arizona Juvenile Proceedings are Covered by ICWA?

Foster care placements (A.R.S. §§ 8-501 to -530).

Guardianships (A.R.S. §§ 8-801 to -892; Ariz. R. P. Juv. Ct. 63).

Terminations of parental rights (A.R.S. §§ 8-531 to -544; Ariz. R. P. Juv. Ct. 66).

Adoptions and pre-adoptive placements (A.R.S. §§ 8-101 to -135; Ariz. R. P. Juv. Ct. 84).

Incorrigible child custody (A.R.S. §§ 8-201(19), 8-341(A)(2); Ariz. R. P. Juv. Ct., Rule 8).

C. What Arizona Juvenile Proceedings are not Covered by ICWA?

ICWA's broad definition of "child custody proceeding" has two express exceptions: dissolution of marriage and delinquency proceedings. ICWA § 1903(1).

Domestic Relations Proceedings. First, the statutory definition of a "child custody proceeding" does not include an award of custody to one of the parties in a dissolution of marriage proceeding. Thus, child custody and parenting time disputes between parents are not "child custody proceedings" under ICWA. Courts have applied this exception to custody disputes between unmarried parents as well, and the Regulations similarly provide that ICWA does not apply to "an award of custody. . . to one of the parents including, but not limited to, an award in a divorce proceeding." ICWA Regulations § 23.103(b)(3).

Delinquency and Incorrigibility Proceedings. Second, if a juvenile commits an act that would be a crime if committed by an adult, then the proceeding and resulting placement is not a "child custody proceeding" under ICWA. If the investigation of a delinquency case involving a criminal act reveals that the Indian child suffered abuse and neglect, then ICWA will apply to any dependency case arising out of the delinquency case. All other placements of juveniles with anyone other than a parent, including status offenses,[4] are "child custody proceedings" and fall under the provisions of ICWA. ICWA Regulations § 23.2(2). The Regulations clarify that ICWA applies to involuntary proceedings, voluntary proceedings that could prohibit the parent or Indian custodian from regaining custody of the child upon demand, and a "proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, pre-adoptive, or adoptive placement, or termination of parental rights." ICWA Regulations § 23.103(a)(1)(iii).

ICWA applies to a juvenile whom the court adjudicates as incorrigible and, pursuant to A.R.S. § 8-341(A)(2), awards custody to a reputable citizen, to a public or private agency, or to relatives,

[4] The Regulations define "status offenses" to mean "offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (e.g., truancy, incorrigibility)." ICWA Regulations § 23.2.

rather than to the child's parents. *See* Guidelines B.2. (ICWA applies to placement resulting from a child's status offense, defined as an offense that would not be considered criminal if committed by an adult, such as truancy or incorrigibility). Even if the child is not removed from the parents' custody and ICWA does not apply, the court may nevertheless provide the child's tribe notice of the proceedings. This would give the tribe the opportunity to intervene to assist in identifying and providing culturally competent services.[5]

If an Indian child is returned home after being found delinquent in a proceeding to which ICWA does not apply, the Department of Child Safety may intervene if a lack of proper supervision may have contributed to the child's delinquent behavior. DCS 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 ICWA would apply to the proceedings initiated by the new DCS petition even though it did not apply to the original juvenile proceeding that caused DCS to become involved.

In rare cases, when a minor runs away and the police later detain him for a status offense, the case may qualify temporarily as an "emergency removal" placement. *See* ICWA § 1922; ICWA Regulations § 23.113. ICWA still applies, which means the placement based on the emergency situation must end as soon as the emergency itself ends. *See infra* Section VII(B).

III. "Indian Child"

A. How Does ICWA Define "Indian Child"?

Consistent with ICWA § 1903(4), the Regulations; define an "Indian child" as someone who is (1) under the age of 18 and unmarried, and (2) either (a) a member or citizen of an Indian tribe, or (b) is eligible for membership or citizenship in an Indian tribe and is the biological child of a member/citizen of an Indian tribe. ICWA Regulations § 23.2; *see also* Ariz. R. P. Juv. Ct. 37(C)(2), 68(B)(3).

The best way to identify an "Indian child" and determine the tribal affiliation is to obtain the required information from the child, the child's family members, and the tribe.[6] The tribe's determination of membership or eligibility for membership is conclusive, and the state may not substitute its own determination regarding tribal membership. *See* ICWA Regulations § 23.108; DCS Policy Manual, Chapter 6, Section 1, *Identification of an Indian Child and Determination of Jurisdiction*.

> **Practice Tip:** To ensure the most timely and accurate response regarding a child's membership or eligibility for membership in a tribe, the party seeking confirmation should provide as much information as possible, including maiden names, dates of birth, social security numbers, and tribal enrollment (or census) numbers.

[6] A.R.S. § 8-824(E)(7) requires the court to order a parent or guardian at a preliminary protective hearing to provide the names, relationships, and information necessary to locate persons related to the child.

The Regulations require courts to "ask each participant … in a child custody proceeding whether the participant knows or has reason to know that the child is an Indian child."[7] If the child is subject to ICWA, the court must meet all the requirements of the Act.[8]

Under the Regulations[9], a state court has reason to know a child may be an Indian child if:

1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indication that the child is an Indian child;
3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
4) The court is informed that that the residence or domicile of the child, the child's parent, or the child's custodian is on a reservation or in an Alaskan Native village;
5) The court is informed that the child is or has been a ward of a Tribal court; or
6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian tribe.

These are common circumstances that should be checked and would give a court reason to know that the child may be an Indian child covered by ICWA. But the list is not exhaustive. Courts must watch for other indications that the child is an Indian child under ICWA.

DCS Policy requires the assigned child safety worker to make "diligent efforts" to identify whether a child is subject to ICWA within 48 hours of removal and within 5 days of a case opening for investigation. Court review should include what steps the child safety worker has taken to determine the child's status. This will significantly reduce the risk of discovering the child's Indian heritage at an advanced stage in the proceedings.

If in doubt, the court may order the parent or custodian to provide any available information about the child's Indian heritage to the child's attorney or to the guardian ad litem for the child appointed by the court to help investigate whether the child is an Indian child. Another option for identifying an Indian child's tribe is to contact the Bureau of Indian Affairs' regional office. For Arizona tribes (except the Navajo Nation), contact:

Western Regional Office
2600 N. Central Avenue
4th Floor Mailroom
Phoenix, AZ 85004-3050
Telephone: (602) 379-6600

[7] ICWA Regulations § 23.107(a); A.R.S. § 8-815; Ariz. R. P. Juv. Ct. R. 50, 52, 62, 63.2, 65.

[8] ICWA Regulations § 23.107(b).

[9] ICWA Regulations § 23.107(c).

Telefax: (602) 379-4413

For the Navajo Nation:

Navajo Regional Office
Bureau of Indian Affairs
P.O. Box 1060
Gallup, NM 87305
Telephone: (505) 863-8314
Telefax: (505) 863-8324

When contacting the BIA, be prepared to provide as much family-tree information as possible. This includes the child's name and the names of the parents and grandparents (including maiden names).

If there is reason to know that a child is an Indian child, but the court lacks sufficient evidence to finally determine the child's status, the court must "[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an 'Indian child'." ICWA Regulations § 23.107(b). This mandatory language in the Regulations gives ICWA presumptive application. Ariz. R. P. Juv. Ct. 8(C). Note that this differs from an earlier court decision from the Arizona Court of Appeals. *See Ariz. Dep't of Econ. Sec. v. Bernini*, 202 Ariz. 562, 48 P.3d 512 (App. 2002) (holding that unless and until the party asserting ICWA's application can prove that the child is an Indian child, only the ICWA notification requirements apply to the proceedings).

B. What Special Considerations Apply to Adopted Children?

Regardless of a child's heritage by birth, a child adopted by parents who are members of a particular tribe may be subject to ICWA if the child is a member of 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 ICWA.

C. What Special Considerations Apply to Children of Unwed Fathers?

Under ICWA § 1903(9) and Arizona case law, an Indian father of a child born out of wedlock to a non-Indian mother must acknowledge or establish paternity before the Act applies. *See, e.g.*, *Jared P. v. Glade T.*, 221 Ariz. 21, 209 P.3d 157 (App. 2009); *Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, 7 P.3d 960 (App. 2000); *Maricopa Cnty. Juv. Action No. A-25525*, 136 Ariz. 528, 667 P.2d 228 (App. 1983). The Arizona Court of Appeals has held that an unwed father need not strictly comply with state-law rules for establishing paternity to demonstrate that he has "acknowledged or established" paternity for purposes of the application of ICWA. *Jared P.*, 221 Ariz. 21, 209 P.3d 157. The continued validity of the holding in *Jared P.*, is subject to question in light of *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). *See* discussion *infra* Section III(E). Even when one parent is a non-Indian and the child has been raised in a non-Indian home, the Act still governs the child's placement if the child is an "Indian child" as defined by the Act. *Coconino Cnty. Juv. Action No. J-10175*, 153 Ariz. 346, 349, 736 P.2d 829, 832 (App. 1987). This holding may be subject to reinterpretation in light of *Adoptive Couple*, in situations where the Indian parent never had legal or physical custody of the child. Additionally, a child who has an Indian parent

may not be eligible for membership under the tribe's membership criteria. In that circumstance, ICWA would not apply. All these considerations underscore the need for prompt notice to the alleged father to ensure that the child's Indian status can be immediately ascertained.

D. Does the Existing Indian Family Exception Apply in Arizona?

Courts in a few states have refused to apply ICWA if the child is not part of an "existing Indian family unit," even if the child is clearly included in the definition of "Indian Child" under ICWA. *See, e.g.*, *In re Adoption of Baby Boy L.*, 231 Kan. 199, 206, 643 P.2d 168, 175–76 (1982) (first state court to adopt the "existing Indian family" exception), *overruled by In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009). Currently only Alabama, Indiana, Kentucky, Louisiana, and Tennessee recognize the exception, and Alabama and Indiana do not apply the exception if the child's mother is Indian. *See, e.g.*, *Ex parte C.L.J.*, 946 So. 2d 880, 889 (Ala. Civ. App. 2006); *see also Matter of D.S.*, 577 N.E.2d 572, 574 (Ind. 1991). Twenty states have rejected the exception judicially or legislatively. The California courts of appeal are split, but a statutory amendment in that state clarified the application of ICWA and was intended to bar the application of the exception. *See generally In re Vincent M.*, 150 Cal. App.4th 1247, 1265, 59 Cal.rptr.3d 321 (Cal App. 2007).

