The Indian Child Welfare Act (ICWA): A Legal Overview

Jane M. Smith
Legislative Attorney

January 28, 2013

Congressional Research Service
7-5700
www.crs.gov
R42047

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

From the 19th century to the passage of the Indian Child Welfare Act (ICWA) in 1978, the federal government, states, and private adoption agencies sought to remove Indian children from their tribes and families in order to "civilize" the children or provide them with better lives. Congress passed the ICWA to end this practice and the high rate at which Indian children were being removed from their homes and placed with non-Indians.

One survey reported that 25%-35% of all Indian children were being separated from their families and placed in foster homes, adoptive homes, or institutions. The House Committee on Interior and Insular Affairs termed the disparity between placement rates for Indians and non-Indians "shocking." The committee concluded that many non-Indian social workers who recommended removal of Indian children from their families and communities were ignorant of Indian cultural values and social norms, and biased against typical Indian family life. The report indicated that this bias too often resulted in finding neglect or abandonment when there was none. The committee noted also that the decision to take Indian children from their natural homes was frequently carried out without due process of law and that most cases did not go through adjudication because parents voluntarily waived their parental rights in the face of coercion from the state.

Accordingly, Congress passed the ICWA to establish standards for removing Indian children from their homes, prioritizing placement of Indian children with extended family members and other Indians, and giving tribes a recognized role in the placement of Indian children by, among other things, recognizing tribal court jurisdiction over Indian child placements and adoptions. In addition, the ICWA includes important procedural protections for Indian parents, custodians, and tribes to provide due process of law.

In *Adoptive Couple v. Baby Girl*, the U.S. Supreme Court granted a writ of *certiorari* in a case from the South Carolina supreme court in which an unwed non-Indian mother placed her child, whose biological father is a member of the Cherokee Nation, with a non-Indian couple without the father's consent. The state supreme court upheld a lower court decision ordering the adoptive parents to turn over the child to her father. The Court will determine the validity of the "existing Indian family" doctrine and whether an unmarried Indian father must establish his paternity under state law in order to assert rights under the ICWA.

Contents

Contacts

Background

From the 19th century to the passage of the Indian Child Welfare Act (ICWA)[1] in 1978, the federal government, states, and private agencies sought to separate Indian children from their tribes and families in order to "civilize" the children or provide them with better lives.[2] Congress undertook to reverse this practice when it passed the ICWA in response to the high rate at which states were separating Indian children from their parents, families, and tribes through involuntary removal of Indian children from Indian homes and involuntary termination of parental rights.[3] One survey reported that "approximately 25–35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions."[4] The House Committee on Interior and Insular Affairs—the predecessor of the present-day House Committee on Natural Resources—termed the disparity between placement rates for Indians and non-Indians "shocking."[5] The committee expressed concern about the welfare of Indian children who are traumatized by removal from their families and then "adjusting to a social and cultural environment much different from their own."[6] The committee concluded, "[i]n judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists."[7] The committee noted also that "[t]he decision to take Indian children from their natural homes is, in most cases, carried out without due process of law" and that most cases did not go through adjudication because parents voluntarily waived their parental rights in the face of coercion from the state.[8]

Congress declared two policy aims of the ICWA: (1) "to protect the best interests of Indian children," and (2) "to promote the stability and security of Indian tribes and families."[9] The ICWA is premised on the belief that "protection of the child's relationship with the tribe is in the child's best interest."[10] It identifies Indian children as a "resource" that is "vital to the continued existence and integrity of Indian tribes."[11] Thus, the ICWA recognizes that Indian tribes have a unique interest in their minor members or potential members. The Bureau of Indian Affairs (BIA) described the ICWA's policy as follows: "Congress through the [ICWA] has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes."[12]

---

[1] 25 U.S.C. §§1901 *et seq*.

[2] Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 155-158 (2010); *see also* Lorie M. Graham, "The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine, 23 Am. Ind. L. Rev. 1 (1998-1999).

[3] H.Rept. 95-1386, at 8-11.

[4] *Id.* at 9.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 10.

[8] *Id.* at 11.

[9] 25 U.S.C. §1902.

[10] Chester County Dep't of Social Services. v. Coleman, 372 S.E.2d 912, 914 (S.C.Ct. App. 1988).

[11] 25 U.S.C. §1901(3).

[12] Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,585 (1979) (BIA Guidelines).

To achieve these policy aims, the ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family services programs."[13] In addition, the ICWA provides procedural protections for parents and tribes in state court proceedings.

When the ICWA Applies

The ICWA applies to child custody proceedings involving Indian children. "Child custody proceedings" include "foster care placement," "termination of parental rights," "preadoptive placement," and "adoptive placement."[14] It does not apply to placements resulting from juvenile proceedings concerning an act which if committed by an adult would be a crime, or custody determinations made in conjunction with divorce proceedings.[15] Although the ICWA is associated primarily with involuntary child custody proceedings, it applies to voluntary proceedings as well.[16] The ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[17]

The *BIA Guidelines*[18] provide "[w]hen a state court has reason to believe a child involved in a custody proceeding is an Indian, the state court shall seek verification of the child's status from either the [BIA] or the child's tribe."[19] Under the *BIA Guidelines*, the tribe's determination of the child's or parent's status as a member or the child's status as eligible for membership is conclusive.[20] In the absence of a tribal determination, the BIA's determination is conclusive.[21]

---

[13] *Id.*

[14] 25 U.S.C. §1903(1).

[15] *Id.*

[16] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[17] 25 U.S.C. §1903(4).

[18] The *BIA Guidelines* are not binding on the states. Rather, they are intended to provide guidance to state courts in administering the ICWA. Courts frequently follow the *BIA Guidelines* as an administrative interpretation of the ICWA. S*ee, e.g., In re C.W.*, 479 N.W. 2d 105, 113 (Neb. 1992) (relying on *BIA Guidelines*); Felix Cohen's Handbook of Federal Indian Law (2005) (Cohen) 11.02[1] citing *In re Junious M.*, 193 Cal. Rptr 40, 43 n7 (Ct. App. 1983).

[19] *BIA Guidelines*, *supra* note 12 at 67,586.

[20] *Id.* In *Nielson v. Ketchum*, 640 F.3d 1117 (10th Cir. 2011), however, the Court of Appeals for the Tenth Circuit rejected the tribe's determination that the child was a member. The Cherokee Nation adopted a "Citizenship Act," which made every newborn who was direct descendant of an original enrollee a temporary citizen of the Cherokee Nation for a period of 240 days following birth. The purpose of the act was to "protect[] the rights of the Cherokee Nation under the ICWA." *Id.* at 2. The child at issue was a direct descendant of an original enrollee but his mother was not enrolled. Thus, the ICWA applied only if the Citizenship Act effectively conferred citizenship on him for purposes of the ICWA. Noting that Congress rejected a definition of Indian child which would have included all children eligible for membership such as the child at issue, the court rejected the tribe's position that the child was a member. The court concluded that involuntary temporary membership, such as that conferred by the Citizenship Act, did not qualify as membership for the purposes of the ICWA.

[21] *Id.* The *BIA Guidelines* identify the following common circumstances as providing reason to believe that a child may be an Indian child: a party, an Indian tribe, or a public or private agency informs the court the child is Indian; any public or state licensed agency involved in child protection or family support obtains information indicating the child is Indian; the child gives reason to believe he or she is Indian; the residence or domicile of the child or the parents is a predominantly Indian community; and an officer of the court involved in the proceeding has knowledge that the child may be Indian.