Arizona has explicitly rejected this "exception" for several reasons. *See Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, ¶ 13, 7 P.3d 960, 963 (App. 2000). In *Michael J., Jr.*, the court criticized the existing Indian family exception because it frustrated the express purposes of the Act. In addition, the exception interfered with the tribe's ability to protect the welfare of its children and its culture. Furthermore, the plain language of the Act does not require that the child be part of an existing Indian family and enforcing such a requirement inscribes a judicially made condition onto the Act. Consistent with the case law, the BIA Guidelines flatly reject the exception (sometimes known as the "existing Indian family doctrine"), stating that the court may not determine whether ICWA is applicable based on several factors, including the participation of the parents or the Indian child in Tribal cultural, social, religious or political activities. *See* Guidelines A.3.

E. What Did *Adoptive Couple v. Baby Girl* Add to the Analysis of the Applicability of ICWA?

In *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), the Supreme Court did not endorse the existing Indian family exception but did reach a result arguably consistent with the reasoning underlying the exception based upon the language of ICWA. In its 5-4 decision, the Court held that an unmarried Indian father who had "abandoned" the child before birth and had never had custody under state law was not entitled to the procedural protections of ICWA in a proceeding to terminate his parental rights.

The birth father was an enrolled member of the Cherokee Nation, and the birth mother was non-Indian, both Oklahoma residents. Their daughter was an "Indian child" within the meaning of ICWA because she was eligible for tribal enrollment with the Cherokee Nation and was the biological child of a tribal member. The birth mother relinquished the child for adoption by a non-Indian couple from South Carolina. The birth father informally renounced his paternal rights in communications with the mother but objected to the adoption once he understood the mother's plan that the child be adopted.

As described by the majority opinion, "Birth Mother sent Biological Father a text message asking if he would rather pay child support or relinquish his parental rights. Biological Father responded via text message that he relinquished his rights." *Adoptive Couple*, 570 U.S. at 643. Furthermore, "[w]orking through a private adoption agency, Birth Mother selected Adoptive Couple, non-Indians living in South Carolina, to adopt Baby Girl. Adoptive Couple supported Birth Mother both emotionally and financially throughout her pregnancy. Adoptive Couple was present at Baby Girl's birth in Oklahoma on September 15, 2009, and Adoptive Father even cut the umbilical cord. The next morning, Birth Mother signed forms relinquishing her parental rights and consenting to the adoption." *Adoptive Couple*, 570 U.S. at 644.

Four months later, after being served with notice of the adoption, "Biological Father signed papers stating that he accepted service and that he was 'not contesting the adoption.' But Biological Father later testified that, at the time he signed the papers, he thought that he was relinquishing his rights to Birth Mother, not to Adoptive Couple." *Adoptive Couple*, 570 U.S. at 644-45. The Cherokee Nation subsequently intervened in the adoption proceeding. Under South Carolina law, the birth father's failure to assert his paternal rights in a timely fashion meant that he was not entitled to veto the adoption.

Both the South Carolina trial court and the state supreme court, however, held that the heightened evidentiary burdens and the placement preferences under ICWA trumped state law. Because the birth father's paternal rights could not be terminated, the adoption did not go forward, and the state trial court ordered the transfer of the child to the birth father. The transfer occurred while the case was still in litigation.

The U.S. Supreme Court reversed and remanded. The majority announced three separate holdings, each of which marks an important limitation on ICWA.

1) The heightened burden under ICWA § 1912(f), to show "evidence beyond a reasonable doubt 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" does not apply where the Indian parent never had physical or legal custody of the Indian child under state law. The Court reasoned that the term "continued custody" required this result, and it also found support for this interpretation in the original BIA Guidelines. *Adoptive Couple*, 570 U.S. 647-51.

2) The heightened requirement under ICWA § 1912(d) to show that "active efforts have been made to provide remedial services . . . designed to prevent the breakup of the Indian family" does not apply "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody." The Court reasoned that "there is no 'relationship' that would be 'discontinu[ed]'—and no 'effective entity' that would be 'end[ed]'—by the termination of the Indian parent's rights." *Adoptive Couple*, 570 U.S. at 651-54.

3) The placement preferences under ICWA § 1915 do not apply "in cases where no alternative party has formally sought to adopt the child." The Court pointed out that the "Biological Father is not covered by § 1915(a) because he did not seek to adopt Baby Girl. . . Moreover, Baby Girl's paternal grandparents never sought custody of Baby Girl. . . Nor did other members of the Cherokee Nation or 'other Indian families' seek to adopt Baby Girl, even

though the Cherokee Nation had notice of—and intervened in—the adoption proceedings." *Adoptive Couple*, 570 U.S. at 654-55.

Summarizing its ruling, the Court clearly disapproved of the application of ICWA to unwed fathers who are slow to assert their rights. According to Justice Alito, writing for the majority, "a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother – perhaps contributing to the mother's decision to put the child up for adoption – and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests." *Id.* at 656. The Court further observed, "If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under ICWA. Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(d), (f), makes clear that neither provision applies in the present context. Nor does the rebuttable adoption preferences in § 1915(a), apply when no alternative party has formally sought to adopt the child. *Adoptive Couple*, 570 U.S. at 656. The full implications of *Adoptive Couple* are still uncertain, but at least one court has recognized that the case did not endorse the existing Indian family exception. *See Thompson v. Fairfax County Dept. of Family Services*, 747 S.E.2d 838 (Va. App. 2013).

IV. Determining an Indian Child's Tribe

When there is reason to know a child is an Indian child, identifying the child's tribe is essential considering the tribe's right to notice and the right to intervene in state child custody proceedings, among other rights.

A. Definition of "Indian Tribe"

ICWA § 1903(8) defines an "Indian tribe" as "[A]ny 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."[10] *See* ICWA Regulations § 23.2; *see also* Ariz. R. P. Juv. Ct. 37(C)(5), 68(B)(5).

i. What is a federally recognized tribe?

The federal Bureau of Indian Affairs recognizes 567 American Indian and Alaska Native tribes. BIA's Designated Tribal Agents for Service of Notice contains contact information for all tribal ICWA contacts. Arizona has 22 federally recognized tribes. They are:

1) Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation
2) Cocopah Tribe of Arizona
3) Colorado River Indian Tribes of the Colorado River Indian Reservation (Arizona and California)
4) Fort McDowell Yavapai Nation
5) Fort Mojave Indian Tribe (Arizona, California and Nevada)
6) Gila River Indian Community of the Gila River Indian Reservation

[10] Ariz. R. P. Juv. Ct. 37(C)(5) (applying the ICWA definition of "tribe").

7) Havasupai Tribe of the Havasupai Reservation
8) Hopi Tribe of Arizona
9) Hualapai Indian Tribe of the Hualapai Indian Tribe Reservation
10) Kaibab Band of Paiute Indians of the Kaibab Indian Reservation
11) Navajo Nation (Arizona, New México and Utah)
12) Pascua Yaqui Tribe of Arizona
13) Pueblo of Zuni Tribe (Arizona and New México)
14) Quechan Tribe of the Fort Yuma Indian Reservation (Arizona and California)
15) Salt River Pima-Maricopa Indian Community of the Salt River Reservation
16) San Carlos Apache Tribe of the San Carlos Reservation
17) San Juan Southern Paiute Tribe of Arizona
18) Tohono O'odham Nation of Arizona
19) Tonto Apache Tribe of Arizona
20) White Mountain Apache Tribe of the Fort Apache Reservation
21) Yavapai-Apache Nation of the Camp Verde Indian Reservation
22) Yavapai-Prescott Tribe of the Yavapai Reservation

ii. Does ICWA apply to a child who is not a U.S. citizen and to tribes that are not federally recognized?

Some Indian children are Canadian or Mexican[11] citizens and members of U.S. federally recognized tribes. Because ICWA is not restricted to U.S. citizens, the Act may apply to those children because of their membership in tribes recognized by our federal government. ICWA does not apply to members of tribes that are not federally recognized, state historic tribes,[12] or tribes recognized by other countries.

> **Practice Tip:** Even though ICWA does not apply to a non-federally-recognized tribe, a state historic tribe, or a tribe recognized by another country, courts may choose to send notice of a custody proceeding to such tribes when a child member is involved. Those tribes may offer culturally appropriate services that can help the child and family or aid in locating relatives. Two websites with information about the First Nations of Canada are: Indigenous Services Canada and Aboriginal Affairs and Northern Development Canada. Nevertheless, even if notice is sent and one of those tribes responds, it will not have the right of formal intervention under ICWA

B. What is the Definition of "Indian Child's Tribe"?

ICWA § 1903(5) defines an "Indian child's tribe" as the tribe (or tribes) in which the child "is a member or eligible for membership." If the child already is a member or eligible for membership

[11] The Tohono O'odham Nation is the only Arizona tribe that enrolls Mexican members, although those members are not U.S. citizens.

[12] Approximately half of the states—but not Arizona—have recognized "state historic tribes," that is, tribes that are not federally recognized but that enjoy some protection or benefit under state laws. Although members of state historic tribes are not entitled to ICWA's protections, notifying such tribes may be beneficial in obtaining resources to help with reunification and location of relatives.

in more than one tribe, then ICWA recognizes the tribe "with which the child has the more significant contacts." *See also* DCS Policy Manual, Chapter 6, Section 1, *Identification of an Indian Child and Determination of Jurisdiction*.

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.

C. What if a Child is a Member or Eligible for Membership in More than one Tribe?

The Regulations give detailed directions for situations where the child is connected to more than one tribe. If a child already is a member of one tribe, that tribe is the "Indian child's tribe" for purposes of ICWA even if the child is *eligible* for membership in another tribe, unless otherwise agreed to by the tribes. ICWA Regulations § 23.109(c). If a child is a member in more than one tribe or not a member but eligible for membership in more than one tribe, "the court must provide the opportunity in any involuntary child custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe." *Id.* The Tribes are to reach an agreement together. *Id.* § 23.109(c)(1). The Guidelines discuss that some states have "entered into negotiated Tribal-State agreements." BIA Guidelines A.2. Only if the tribes are unable to reach an agreement should the state court designate the tribe with which the child has the more significant contacts.

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

1) Preference of parents for membership of the child;
2) Length of past domicile or residence on or near the reservation of each tribe;
3) Tribal membership of custodial parent or Indian custodian;
4) Interest asserted by each tribe in the child-custody proceeding;
5) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
6) The child's self-identification, if the child is of sufficient age and capacity to meaningfully self-identify.

See ICWA Regulations § 23.109(c)(2); BIA Guidelines § A.2.

Similarly, Ariz. R. P. Juv. Ct. 37(C)(3) provides, "The term Indian child's tribe means . . . 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." The Rules of Procedure for Juvenile Court do not contain a definition of the term "significant contacts."

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. *See* Ariz. R. P. Juv. Ct. 50.

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 addresses:

Western Regional Office
2600 N. Central Avenue
4th Floor Mailroom
Phoenix, AZ 85004-3050
Telephone: (602) 379-6600
Telefax: (602) 379-4413

For the Navajo Nation:

Navajo Regional Office
Bureau of Indian Affairs
P.O. Box 1060
Gallup, NM 87305
Telephone: (505) 863-8314
Telefax: (505) 863-8324

V. ICWA Notification Requirements

A. In Which Cases Must ICWA Notice Be Provided?

In any *involuntary* proceeding in state court, if the court knows or has reason to know that an Indian child is involved, the party who initiated the child custody proceeding must provide notice of the proceeding and the right of intervention to the child's:

1) Parents;
2) Indian custodians; and
3) Any tribe or tribes the child belongs to or is eligible to join.[13]

The notice must be by registered or certified mail with return receipt requested. The Regulations provide detailed directions on how to give notice, including the mandatory content of such notices. *See* ICWA Regulations § 23.107(b). If the identity or location of the parent or Indian custodian and tribe cannot be ascertained, but there is reason to know the child is an Indian child, then notice must be sent to the appropriate BIA Regional Director. In that circumstance, to establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not decide of Tribal membership but may, in some instances be able to identify Tribes to contact. ICWA Regulations § 23.111(e).

Although neither ICWA nor the Regulations require notice of voluntary proceedings, Indian custodians and tribes have the right to intervene at any time during voluntary or involuntary foster care or termination of parental rights proceedings under ICWA § 1911(c). Without notice of the proceedings, the right of intervention would be meaningless. The BIA Guidelines recommend that notice should be sent in voluntary proceedings as well. BIA Guidelines § D.1. Notice in voluntary proceedings is arguably necessary because the tribe might have exclusive jurisdiction or the right to intervene and would need notice to exercise those rights. Also, notice might help the agency and court in determining whether the child is an Indian child and in complying with ICWA § 1915.

[13] ICWA § 1912(a); *see also* ICWA Regulations § 23.107(b); A.R.S. § 8-535; Ariz. R. P. Juv. Ct. 64(D).

See BIA Guidelines § I.3 ("The Department recommends that the Indian child's Tribe be provided notice of voluntary proceedings involving that child to allow the Tribes participation in identifying preferred placements and to promote the child's continued connections to the Tribe").

B. What Information Is Required in ICWA Notices?

Under the ICWA Regulations,[14] notice must include comprehensive information, including but not limited to the following:

1) The name of the Indian child
2) The Indian child's birthdate and birthplace
3) all names known (including maiden, married, and former names or aliases), birthdates, birthplaces and Tribal enrollment numbers - if known - of the parents,
4) The child's tribal affiliation or eligibility for enrollment
5) A copy of the petition, complaint, or other document initiating the proceedings and if a hearing has been scheduled, information on the date, time, and location of the hearing.
6) The petitioner's name, along with the name and address of the petitioner's attorney.
7) A statement that the parents, Indian custodian, and tribe all have a right to intervene in the proceedings.
8) A statement that the court will appoint counsel for the parents or custodian if they cannot afford one.
9) A statement that the parents or Indian custodian have the right to request up to 20 days additional time to prepare for the proceedings, if needed.
10) The court's location, mailing address, and telephone number.
11) A statement that the parents, custodian, and tribe all have a right to petition the court to transfer the case to the tribal court.
12) The potential legal consequences of a current adjudication for the future custodial rights of the parents or custodian.
13) 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.

C. How Must ICWA Notice Be Provided and Proved?

ICWA § 1912(a) also specifies *how* the court may provide notice. It must be provided by registered mail with return receipt requested.[15] Additional options for notice might include personal service or electronic service. These options, however, do not replace registered mail but must be done in conjunction with registered mail with return receipt. *See* ICWA Regulations § 23.111(c).

The original or a copy of each notice along with return receipts or other proofs of service must be filed with the court. The Regulations require that the notice be in "clear and understandable language." ICWA Regulations § 23.111(d). If the court determines that the parent or custodian

[14] ICWA Regulations § 23.111(d); *see also* Ariz. R. P. Juv. Ct. 64.

[15] *See* Ariz. R. P. Juv. Ct. 48(D)(9), 64(D). In Arizona, notice of ICWA proceedings is usually sent by certified mail, return receipt requested, since both methods require a signature for delivery and provide confirmation of receipt, but certified mail is considerably less expensive and typically arrives more quickly than does registered mail.

does not understand the written notice due to inadequate comprehension of written English, the court must provide language access services as required by Title VI of the Civil Rights Act and other federal laws. ICWA Regulations § 23.111(f). If necessary, a court should contact the nearest Bureau of Indian Affairs regional office, so the BIA can ensure that the notice is explained to the parent or custodian in a language that he or she understands. ICWA Regulations § 23.111(f); DCS Policy Manual, Chapter 6, Section 1, *Identification of an Indian Child and Determination of Jurisdiction*.

> **Practice Tip:** The petitioner may use additional means to communicate the notice such e-mail, telephone or other electronic communication. These additional means may help ensure that tribes receive actual notice, but they are not a substitute for the required statutory notice. See ***ICWA eNotice User Guide.***

A trial court's failure to provide the required notice under ICWA may be reversible error in involuntary child custody proceedings. In *Michelle M. v. DCS*, a mother challenged the termination of her parental rights on the ground that her child was an Indian child and the trial court had failed to comply with ICWA.[16] The mother's testimony that the child was eligible for tribal membership came before her rights were terminated. Considering the mother's testimony, the appeals court concluded that "DCS was required to provide proper notice under ICWA." *Michelle M. v. DCS*, 401 P.3d at 1017. Nevertheless, the court did not reverse the termination order. Opting instead for judicial efficiency, the court stayed the appeal for 90 days to allow for proper notice under ICWA. If the child's identity as an "Indian child" under ICWA is confirmed, then further proceedings consistent with ICWA would be required. On the other hand, if the tribe responds that the child is not an Indian child, no further proceedings under ICWA would be necessary.

D. What Are the Time Limits for Notice?

Regardless of the service method, ICWA § 1912(a) requires that service 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. *See also* ICWA Regulations § 23.112(a). This requirement is designed to give the parent or Indian custodian and the tribe adequate time to prepare for the hearing. *See* Ariz. R. P. Juv. Ct. 48, 61, 64.

A conflicting state law adopted to comply with other federal law mandates that the court "hold a preliminary protective hearing to review the taking into temporary custody of a child . . . not fewer than five days nor more than seven days after the child is taken into custody, excluding Saturdays, Sundays and holidays." A.R.S. § 8-824(A). This statute permits the court to grant one continuance of no more than five days if "clearly necessary to prevent abuse or neglect, to preserve the rights of a party, or for other good cause shown." *Id.* These requirements are designed to minimize the time a child remains in custody without a hearing.

There are several schools of thought regarding resolution of this conflict. First, the state statutory provision for a continuance "to preserve the rights of a party" can be read to support continuing the preliminary protective hearing to comply with ICWA's notice requirements. On the other

[16] *Michelle M. v. DCS*, 243 Ariz. 64, 401 P.3d 1013 (App. 2017).

hand, the policy that favors holding a court hearing as quickly as possible gives the parent a chance to limit the duration of the child's out-of-home placement by challenging the state's temporary custody, an added protection afforded by state law and thus supported by ICWA. *See* ICWA Regulations § 23.106. If the parent chooses to appear at the preliminary protective hearing, she may waive the 10-day notice requirement. Alternatively, the preliminary protective hearing requires an order either affirming or denying continued temporary custody pending an adjudication hearing on the dependency petition. Considering the function of the preliminary protective hearing in Arizona, it may fall within the "emergency removal" provision of ICWA. *See* ICWA § 1922; ICWA Regulations § 23.113; *see also infra* Section VII(B). Therefore, the ten-day notice provision would not apply at that stage but would apply to the dependency adjudication hearing held later, typically well after ICWA's ten-day notice window.

> **Practice Tip:** Parents and tribes often waive ICWA's ten-day notice requirement in the interest of quickly determining temporary custody, but the practice is not standardized, and nothing obligates a parent or tribe to do so.

VI. Jurisdiction

ICWA requires state courts to recognize and respect tribal jurisdiction.[17]

A. When Does a Tribal Court Have Exclusive Jurisdiction?

ICWA § 1911(a)[18] provides that an Indian tribe shall have exclusive jurisdiction over any child custody proceeding involving an Indian child who:

1) Resides or is domiciled within the tribe's reservation,[19] or
2) Is a ward of the tribal court, regardless of the child's residence. 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:
    - Tribal court order (for custody or placement), or
    - Tribal resolution, where a tribe does not conduct formal tribal court proceedings.[20]

"Domicile" is not defined in ICWA. The U.S. Supreme Court held that federal law determines the meaning of domicile in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30 (1989). In

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[17] In some states, jurisdiction is vested in the state by a federal law known as Public Law 280. *See* 18 U.S.C. § 1162(a); *see also* 28 U.S.C. § 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 U.S.C. § 1918. Arizona is not a Public Law 280 state.

[18] *See* ICWA Regulations § 23.110.

[19] Note that not all federally recognized tribes have land set aside or reserved for their exclusive use. Those tribes may lack the territorial basis for exclusive jurisdiction. *See* Jones, Tilden & Gaines-Stoner, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* 56-57 (2d ed. 2008). An example of this is the San Juan Southern Paiute Tribe located on the Navajo reservation.

[20] *In re M.R.D.B.*, 787 P.2d 1219 (Mont. 1990); *In re J.M.*, 718 P.2d 150 (Alaska 1986); *In re D.L.L.*, 291 N.W.2d 278 (S.D. 1980).

recognizing a uniform federal definition under ICWA, 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, even if the child has never physically been present in the mother's domicile. Even before *Holyfield*, an Arizona court found that the domicile of a child born out of wedlock derived from his mother, even though the child had never been on the reservation. *Pima Cnty. Juv. Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981).

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 when the child is not physically present on the reservation; there, ICWA permits the state court to authorize the filing of a petition before transferring the case to the appropriate tribal court. *See infra* Section VII(B). Exclusive tribal jurisdiction under § 1911 applies even if the Indian child is not a member of the tribe on whose reservation the child is living. If the tribe's own tribal code limits its jurisdiction to children who are members of that tribe, however, an inter-tribal transfer may be available. ICWA does not govern child welfare jurisdiction over a child who resides on an Indian reservation but who does not qualify as an Indian child under ICWA. Determining child welfare jurisdiction in this circumstance requires a case-by-case analysis using general principles of state and tribal jurisdiction that is beyond the scope of this Guide.