The "Existing Indian Family" Doctrine

Although most jurisdictions have rejected the "existing Indian family" doctrine, the courts of seven states have adopted it to determine whether the ICWA applies.[22] Under this doctrine, the ICWA does not apply when "neither the child nor the child's parents have maintained a significant social, cultural, or political relationship with his or her tribe."[23] Courts usually apply the doctrine in cases involving children of mixed heritage who have been living in a non-Indian environment for an extended period.[24] The Kansas Supreme Court first formulated the doctrine based on the belief that, "[a] careful study of the legislative history behind the [ICWA] and the [ICWA] itself discloses that the overriding concern of Congress and the proponents of the [ICWA] was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment."[25]

The doctrine is applied differently depending on the state. Alabama courts have limited the existing Indian family doctrine to circumstances where the parents are unmarried and the non-

[22] The following states have judicially adopted the existing Indian family doctrine: Alabama (*S.A. v. E.J.P.*, 571 So.2d 1187 (Ala. App. 1990)); Indiana (*In re Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988), *cert. denied sub nom*, *In re Adoption of T.R.M.*, 490 U.S. 1069 (1989)); Kentucky (*Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); Louisiana (*In re: James Ronald Hampton and Jan Harris Milz Hampton.*, 658 So.2d 331 (La. Ct. App. 1995), *cert. denied*, 517 U.S. 1158 (1996)); Missouri (*In re S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986)); Nevada (*In the Matter of the Parental Rights as to N.J.*, 221 P.3d 1255, 1264 (Nev. 2009)); and Tennessee (*In re Morgan*, 1997 Tenn. App. LEXIS 818 (Tenn. Ct. App. 1997)). The following states have rejected the doctrine: Alaska (*In re Adoption of Crews*, 781 P.2d 973 (Alaska 1989), *cert. denied sub nom*, *Jasso v. Finney*, 494 U.S. 1030 (1990)); Arizona (*Michael J. Jr. v. Michael J. Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000)); Idaho (*In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993), *cert. denied sub nom*, *Swenson v. Oglala Sioux Tribe*, 510 U.S. 960 (1993)); Illinois (*In re Adoption of S.S.*, 662 N.E.2d 832 (Ill. 1993)); Iowa (Iowa Code §232B.5 (2011)); Kansas (*Matter of A.J.S.*, 204 P.3d 543 (Kan. 2009)); Michigan (*In re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 2000)); Minnesota (*In re Welfare of S.N.R.*, 617 N.W.2d 77 (Minn. Ct. App. 2000)); Montana (*In re Adoption of Riffle*, 922 P.2d 510 (Mont. 1996)); New Jersey (*In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988)); New York (*In the matter of Baby Boy C. Jeffrey A.*, 805 N.Y.S.2d 313 (N.Y. App. 2005)); North Dakota (*Hoots v. K.B.(In re A.B.)*, 663 N.W.2d 625 (N.D. 2003) *cert. denied*, 541 U.S. 972 (2004)); Oklahoma (*Matter of Baby Boy L.*, 103 P.3d 1099 (Okla. 2004)); South Dakota (*Matter of Adoption of Baade*, 462 S.W.2d 485 (S.D. 1990)); Utah (*In re D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997)); Washington (Rev. Code Wash. §13.34.040(3)); and Wyoming (*S.N.K. v State*, 78 P.3d 1032 (Wyo. 2005)). In California the state supreme court has not ruled on the issue and the lower courts are divided. *In re Alicia S. 76* Cal. Rptr 2d 507 (Ct. App. 1998) (rejecting doctrine); *In re Bridget R.*, 49 Cal. Rptr 2d 507 (Ct. App. 1996) (accepting doctrine and finding it necessary for constitutionality of the ICWA).

[23] Atwood, *supra* note 2 at 204; *see In re: James Ronald Hampton and Jan Harris Milz Hampton*, 658 So.2d 331, 336-337 (Ct. App. La. 1995), *cert. denied*, 517 U.S. 1158 (1996) (court determined that even if it applied the ICWA and did not terminate Indian mother's rights, the child would not be raised in an Indian family because the Indian mother had few ties with her Indian heritage).