When the state court determines that the tribal court has exclusive jurisdiction, the Regulations direct the state court to notify the tribal court of the pending dismissal, dismiss the proceeding, and ensure that the tribal court is sent all information regarding the child-custody proceeding.[21]

B. When Do the State Court and Tribal Court Have Concurrent Jurisdiction?

If the state court determines that the Indian child is not a resident of or domiciled on a reservation and is not a ward of the tribal court, the tribal court and state court share concurrent jurisdiction under ICWA § 1911(b), described below. *See infra* Section VI(C).[22]

In child custody proceedings involving Indian children who reside off their tribe's reservation, federal law imposes specific duties on state courts, as discussed in this Guide's section titled: ICWA Notification 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.

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.

[21] ICWA Regulations § 23.110.

[22] *See also* ICWA Regulations. § 23.117.

C. Transferring Jurisdiction to Tribal Court

ICWA provides mechanisms through which the role of tribal courts is protected even in the absence of exclusive tribal court jurisdiction. For cases involving Indian children who are not within a tribe's exclusive jurisdiction, ICWA creates presumptive tribal jurisdiction by means of transfer to tribal court. Under ICWA § 1911(b), a parent, Indian custodian, or tribe may move for transfer to tribal court of proceedings for foster care placement or termination of parental rights. If a transfer motion is made, 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.

Significantly, in *Gila River Indian Community v. DCS*, 242 Ariz. 277 (2017), the Arizona Supreme Court clarified that the right to transfer a proceeding to tribal court, under ICWA § 1911(b), applies only to a foster care placement or termination of parental rights. The court held that a pre-adoptive or adoptive placement proceeding that occurs after termination of parental rights does not fall within the statutory right of transfer under ICWA. The court recognized, however, that "tribes have the inherent authority to hear child custody proceedings involving their own children," and ICWA does not preclude transfer in such circumstances on other grounds. *Gila River Indian Community v. DCS*, 242 Ariz. at 291. For pre-adoptive and adoptive placement proceedings, state courts have discretion to consider transfer motions on forum non-convenience grounds or other bases. *See also* BIA Guidelines F.2 (stating that "[p]arties may request transfer of pre-adoptive and adoptive placement proceedings, but the standards for addressing such motions are not dictated by ICWA or the regulations").

ICWA also permits states and tribes to craft agreements for the care and custody of Indian children. These agreements may provide for the orderly transfer of jurisdiction on a case-by-case basis and for concurrent jurisdiction between states and tribes. ICWA § 1919(a); BIA Guidelines A.2. To be valid under the Act, such agreements may be revoked by either party within 180 days on written notice to the other party. ICWA § 1919(b). Currently only the Navajo Nation and DCS have a binding Intergovernmental Agreement in place.

i. Who may petition for transfer to tribal court?

A parent, Indian custodian, or tribe may request that the state court transfer the Indian child's custody proceeding to the tribal court of the child's tribe. There is no requirement that the transfer request be made in writing. The Regulations provide for oral requests made on the record and make clear that the request may be made at any stage in each proceeding for foster care or termination of parental rights. *See* ICWA Regulations § 23.115. The Guidelines recognize that a tribe or parent may have reasons for not immediately moving to transfer the case. BIA Guidelines F.2.

When a request for transfer is made, the tribal court must be promptly notified so that it can decide whether to accept or decline the transfer request. The Guidelines recommend that the notice be both in writing and by phone. *See* BIA Guidelines F.3; DCS Policy Manual, Chapter 6, Section 2, *Removal and Temporary Custody of an Indian Child*.

If the state court receives an oral request to transfer the case, the state court should record the request in writing and make it part of the court's record.

ii. When may the state court refuse to transfer?

On petition by a parent, Indian custodian, or tribe, the state court must transfer a proceeding for the foster care placement or termination of parental rights regarding an Indian child who resides off the reservation unless a parent objects, the tribe declines jurisdiction, or there is good cause to the contrary. ICWA § 1911(b); ICWA Regulations § 23.117. Only a parent can veto a transfer. *Maricopa Cnty. Juv. Action No. JD-6982*, 186 Ariz. 354, 922 P.2d 319 (App. 1996) (noting that a parent's objection to a placement is distinct from the right of a parent to object to a transfer of jurisdiction). Any other party, including the child, may object to the transfer but must demonstrate good cause to deny the transfer request.

Sometimes tribes may decline jurisdiction to avoid burdening their tribal court or their tribal child welfare system. In such a circumstance, the tribe may choose to participate in the case by exercising their right to intervene in the proceedings. *See infra* Section VI(D).

iii. When is there "good cause" not to transfer?

Under ICWA, "good cause" to not transfer jurisdiction from state court to tribal court 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. Neither ICWA itself nor the Regulations provide a standard of evidence for establishing good cause to refuse to transfer to tribal court. The Guidelines recognize that the trend in state courts is to impose a clear and convincing evidence standard and recommends that state courts follow this trend. BIA Guidelines. F.5.

The Regulations and Guidelines[23] provide that state courts must presume that transfer is in the Indian child's best interests and that state courts *must not* consider any of the following:

(1) whether the proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
(2) whether there have been prior proceedings involving the child for which no petition to transfer was filed;
(3) whether transfer could affect the placement of the child;
(4) the Indian child's cultural connections with the Tribe or its reservation; or
(5) socioeconomic conditions or any negative perception of tribal or BIA social services or judicial systems.

Arizona case law, decided before the Regulations became effective, discussed factors to consider in determining whether there is good cause to deny transfer. *See, e.g.*, *Pima Cnty. Juv. Action No. S-903* 130 Ariz. 202, 635 P.2d 187 (App. 1981). Arizona cases have looked to:

1) the availability of the child's biological parents;

[23] ICWA Regulations § 23.118; BIA Guidelines F.5.

2) whether an Indian custodian has been appointed;
3) the amount of contact between the child and tribe over a period of time;
4) whether the child has lived on the reservation and for what period; and
5) if the child, over 12 years of age, has indicated any opposition to the transfer.

Id. These suggestions for determining good cause are subject to the limitations imposed by the Regulations.

Arizona case law has also affirmed that the party opposing the transfer carries the burden to prove that good cause exists to deny the transfer. *Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, 159 ¶ 21, 7 P.3d 960, 965 (App. 2000). The court may not consider the tribe's socio-economic conditions or the adequacy of tribal services when making a good-cause finding. *Id.* An appellate court will determine whether a trial court abused its discretion in deciding whether good cause exists to deny transfer. *Maricopa Cnty. Juv. Action No. JS-8287*, 171 Ariz. 104, 828 P.2d 1245 (App. 1991); *see also* BIA Guidelines § F.5.

The original BIA Guidelines provided several examples of good cause:

1) The Indian tribe does not have a tribal court.
2) 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.
3) The child is over twelve years of age and objects to the transfer.
4) Requiring the parties or witnesses to present evidence in tribal court would cause undue hardship.
5) The child is over five years of age, the parents are not available, and the child has had little or no contact with the tribe or tribal members.

As with earlier Arizona case law, these examples of good cause are now subject to the limitations in the ICWA Regulations. In particular, the fact that a proceeding is at an advanced stage may not be considered by the state court unless the petitioner failed to act after receiving notice. ICWA Regulations § 23.118.

D. When May a Tribe Intervene in State Court Proceedings?

Under ICWA § 1911(c), in any state court proceeding involving an Indian child's foster care placement or termination of parental rights, both the child's Indian custodian and the child's tribe[24] have a right to intervene at *any* point in the foster care or termination proceedings. ICWA § 1911(c) does not include adoption or preadoption proceedings, but permissive intervention in an adoption matter would still be available. Sometimes a tribe will intervene, but then opt not to appear at any hearing or seek a transfer. ICWA applies throughout a case even if no tribal representative intervenes, appears, or requests a transfer.

[24] Arguably a tribe may intervene without having an attorney – or an attorney licensed to practice in Arizona – to represent them. *See In re Shuey*, 850 P.2d 378 (Or. Ct. App. 1993); *see also In re Elias L.*, 277 Neb. 1023, 767 N.W.2d 98 (Neb. 2009).

VII. Involuntary Proceedings

A. Involuntary Proceedings in General

ICWA § 1903 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, but where parental rights have not been terminated." *See also* ICWA Regulations § 23.2. This would include both emergency removals under ICWA § 1922 and other involuntary removal procedures authorized by Arizona law. In Arizona, that almost always will involve DCS, 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 motions.[25] *See infra* Section IX.

If the removal is involuntary (i.e., pursuant to a dependency petition), ICWA will apply and the following requirements must be met:

- The tribe must be notified, along with the parents and any Indian custodian;
- "Active efforts" must be made to maintain the Indian family;
- A "qualified expert witness" must testify to the necessity of the removal;
- The placement preferences in ICWA must be honored unless the child's tribe adopts a resolution that alters those preferences, or the court finds good cause to deviate from those preferences.

i. When may an Indian child be placed in involuntary foster care?[26]

ICWA § 1912(e) states that:

> No foster care placement may be ordered . . . 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.[27]

Furthermore, ICWA § 1912(d) requires that any party who petitions a state court to remove an Indian child from the home show that "active efforts" were made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.[28] These efforts must take into account the tribe's socio-economic conditions, cultural traditions, and contemporary way of life, and

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[25] A.R.S. § 8-871.

[26] *See* DCS Policy Manual, Chapter 6, Section 3, *Voluntary Placement of an Indian Child* (DCS process for securing voluntary foster-care arrangements).

[27] *See* Ariz. R. P. Juv. Ct. 51(B).

[28] *See* Ariz. R. P. Juv. Ct. 57(C)(6).

should involve use of tribal and extended family resources. *See infra* Section VII(C); *see also* discussion *infra* Section VII(B).

To meet ICWA's "clear and convincing evidence" threshold, the evidence must show the existence of particular conditions in the home or factors relating to the continued custody of the child that are likely to result in serious emotional or physical damage to the child. The evidence must show a causal relationship between the conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the child. ICWA Regulations § 23.121; *see also* BIA Guidelines § G.1. That evidence must be forward-looking, that is, it must not be limited to evidence of past harm, such as the original incident that led to DCS or court involvement. *Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, 190 P.3d 180 (2008).

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* ICWA Regulations § 23.121(d); BIA Guidelines C.2.

ii. When may parental rights to an Indian child be involuntarily terminated?[29]

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.[30] *See infra* Section VII(D).

Before seeking termination of parental rights, the petitioner must have made the same types of "active efforts" described above and as discussed in more detail below, *see infra* Section VII(C).

In *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), the United States Supreme Court held that the phrase "continued custody" in ICWA § 1912(f) refers to custody a parent already has exercised, or at least had exercised at some point in the past. Therefore, the protections of § 1912(f) did not extend to an unwed father of an Indian child who was deemed to have "abandoned" the child before birth, failed to provide support for mother or child after birth, and never had physical or legal custody of the child under state law. *See* discussion *supra* Section III(E).[31]

The heightened burden of proof under ICWA means a court may not terminate parental rights simply because:

1) someone else could do a better job of raising the child; or

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[29] DCS Policy Manual, Chapter 6, Section 63, *Voluntary Placement of an Indian Child*; *see also* DCS Policy Manual, Chapter 6, Section 8, *Termination of Parental Rights and Adoption of an Indian Child*.

[30] Ariz. R.P. Juv. Ct. 65(D)(4) applies ICWA burden of proof to any ICWA findings. *See Valerie M. v. Arizona Dept. of Economic Sec.*, 219 Ariz. 331, 334, ¶ 11, 198 P.3d 1203, 1206 (2009).

[31] In a concurring opinion necessary for the majority decision, Justice Breyer stated the holding was limited to the particular facts of the case.

2) termination is in the child's best interest.

The petitioner must prove that serious emotional or physical damage to the child will occur if the child stays with (or is returned to) the parent or Indian custodian. *See* BIA Guidelines G.1; *see also Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, 190 P.3d 180 (2008); Ariz. R. P. Juv. Ct. 65(C)(1), (D)(4). ICWA requires that this must be proved beyond a reasonable doubt before the court can terminate parental rights. *Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, 334, ¶ 11, 198 P.3d 1203, 1206 (2009). This is a higher burden of proof than the standard Arizona law requirement of proof of the ground for termination by clear and convincing evidence. *Id.* According to the Guidelines, "there must be a demonstrated correlation between the conditions of the home and a threat to the specific child's emotional or physical well-being." BIA Guidelines G.1.

B. When May the State Take an Indian Child into Protective Custody on an Emergency Basis?

An Indian child physically located *off* the reservation is subject to an emergency removal by child safety or law enforcement officials acting pursuant to state statutory authority. *See* A.R.S. § 8-821; *see also* Ariz. R. P. Juv. Ct. 47.3. According to ICWA § 1922, "[n]othing 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." Consistent with legislative history and case, § 1922 applies to both (1) Indian children domiciled on a reservation but temporarily located elsewhere and (2) Indian children who are not domiciled on a reservation. *See* BIA Guidelines C.1. When there is reason to know a child is an Indian child and the child is removed from a parent or Indian custodian by a law enforcement officer pursuant to the emergency removal provisions of state law, the law enforcement agency responsible for the removal should ask a DCS child safety worker to *immediately* ascertain the residence and domicile of the child so that the appropriate tribe can be notified. *See* BIA Guidelines C.3.

Regardless of an Indian child's residence, an emergency removal or placement must be based on a finding that it is necessary to prevent imminent physical damage or harm to the child and must end immediately when it is no longer necessary to prevent imminent physical damage or harm to the child. BIA Guidelines C.3; *see also* ICWA Regulations § 23.113; Ariz. R.P. Juv. Ct. 47.3(B), 50(C)(6). Emergency removal is justified by circumstances in which the child is immediately threatened with harm, including when there is an immediate threat to the safety of the child, when a young child is left without care or adequate supervision, or where there is evidence of serious ongoing abuse and there is reason to fear imminent recurrence. *See* BIA Guidelines C.2.

A child may not remain in temporary custody for more than 72 hours unless a dependency petition is filed. A.R.S. § 8-821 (H). A dependency petition may request temporary custody orders pending the preliminary protective hearing. Ariz. R. P. Juv. Ct. 48(B). A request for continued emergency placement of an Indian child should contain evidence that the removal or placement continues to be necessary to prevent imminent physical damage or harm to the child. ICWA Regulations § 23.113(b)(1).

The Regulations clarify that an emergency proceeding can be terminated by one of three actions: the initiation of a child-custody proceeding in accordance with the full protections of ICWA, transfer of the child to the jurisdiction of the appropriate Tribe, or restoring the child to the parent or Indian custodian. ICWA Regulations § 23.113(c); BIA Guidelines C.3. In other words, when the emergency ends, the out-of-home placement also must end unless a child-custody proceeding has been initiated under ICWA and Arizona law.

> **Practice Tip:** The court may order DCS 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.

Although the notice requirements of ICWA § 1912 do not strictly apply to emergency proceedings, the Regulations provide that any petition for emergency removal or placement of an Indian child should state "the steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding." ICWA Regulations § 23.113(d). Similarly, while the placement preferences of ICWA § 1915 do not strictly apply, DCS should strive to provide an initial placement that meets ICWA's preferences. This will help prevent subsequent disruptions if a child-custody proceeding is initiated. BIA Guidelines C.6. The Guidelines also recommend that state agencies work with tribes, parents, and other parties as soon as possible, even in an emergency, to begin providing active efforts to reunite the family. *See* BIA Guidelines C.8; *see also* DCS Policy Manual, Chapter 6, Section 2, *Removal and Temporary Custody of an Indian Child*.

When there is reason to know a child is an Indian child and a petition seeks a state court order authorizing the emergency removal or the *continued* emergency placement of the child, the petition should be accompanied by an affidavit containing complete information about the need for the removal or continued placement and the individuals affected, including but not limited to the following:

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) Steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceedings.
4) If the child's parents and Indian custodians are unknown, a detailed explanation of efforts made to locate and contact parents, custodians, and the Tribe, including contact with the appropriate BIA Regional Director.
5) The residence and domicile of the Indian child.
6) If either the residence or domicile is on a reservation, then the name of the reservation.
7) Tribal affiliation of the child and the parents or Indian custodians.
8) A detailed account of the emergency removal circumstances.
9) 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.
10) A detailed statement of any efforts already made to return the child safely to a parent or Indian custodian.

ICWA Regulations § 23.113(d); *see also* BIA Guidelines C.4; Ariz. R. P. Juv. Ct. 47.3(C)(1). The Regulations provide that emergency removal should not continue for more than 30 days unless the court determines that returning the child to the parent would subject the child to imminent physical damage or harm, that the court has been unable to transfer the case to the appropriate tribe, and that it has not been possible to initiate a child-custody proceeding. ICWA Regulations § 23.113(e); *see also* BIA Guidelines C.5.

C. Active Efforts

i. Why does Congress require "active efforts" when ICWA applies?

Each federally recognized tribe is a sovereign nation whose right to self-governance can be impeded or obstructed only in limited ways by the federal government. Under current U.S. policy and long standing Supreme Court doctrine, state governments and state law cannot interfere with tribal self-governance. *See Fisher v. District Court*, 424 U.S. 382 (1976); *see also Worcester v. Georgia*, 31 U.S. 515 (1832).

As Congress stated in 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. Similarly, Congress noted that in many cases *no* efforts were being made to preserve Indian families prior to the forced removal of their children. To the contrary, governmental efforts often led to the destruction of Indian families.

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. A tribe's interest in protecting the welfare of its member children is on a par with but different from that of the parent. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989).

ii. When are "active efforts" required?

In any involuntary foster care placement of, or involuntary termination of parental rights to, an Indian child, ICWA requires that the petitioner show 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); ICWA Regulations § 23.120(a). The active efforts must be made prior to the child's removal from home, except in an emergency placement pursuant to ICWA § 1922. *See supra* Section VII(B). In emergency situations, the BIA Guidelines recommend that state agencies work with Tribes, parents, and other parties as soon as possible to begin providing active efforts to reunite the family. BIA Guidelines C.8. Under Ariz. R. P. Juv. Ct. 51, a parent, guardian, or Indian custodian at the preliminary protective hearing may request a review of temporary custody. At a review of temporary custody,

the petitioner must show that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proved unsuccessful.

"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 non-consenting parent in that case would receive all the protections under ICWA, including active efforts. *See supra* Section VII; *see also infra* Section X.

While ICWA does not require "active efforts" in voluntary cases, the court may choose to require them. This Guide 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 applying ICWA provisions in voluntary proceedings consistent with the spirit of ICWA.

Note: In *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), which involved the voluntary adoptive placement of an Indian child by her non-Indian birth mother, the Supreme Court held that the active efforts requirement of ICWA § 1912(d) did not apply to the termination of parental rights of an unwed father who had abandoned the child before birth, failed to provide support for the mother or child after birth, and never acquired custody rights under state law. *See* discussion *supra* Section III(E).

iii. What are "active efforts"?

The Regulations define "active efforts" as: "Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan." ICWA Regulations § 23.2. Active efforts are to be provided, to the maximum extent possible, "in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe" and should be done in partnership with the child, the parents, extended family members, custodians and tribe. *Id.* Active efforts should be tailored on a case-by-case basis.

Section 23.2 of the Regulations provides examples of active efforts. This list is not comprehensive.

(1) Conducting a comprehensive assessment of the Indian child's circumstances focusing on reunification as the most desirable goal;
(2) Identifying appropriate services and helping parents to overcome barriers;
(3) Identifying, notifying and inviting representatives of the Indian child's Tribe to provide support and services to the family;
(4) Conducting diligent searches for the Indian child's extended family so they can provide support;
(5) Offering culturally appropriate family preservation strategies and facilitating the use of services provided by the child's tribe;
(6) Taking step to keep siblings together whenever possible;

(7) Supporting regular visits with parent(s) or Indian custodians in a neutral setting or trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child;
(8) Identifying community resources including housing, financial, transportation, mental health, etc. and help the Indian child's parents use these programs when appropriate;
(9) Monitoring progress;
(10) Considering alternative ways to address the needs of the child's parents and, where appropriate, the family, if the optimum services are not available;
(11) Providing post-reunification services and monitoring.

The Regulations further provide that active efforts must be documented in detail in the record. ICWA Regulations § 23.120; *see also* BIA Guidelines E.2. In addition, the DCS Policy Manual provides some guidance. DCS Policy Manual, Chapter 6, Section 4, *Family Reunification of an Indian Child*.

The examples of active efforts in the BIA Regulations should be considered in conjunction with ICWA's core policies, including the establishment of "minimum Federal standards for the removal of Indian children from their families" in order to help protect tribal identity and culture. ICWA § 1902; *Valerie M. v. Ariz. Dep't. of Econ. Sec.*, 219 Ariz. 331, 198 P.3d 1203 (2009).