[24] *Id.* at 206-207, 209; *see, e.g., In the Matter of the Parental Rights as to N.J.*, 221 P.3d 1255 (Nev. 2009) (court applied the existing Indian family doctrine in termination proceeding in which non-Indian mother objected and Indian father and tribe did not object); *In re: James Ronald Hampton and Jan Harris Milz Hampton*, 658 So.2d 331, 336-337 (Ct. App. La. 1995), *cert. denied*, 517 U.S. 1158 (1996) (court applied the existing Indian family doctrine because it found the child's father was unknown and her mother was a member of the Cheyenne River Sioux Tribe who had not lived on the reservation since she was a child and did not maintain ties with her Indian heritage; the child was placed with a non-Indian family and the court determined application of the ICWA would not result in the child being raised in an Indian family); *S.A. v. E.J.P.*, 571 So.2d 1187 (Ala. App. 1990) (court applied the existing Indian family doctrine when child was illegitimate, non-Indian mother placed child for adoption, and Indian father had had little contact with the child).

[25] *Matter of the Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982).

Indian mother voluntarily places the child for adoption.[26] In *Ex Parte C.L.J.*,[27] the Alabama Court of Civil Appeals explicitly limited the doctrine to those circumstances and declined to apply the doctrine to a child whose mother did not obtain membership in her tribe until after the child had been removed from her custody and it was clear the state was going to move to terminate her parental rights. Even though the child had not been raised in an Indian family, the court held the ICWA applied. In contrast, the Kentucky Supreme Court applied the doctrine to a proceeding involving a child who was a ward of the tribal court but who had lived with a non-Indian family for years.[28] The court gave no reason as to why the tribal court would not continue to have exclusive jurisdiction over the child. Indiana, Louisiana, Missouri, and Tennessee courts apply it even when the mother is Indian.[29] In *In re: James Ronald Hampton*,[30] the Louisiana supreme court applied the existing Indian family doctrine to deprive an Indian mother of her rights under the ICWA to revoke her consent to a voluntary adoption by a non-Indian family. Nevada courts have determined to apply the existing Indian family doctrine on a "case-by-case basis to avoid results that are counter to the ICWA's policy goal of protecting the best interest of a Native American child."[31]

The existing Indian family doctrine appears to be on the decline. The Kansas and South Dakota supreme courts, initially leading courts in adopting the doctrine, have since rejected it.[32] Washington, Minnesota, Oklahoma, Wisconsin, and Iowa have rejected it through legislation.[33]

In *Adoptive Couple v. Baby Girl*, the South Carolina supreme court declined to adopt the doctrine.[34] The U.S. Supreme Court has since granted a writ of *certiorari* in the case to resolve the split between jurisdictions on whether the existing Indian family doctrine is valid.[35] In this case, an unwed non-Indian mother agreed to an adoption of her child, whose biological father is a member of the Cherokee Nation, by non-Indians. The father indicated informally that he would sign away his parental rights rather than pay child support. When the father learned the child was being adopted, he contested the adoption, asserting his rights under the ICWA. The South Carolina supreme court declined to apply the existing Indian family doctrine and upheld a lower court order which required the adoptive parents to turn over the child to the father.

Adoptions Under the ICWA

To counter the high rate at which states were removing Indian children from their families and Indian communities, the ICWA provides uniform and heightened standards for involuntarily

[26] *Ex Parte C.L.J.*, 946 So.2d 880 (Ala. Civ. App. 2006).

[27] *Id.*

[28] *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996).

[29] *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988); *In re: James Ronald Hampton and Jan Harris Milz Hampton*, 658 So.2d 331 (La. 1995); *C.E.H. v. R.H.*, 8837 S.W.2d 947 (Mo. Ct. App. 1992); *In re: Morgan*, 1997 Tenn. App. LEXIS 818 (Tenn. App. 1997).

[30] *In re: James Ronald Hampton*, 658 So.2d 331 (La. 1995).