Arizona case law provides additional guidance for courts and practitioners to consider. DCS does not need to "provide every imaginable service or program designed to prevent the breakup of the Indian family before the court may find that 'active efforts' took place." *Yvonne L. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 415, 423 ¶ 34, 258 P.3d 233, 241 (App. 2011). However, DCS must provide the parent the opportunity and the time to participate in the services. *Id*. Arizona courts may also look to the parent's own efforts to determine whether DCS has fulfilled its obligation under the statute. *Id*.

The BIA Guidelines recognize that some courts have compared the "active efforts" standard to the "reasonable efforts" standard imposed by other federal law governing child-welfare agencies, with some courts finding that "active efforts" sets a higher standard. The Guidelines explain that the Regulations focus on the quality of actions necessary and give detailed examples, rather than engaging in a comparison with other federal law. BIA Guidelines E.1.

While courts in other states have recognized that "active efforts" establishes a higher standard,[32] the issue remains unresolved in Arizona. One unpublished opinion from the Arizona Court of Appeals agreed with an earlier California case that called both standards "indistinguishable." *Pascua Yaqui Tribe v. Ariz. Dep't of Econ. Sec.*, 2007 WL 5515315, ¶ 42 (App. 2007) (unpublished opinion cannot be cited for precedential value) (citing *In re S.B.*, 130 Cal. App. 4th 1148, 1165, 30 Cal.Rptr.3d 726 (2005)).

Other states have produced their own definitions, which may be helpful to consider.

> 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

[32] *See, e.g.*, *In re. J.S.*, 177 P.3d 590 (Okla. Civ. App. 2008).

> 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.
>
> *Dep't of Human Servs. v. Finfrock (In re Roe)*, 281 Mich. App. 88, 106; 764 N.W.2d 789, 800 (2008), quoting *AA v Dep't of Family & Youth Servs*, 982 P.2d 256, 261 (Alaska 1999) (further citation omitted).
>
> "*Active [e]fforts*" 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 Children of S.W.*, 727 N.W.2d 144, 150 (Minn. Ct. App. 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, 384, 106 P.3d 556, 560 (2005).

In summary, the Regulations now provide detailed guidance on "active efforts." In addition, case law suggests that the "active efforts" requirement places responsibility on the agency to identify appropriate services and make them available to parents, and to assist parents in accessing the services. Courts must consider the timing and nature of the services considering the parent's current situation.[33]

iv. What standard of proof is required to establish "active efforts"?

ICWA does not provide the standard by which a party seeking the termination of parental rights to an Indian child must prove that "active efforts" were made and were unsuccessful. *See* ICWA § 1912(d). Active efforts are to be provided on a case-by-case basis and should be tailored to meet the needs of the Indian child. *See* ICWA Regulations § 23.2 (defining "active efforts"). Some jurisdictions apply differing burdens of proof depending on the nature of the proceeding, while others have recognized state-chosen burdens of proof. *In re G.S.*, 312 Mont. 108, 59 P.3d 1063, 1071 (2002) (applying different standards for foster care and termination proceedings); *cf. In re Vaughn*, 320 Wis.2d 652, 770 N.W.2d 795, 810, ¶ 44 (App.2009) (recognizing the state's power to apply its own evidentiary standard).

In the absence of a congressional mandate, Arizona applies a clear and convincing standard of proof to show "active efforts." *Yvonne L. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 415, ¶ 26, 258 P.3d 233, 239 (App. 2011). Note, also, that ICWA does not require qualified expert witness

[33] *In re JL*, 483 Mich. 300 (2009).

testimony to support the "active efforts" finding. *See* ICWA Regulations § 23.120(a); *Yvonne L*, 227 Ariz. 415, 258 P.3d 233 (App. 2011).

D. Qualified Expert Witness

Under ICWA, a state court may not order an involuntary foster care placement or terminate a parent's rights unless the testimony of "*qualified expert witnesses*" is presented demonstrating 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." ICWA § 1912(e), (f); ICWA Regulations § 23.121; DCS Policy Manual, Chapter 6, Section 10, *Qualified Expert Witnesses in Indian Child Welfare Act Cases*.[34]

i. Who is a qualified expert witness?

The Regulations state that a qualified expert witness "must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." ICWA Regulations § 23.122(a). The Regulations further provide that such an expert "should" be qualified to testify as to the prevailing social and cultural standards of the child's tribe. *Id.* In other words, expertise in a tribe's culture and traditions is strongly recommended but not required to be a qualified expert witness. As the Guidelines explain, there may be circumstances where a qualified expert witness need not have specific knowledge of tribal culture, such as an expert regarding sexual abuse of children. BIA Guidelines G.2. On this point, the Regulations are consistent with Arizona case law. *See infra* Section VII(D)(iii). Importantly, the Regulations prohibit the social worker regularly assigned to the Indian child from serving as a qualified expert witness in proceedings concerning that child. ICWA Regulations § 23.122(c). This prohibition serves the goal of bringing a culturally informed, outside opinion to the court. BIA Guidelines G.2.

According to the original BIA Guidelines,[35] the following people met 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.[36]

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[34] Ariz. R.P. Juv. Ct. 51(B), 55(C), 63(C), 66(C), 84(C)(6) (incorporating the language into the petitioner's burden of proof at a Review of Temporary Custody, Dependency Adjudication Hearing, Guardianship Adjudication Hearing, Termination Adjudication Hearing, and Hearing to Finalize Adoption).

[35] *See* 1979 BIA Guidelines, 44 Fed. Reg. 67,584, § D.4.

[36] The Arizona Rules of Procedure for Juvenile Court do not define or set out standards for a "qualified expert witness."

The party presenting the expert witness has the burden of establishing the witness's qualifications.

ii. Why is a qualified expert witness needed?

Arizona courts recognize that expert testimony may be required to diminish the risk of cultural bias in light of different childrearing practices and customs among tribes. *Steven H. v. Ariz. Dep't. of Econ. Sec.*, 218 Ariz. 566, ¶ 17, 190 P.3d 180, 185 (2008). Congress's primary intent in passing this provision was to prevent courts from basing decisions on the testimony of social workers with no specialized cultural knowledge. *Id.*

iii. What is the substance of a qualified expert witness's testimony?

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 concerning matters affected by the tribe's culture is the Indian child's tribe itself.

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 ICWA if the individual meets those tribal criteria, but the tribe must still show that the witness is an expert by education or experience. The Indian child's tribe or the BIA may help courts locate ICWA qualified expert witnesses. ICWA Regulations § 23.122; BIA Guidelines G.2.

Notwithstanding this function, expert witnesses do not need to possess specialized knowledge of tribal culture, if their testimony supports the determination "that continued custody will likely result in serious emotional or physical harm to the child." *Steven H.*, 218 Ariz. 566, ¶ 18, 190 P.3d 180, 185 (2008). An expert need not have expertise in Indian culture or child-rearing practices if their testimony does not relate to cultural mores and if they are otherwise an expert in their field, such as a psychologist (*Brenda O. v. Ariz. Dep't of Econ. Sec.*, 226 Ariz. 137, 244 P.3d 574 (App. 2010)) or a physician (*Rachelle S. v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 518, 958 P.2d 459 (App. 1998)). In rare instances, a DCS child safety worker with exceptional qualifications may be qualified as an expert witness. *See Maricopa Cnty. Juv. Action No. JS-8287*, 171 Ariz. 104, 828 P.2d 1245 (App. 1991).

The substance of the expert's testimony must be forward looking, regarding whether the parent or Indian custodian's continued custody of the child is likely to result in serious emotional or physical damage to the child. *Steven H., supra*. The expert's testimony need not be the sole basis for the court's finding of future harm, and it need not be expressed in any particular manner or language so long as it supports the finding. *Id.*

VIII. Placement of Indian Children

ICWA § 1915 mandates specific placement priorities for adoptions and foster care. Potential placements must be considered in the order specified by ICWA unless a different order of preference is established by tribal code or resolution. However, a court may override ICWA

priority sequence for good cause.[37] This section examines the placement options and explains what constitutes good cause to depart from 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 must meet the placement preferences.

Note: In *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), the United States Supreme Court held that the adoptive placement preferences of ICWA § 1915 do not apply when there is only one proposed adoptive placement before the court. *See* discussion *supra* Section III(D). The Alaska Supreme Court has held that the § 1915 holding in *Adoptive Couple* applies to involuntary proceedings as well as voluntary proceedings. *See Native Village of Tununak v. State of Alaska*, 334 P.3d 165 (Alaska 2014).

A. What are the Adoptive Placement Preferences?

Absent good cause to the contrary, state courts must give preference to potential adoptive parents of Indian children as follows:

1) A member of the child's extended family.[38]
2) Other members of the child's tribe.
3) Other Indian families, including single parent families.

ICWA § 1915(a); *see also* ICWA Regulations § 23.130; BIA Guidelines H.1; A.R.S. § 8-105.01(B); DCS Policy Manual, Chapter 6, Section 5, *Placement Preferences of an Indian Child*.

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 placement preferences. ICWA § 1915(c); ICWA Regulations § 23.130(b). 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 request a caseworker or court officer to make that contact or inquiry. If a tribal-state agreement establishes an order of preference, that would constitute an order established by "resolution," as required by ICWA and the Regulations. BIA Guidelines H.1.

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 ICWA's placement preferences. But if the consenting parent requests anonymity in the adoption process, the court "must give weight to the request in applying the preferences." *See* ICWA Regulations § 23.129(b). Also, the state court

[37] *See* Ariz. R. P. Juv. Ct. 52, 61, 65, 68.

[38] ICWA Regulations § 23.2 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, is 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.

must, where appropriate, consider the placement preferences of the Indian child or the child's parent. ICWA Regulations § 23.130(c).

The Regulations and Guidelines provide detailed procedures for complying with the placement preferences of ICWA. *See* ICWA Regulations §§ 23.129-132; BIA Guidelines H.

> **Practice 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.

B. What are the Foster Care Placement Preferences?

For foster care or pre-adoptive placements, ICWA requires placing the child in the least restrictive setting that most approximates a family and in which the child's special needs, if any may be met. ICWA § 1915(b). The child must also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. *Id.* Preference must be given in the absence of good cause to the contrary to placement with:

a. A member of the Indian child's extended family;
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., DCS); or
d. 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.

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 pre-adoptive placement must follow the tribe's rule if 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. ICWA § 1915(b). 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. *See* BIA Guidelines § H.2; ICWA Regulations § 23.131(c), (d); A.R.S. §§ 8-514.02 to -514.03; DCS Policy Manual, Chapter 6, Section 5, *Placement Preferences of an Indian Child*.

In Arizona, only the Pascua Yaqui have expressly created placement preferences that differ from those established by ICWA. DCS Policy Manual, Chapter 6, Section 5, *Placement Preferences of an Indian Child*. These include both adoptive and foster care placement preferences. *See* 3 PYTC § 2-6-380 (adoption preferences); 5 PYTC § 7-210 (foster care).

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 child safety workers 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 ICWA because the placement followed an emergency removal or because no ICWA-compliant placement was initially available.

C. What is Good Cause to Deviate from the Foster Care or Adoption Placement Preferences?

The party requesting a deviation from ICWA's preferences has the burden of establishing good cause. "Good cause" to depart from the placement preferences of ICWA § 1915 is not defined in the statute. The Regulations provide that the party seeking departure "should" bear the burden of proving good cause by clear and convincing evidence. ICWA Regulations § 23.132(b). The Guidelines, in turn, recommend that the state agency or other party seeking placement conduct a diligent search for placements that comply with the statutory preferences. *See* BIA Guidelines H.3.

The Regulations provide that a court's determination of good cause must be made on the record or in writing, and "should" be based on one or more of the following considerations:

1) The request of one or both parents if they attest that they have reviewed the placement options that comply with the order of preference;
2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
3) The presence of a sibling attachment that can be maintained only through particular placement;
4) The extraordinary physical, mental, or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements, but none has been located. The standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which they maintain social and cultural ties.

ICWA Regulations § 23.132(c). The Regulations go on to prohibit a departure from the preferences based on the relative socioeconomic status of potential placements. ICWA Regulations § 23.132(d). In addition, the Regulations prohibit a departure "based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." ICWA Regulations § 23.132(e). The Guidelines explain that a placement is made "in violation of ICWA" if it was based on a failure to comply with specific statutory or regulatory mandates, such as the failure to provide a tribe with notice. BIA Guidelines H.5. In contrast, a non-preferred placement would not be in violation of ICWA if the state agency and court followed applicable statutory and regulatory rules in making the placement, including properly determining good cause. *Id.*

Although some states have held that psychological bonding with a current custodian should not be a factor in determining "good cause," Arizona courts look to the level of a child's bonding as a relevant factor in finding good cause to deviate from ICWA's placement preferences. *See Navajo*

Nation v. Ariz. Dep't of Econ. Sec., 230 Ariz. 339, 284 P.3d 29 (App. 2012); *Maricopa Cnty. Juv. Action No. A-25525*, 136 Ariz. 528, 534, 667 P.2d 228, 234 (App. 1983). In those cases, the appellate court upheld the trial courts' reliance on the potential emotional and psychological damage that could result from removing a child who had bonded with adoptive or foster care placements. Case law involving the determination of good cause must be weighed considering the limitations in the new Regulations.

The 1979 BIA Guidelines, now completely supplanted by the 2016 Regulations and Guidelines, provided "good cause" to deviate from ICWA's placement preferences could include one or more of the following considerations not included in the 2016 regulations and guidelines:

1) The request of the biological parents or a child of sufficient age.
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.

See 1979 BIA Guidelines, 44 Fed. Reg. 67,584.

IX. Guardianship

ICWA defines "child custody proceedings" as including any "foster care placement," and the latter phrase is defined broadly to include more than just foster care placements, authorized by Arizona law. Under ICWA § 1903(1)(i), "foster care placement" means "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." *See also* ICWA Regulations § 23.2. As a result, guardianship proceedings under Arizona law where the parent cannot have the child returned on demand come within the definition of "child custody proceeding" in ICWA.[39]

ICWA distinguishes between voluntary and involuntary proceedings. Because ICWA views involuntary juvenile guardianships as a "foster care placement." *See supra* Section VIII(B). Note, however, that by Arizona law, findings in a permanent guardianship proceeding involving an Indian child must be made beyond a reasonable doubt. *See* A.R.S. § 8-872(G). In contrast, in proceedings for termination of parental rights involving Indian children, the best interest element under state law must be proved only by preponderance of the evidence. In *Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, 198 P.3d 1203 (2009), the Arizona Supreme Court held that ICWA permits the use of preponderance of the evidence for the state law "best interests" findings in termination proceedings involving Indian children. The court recognized the "somewhat anomalous" higher standard for permanent guardianship proceedings imposed by state law. *Id.* at 335, 198 P.3d at 1207.

[39] See A.R.S. §§ 8-862(H), 8-872(F), 8-874(D), 14-5204; DCS Policy Manual, Chapter 6, Section 7, *Permanent Guardianship for an Indian Child*.

If the Indian child's parent is available to provide consent for a guardianship, the court should obtain the consent in compliance with ICWA § 1913(a), thereby making the proceedings "voluntary."[40] *See infra* Section X. Consent can be sought with the notice of hearing.

Voluntary guardianships, or petitions for limited guardianships, are not explicitly covered by ICWA. However, voluntary adoptions are within the scope of ICWA. *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30 (1989). If a voluntary guardianship meets the definition of "child custody proceeding," then notice must be sent, placement preferences must be honored, and a valid consent document must be executed.

While ICWA § 1915(c) states that the preference of the "Indian child or parent shall be considered," neither Arizona courts nor the U.S. Supreme Court has decided whether parental preference constitutes good cause to diverge from ICWA's placement preferences. The ICWA Regulations, however, do recognize that a request by the child's parent may constitute good cause if the parent attests that he or she has reviewed the placement options. ICWA Regulations § 23.132(c)(1).

As a practical matter, courts in a voluntary guardianship proceeding should:

1) Send notice to the tribe.
2) 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.

> **Practice Tip:** Permanent guardianship as a permanency option may be particularly well-suited when severance of parental rights would be inconsistent with the child's best interests and the tribe's cultural traditions. In situations where the child has an emotional relationship with his or her parent that is of positive value to the child, a guardianship would avoid having to carry out a legal termination of that relationship.

X. Voluntary Proceedings[41]

Certain protections under ICWA apply to voluntary proceedings, to ensure voluntary and informed parental consent. In addition, the mandatory placement preferences, with the good cause exception, apply to voluntary proceedings. *See* ICWA § 1913; ICWA Regulations §§ 23.124 to .128. Under

[40] That parent's right to revoke his consent at any time must also be honored.

[41] BIA Guidelines § I.

ICWA, a parent or Indian custodian may voluntarily consent to a foster care placement, termination of parental rights, or adoptive placement, and the statute imposes certain requirements:

- Consent. A valid consent document must be executed in accordance with ICWA § 1913. *See infra* Section X(C). The court must certify that the terms and consequences of the consent were explained to the parent on the record, in detail, in a language the parent understands, and that the parent understood the explanation. *See* ICWA § 1913(a).

- Placement. The placement preferences in ICWA must be followed unless amended by the tribe or a court finds good cause to deviate from them. *See supra* Section VIII.

- Confidentiality. When confidentiality is requested, execution of the consent need not be in open court but still must be made before a court of competent jurisdiction in compliance with ICWA. ICWA Regulations § 23.125(d).

Some proceedings may be voluntary as to one parent and involuntary as to the other.[42] In addition, recall that ICWA Regulations 23.2 defines "foster care placement" more broadly than Arizona law. In ICWA cases, it means "[A]ny 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." ICWA Regulations § 23.2(1)(i).

A. Is Notice to the Tribe Required for Voluntary Proceedings?

Neither ICWA nor the Regulations specifically require notice to the tribe for voluntary proceedings. *Cf.* ICWA §§ 1912, 1913. Nevertheless, ICWA provides tribes and extended family members with certain rights that would be ineffective without notice. For example, ICWA provides the Indian custodian and the tribe with a right to intervene in any state court proceeding for the foster care placement or termination of parental rights as to an Indian child. ICWA § 1911(c). Similarly, ICWA defers to specific tribal child placement priorities that differ from those established in ICWA. ICWA § 1915. Because of these statutory rights, the Guidelines recommend that notice of voluntary proceedings be given to tribes. BIA Guidelines I.3. Similarly, some courts have required that tribes and extended family members receive notice of voluntary placement proceedings. *See, e.g.*, *In re Baby Girl Doe, 865 P.2d 1090 (Mont. 1993).* Without such notice, the tribe would not have the opportunity afforded by ICWA § 1915 to invoke its own placement preferences.

> **Practice Tip:** Provide notice to the tribe of an Indian child in a voluntary proceeding to enable the tribe to fully participate as authorized by ICWA.

[42] 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 ICWA requirements for an involuntary placement are followed with respect to both an Indian and a non-Indian parent.

B. May a Parent's Anonymity be Protected?

When a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences. *See* ICWA Regulations § 23.129(b). Moreover, when a parent requests anonymity in a voluntary proceeding, the court must keep relevant documents pertaining to the child's status confidential and under seal. ICWA Regulations § 23.107(d). *But see* A.R.S. § 8-116.01. A request for anonymity, however, "does not relieve the court, agency or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an 'Indian child'." ICWA Regulations § 23.107(d).

> **Practice 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.

C. Requirements for a Valid Consent to Foster Care Placement or Termination of Parental Rights

Pursuant to ICWA § 1913(a),[43] courts may recognize consent to a foster care placement[44] 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 of 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.

i. What must a voluntary consent document contain?

According to the Regulations, consent documents must clearly set out any conditions to the consent. ICWA Regulations § 23.126(a). In addition, the Regulations provide that a written consent to foster care placement should 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, address, and other identifying information of the consenting parent or Indian custodian;

[43] *See also* ICWA Regulations § 23.125.

[44] A.R.S. § 8-806.

5) Name and address of the person or entity through which placement was arranged, and the name and address of the prospective foster parents, if known at the time.

ICWA Regulations § 23.126(b).

ii. What other special considerations apply to adoption consents?

An adoption under ICWA can be voluntary or involuntary. 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. A.R.S. §§ 8-106, -107; Ariz. R. P. Juv. Ct. 81(C). An involuntary adoption typically follows an involuntary termination of parental rights. DCS Policy Manual, Chapter 6, Section 9, *Adoption Consent of an Indian Child*.

Furthermore, given the special nature of proceedings involving an Indian Child, the court should ensure that the child safety worker:

- Informs the parent of the placement preferences.
- Informs the parent that to find an appropriate adoptive placement, the Indian child's tribe will be notified. Unless the consenting parent has requested anonymity, extended family members will also be notified.
- Consults with the tribal social services and/or ICWA representative and the parent's attorney if any and inform the tribe of the parent's desire to place his or her child for adoption, and of the parent's request for anonymity, if applicable.

DCS Policy Manual, Chapter 6, Section 9, *Accepting Consent for Adoption*.

In addition, the court must ensure and certify that the parent understands the implications for both themselves and their child. *See* ICWA Regulations § 23.125. This is usually accomplished at a hearing in open court. *See also* Ariz. R. P. Juv. Ct. 81(A).

iii. What is tribal customary adoption and is it recognized under state law?

Under the traditions of numerous Indian tribes, customary adoption permits recognition of parental rights in someone other than the biological parents without first severing the parental rights of the biological parents. The Gila River Indian Community has included a provision setting out guidelines for customary adoption within its tribal code. *See* GRIC Code 7.1001(C). California law now includes "tribal customary adoption" as a permanency option within its child welfare code. *See* West's Ann. Cal. Welf. & Inst. Code § 366.24. The new statutory recognition was applied in *In re H.R.*, 208 Cal. App.4th 751 (Cal. App. 2012). This legal status has not yet been recognized in Arizona statutes or cases.

iv. Does ICWA apply to stepparent adoption?

If an Indian child's parent seeks a stepparent adoption by a new spouse, then ICWA does apply. A valid consent must be obtained to terminate a parent's rights. Without such a consent, the stepparent adoption may occur only if the non-consenting biological parent's rights are terminated

involuntarily in accordance with the requirements for termination of parental rights under ICWA § 1912. *See* discussion *supra* Section VII(A)(ii); *see also* DCS Policy Manual, Chapter 6, Section 8, *Termination of Parental Rights and Adoption of an Indian Child*.

D. What are the Placement Considerations in Voluntary Proceedings?

The Act's placement preferences apply, either as outlined in § 1915(a), (b) or a different order of preference adopted by the tribe under § 1915(c). Although ICWA does not expressly require notice to a tribe of a voluntary adoption, parties may choose to give notice to permit the tribe to participate in the proceedings. The Guidelines recommend such notice. *See* BIA Guidelines I.3. A parent's request for anonymity, however, must be respected under ICWA. *See* discussion *supra* Section X(B).

ICWA § 1916(b) requires compliance with ICWA any time an Indian child is transferred from a foster home or institution to a different foster care, pre-adoptive, or adoptive placement -- unless the transfer returns the child to the parents or a previous Indian custodian. When ICWA applies, it requires sending a notice of the transfer to the Indian child's parents or previous Indian custodian. The parent of custodian may waive this right to notice and may revoke that waiver at any time.

E. Revocation of Consent

i. How can a parent withdraw 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, and the child must be returned to the parent as soon as practicable. *See* ICWA § 1913(b); *see also* ICWA Regulations § 23.127; BIA Guidelines I.7; DCS Policy Manual, Chapter 6, Section 3, *Considering Voluntary Placement*. Withdrawal of consent must be made in writing or orally in the same court as the earlier consent document was filed. *See* ICWA § 1913(b); ICWA Regulations §§ 23.127, .128.

ii. How can a parent withdraw consent to termination of parental rights?

Consent to termination of parental rights may be withdrawn at any time before a final decree of termination is entered, and the child is to be returned to the parent as soon as practicable. ICWA § 1913(c); ICWA Regulations § 23.128. In other words, the parents may withdraw their consent to a termination for *any* reason -- but only *prior to* the entry of a final decree.

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 pre-adoptive or adoptive placement agency. Whoever has physical custody must then return the child to the parent (or another 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* 2016 BIA Guidelines § I.7 and Commentary, *Withdrawal of Consent to Adoption*; Ariz. R. P. Juv. Ct. 82(J).

iii. How can a parent withdraw consent for adoption?

ICWA has specific requirements for valid consents to adoptive placements. Even after a consent is taken, the following may apply:

- Under ICWA and the Regulations, parents may withdraw a consent to adoptive placement for any reason at any time prior to the entry of a final decree of adoption . ICWA § 1913(c); Ariz. R. P. Juv. Ct. 82(J). 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 pre-adoptive or adoptive placement agency. Whoever has physical custody must then return the child to the parent (or another 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* ICWA Regulations § 23.128; BIA Guidelines I.7 (applying same standard to withdrawal of consent to terminating parental rights and withdrawal of consent to adoption). In Arizona, there is no need for the Indian parent to provide an explanation or justifications for the withdrawal of consent. *Pima Cnty. Juv. Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (App. 1981); *see also* Ariz. R. P. Juv. Ct. 82(J).

- 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. 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. *See also* Ariz. R. P. Juv. Ct. 85(F). A petition to vacate the adoption order due to fraud or duress must be filed in the same court that ordered the adoption. Ariz. R. P. Juv. Ct. 82(J). Upon receipt of the petition, the court must notify all the parties to the adoption proceedings and hold a hearing on the petition. ICWA Regulations § 23.136. Upon finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. ICWA Regulations § 23.137(b). An adoption which has been effective for at least two years may not be invalidated under the provisions of this subsection unless otherwise permitted under the state law.

iv. What is the effect of setting aside an adoption or consent to termination of parental rights?

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.[45] The biological parents may waive their right to receive this notice, but they also may revoke that waiver at any time. ICWA Regulations § 23.139; BIA Guidelines J.3.

[45] 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.

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 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.[46]

v. Who can petition to invalidate a foster care placement or termination of parental rights and on what basis?

ICWA § 1914 allows the Indian child, the parent or Indian custodian from whose custody the child was removed, and the child's tribe to petition any court of competent jurisdiction to invalidate the child's foster care placement or a termination of parental rights if such action violated ICWA §§ 1911, 1912, 1913. *See* ICWA Regulations § 23.137(a); Ariz. R. P. Juv. Ct. 59(E)(5).

1) ICWA § 1911 lists ICWA's requirements for jurisdiction, transfer of proceedings, and intervention.
2) ICWA § 1912 outlines the requirements for notice, appointment of counsel, examination of reports, preventive or rehabilitative programs, and orders for involuntary foster care placement or parental rights termination.
3) ICWA § 1913 governs the voluntary foster care placements and voluntary terminations of parental rights.

XI. Other Matters

A. Are Adult Adoptees Entitled to Information About Their Tribal Affiliations?

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 adoptee can protect any rights flowing from their tribal relationships. *See* ICWA § 1917; ICWA Regulations § 23.138; BIA Guidelines J.4; Ariz. R. P. Juv. Ct. 86(B).

Adopted Indian children possess this right to discover their tribal origins even if 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 work with the BIA, which can confidentially ask the tribe whether the child is eligible for membership. *See* ICWA Regulations § 23.138; BIA Guidelines J.4.

[46] 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). *See* discussion *supra* Section VII(A)(ii) and VIII(B).

Practice Tip: Courts should obtain the adopted child's tribal affiliation information from the beginning of the adoption case and maintain it in order to provide that information later if the child requests it.

B. Is Funding Available for Indian Child Welfare Cases?

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

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, Public Law 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 U.S.C. § 679, an entirely new section within Title IV-E. For more information on this new Act and its 20 effects on Title IV-E funding for tribes, see the *Informational Memorandum* on the Children's Bureau website.

C. What is the Interstate Compact on the Placement of Children (ICPC)?

The ICPC, codified in Arizona at A.R.S. §§ 8-548 to -548.06 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 Arizona is an Arizona law that all of this state's courts and agencies must follow. Its rules apply any time an Arizona court or an agency or entity (other than certain specified relatives) sends a child to another state or receives a child from another state. *See also* DCS Policy Manual, Chapter 5, Section 41, *ICPC Placements*.

The ICPC applies to Indian children if either the receiving state or the sending state will provide services to the child and family.[47] However, because tribes are not signatories to the ICPC, it does not apply to tribe-to-tribe case transfers or transfers from state to tribal custody (even if the tribe is in another state).

D. Do the Expedited Permanency Provisions of Federal and State Law Apply to ICWA?

The Adoption and Safe Families Act of 1997 ("ASFA")[48] was enacted to address national concerns regarding the safety of children alleged to be victims of abuse and neglect, to accelerate permanent placements for children whose parents were unable or unwilling to reunify with them, and to

[47] Remember that ICWA classifies as "foster care placements" *all* out-of-home placements, *including* placements with relatives.

[48] Pub. L. No. 105-89 (1997) (codified in relevant part at 42 U.S.C.A. § 671).

promote adoptions as the preferred form of permanency for children who could not reunify with their parents.[49] ASFA requires states to initiate severance proceedings if the child has been in foster care for 15 of the last 22 months, or if the child is in a relative's care. However, nothing in ASFA's language or legislative history indicates an intent to modify or impact ICWA.[50] In response to ASFA, Arizona amended the timelines for its statutory grounds for severance to nine- and fifteen-months' out-of-home placement.[51] And in 2008, Arizona added an additional termination ground allowing the court to terminate the parental rights of a parent of a child under three years of age after only six months if that parent has substantially neglected or willfully refused to remedy the circumstances that cause the child's out-of-home placement.[52]

Concerns have arisen that ASFA's mandate for expedited permanency may conflict with ICWA's requirement of active efforts at reunification. Put differently, the policy underlying ASFA – to move children out of foster care more quickly – may in some cases be at odds with ICWA's policy of preserving Indian families whenever possible. Many tribes oppose ASFA's timelines, arguing that they provide insufficient time to locate, provide, and monitor appropriate reunification services to the parents of Indian children—who may need specialized services, have cultural or language barriers, or live in remote areas—as well as insufficient time to allow those services to work. On the other hand, the longer a child remains in an out-of-home placement, the more likely that child will bond with the placement with the consequence that the child may be traumatized by removal and placement with a parent or an ICWA-preferred placement, if the child is not in one. There is no easy answer to determine which view best promotes an Indian child's welfare. Courts, parties, and stakeholders must look at each child's particular needs and circumstances to best determine how to comply with ICWA, ASFA, and state law. *See* DCS Policy Manual, Chapter 6, Section 6, *Permanency Planning for an Indian Child*.

XII. Conclusion

This Guide has been developed as a collective effort by the Indian Child Welfare Act Committee of the Arizona State, Tribal & Federal Court Forum. It is intended as a resource for state and tribal court personnel, child welfare workers, attorneys, and guardians ad litem. We invite individuals and agencies involved in implementing ICWA in Arizona to offer comments and suggestions for further improvement of the Guide. We hope the Guide will help provide a foundational and common understanding of federal and state law in this important area that will ultimately benefit Indian children, families, and tribes.

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[49] For a discussion of ASFA, its history, goals, and provisions, *see* Child Welfare Information Gateway: Adoption and Safe Families Act of 1997 Overview.

[50] For a discussion of the intersection of ASFA and ICWA, *see* Native American Rights Fund's *"A Practical Guide to the Indian Child Welfare Act"* §§ 19.9 to .10. *See also* Pub. L. No. 105-89 (1997).

[51] A.R.S. §§ 8-533(B)(8)(a), (c).

[52] A.R.S. § 8-533(B)(8)(b).