[31] *In the Matter of the Parental Rights as to N.J.*, 221 P.3d 1255, 1264 (Nev. 2009).

[32] *Matter of A.J.S.*, 204 P.3d 543 (Kan. 2009); *Matter of Adoption of Baade*, 462 S.W.2d 485 (S.D. 1990).

[33] R.C.W. §26.33.040(1)(a); Minn. Stat. Ann. §260.771; Okla. Stat. Ann. Tit. 10, §40.1; Wisc. Stat. Ann. §938.028(3)(a); Iowa Code §232B.5(2).

[34] 731 S.E. 2d 550, 640 n. 17 (2012), *cert. granted*, 2013 U.S. LEXIS 11 (2013).

[35] *Adoptive Couple v. Baby Girl*, 2013 U.S. LEXIS 11 (2013).

terminating parental rights, preferences for placing Indian children in Indian adoptive homes, and procedural protections for parents and Indian tribes in state court proceedings.

Termination of Parental Rights

The termination of parental rights occurs when the parent-child relationship is legally severed. Termination can be voluntary, such as when parents consent to adoption, or involuntary, upon a finding of abandonment, neglect, or abuse of the child. Upon termination of parental rights, a child is available to enter a parent-child relationship with adoptive parents.

In *Adoptive Couple v. Baby Girl*, the Supreme Court granted a writ of *certiorari* to determine the circumstances under which an unwed Indian father of a child qualifies as a parent under the ICWA.[36] The ICWA provides that the term "parent," "does not include the unwed father where paternity has not been acknowledged or established."[37] The ICWA does not specify how paternity must be "acknowledged or established" in order for the father to enjoy the protections of the ICWA. The plaintiffs in *Adoptive Couple* argued that the court should apply the state law standards for determining whether an unwed father must consent to the adoption of his child, which the Indian father in this case failed to satisfy. The South Carolina supreme court declined to do so and found that the Indian father had satisfied the ICWA's requirements by contesting the adoption as soon as he knew about it and submitting to court-ordered DNA testing.[38]

The ICWA does not restrict a parent's ability to voluntarily terminate his or her parental rights. It limits the circumstances under which state courts may terminate parental rights involuntarily.

Because Congress found that frequently states were terminating the parental rights of Indian parents based on biased evidence of neglect and abandonment, Section 1912(f) of the ICWA establishes the evidence that state courts must consider, the standard of proof, and the substantive standard that the evidence must establish in order for a state court to involuntarily terminate parental rights. A court must find "beyond a reasonable doubt," based on evidence which must include expert testimony, 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."[39] The "beyond a reasonable" doubt standard is higher than the "clear and convincing evidence" standard required for due process and employed by the states in parental termination proceedings,[40] and is "designed to fulfill [the] ICWA's goal of ending practices by state social welfare personnel that result in removal of Indian children from their homes based on nonconformity with non-Indians' stereotypes of what a proper family should be."[41]

The *BIA Guidelines* explain that removal of an Indian child from his or her family "must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious

[36] 2013 U.S. LEXIS 11 (2013).

[37] 25 U.S.C. §1903(9).

[38] *Adoptive Couple*, 731 S.E. 2d at 644.

[39] 25 U.S.C. §1912(f).

[40] Atwood, *supra* note 2 at 176-177; *see also*, *In the Matter of the Parental Rights as to N.J.*, 221 P.3d 1255, 1260 (Nev. 2009) (discussing differences between the state standard and the ICWA standard).

[41] *See* H.Rept. 95-1386, *supra* note 3 at 10; Cohen, *supra* note 18 at §11.04[4].

physical or emotional damage to the child."[42] In requiring expert witness testimony by a witness with relevant experience or education, Section 1912 seeks to counter the bias of non-Indians against Indian communities, families, and circumstances cited in the ICWA.[43] The House Report from the Committee on Interior and Insular Affairs explained the need for these standards with statistical evidence that physical abuse existed in just one percent of the cases in which an Indian child was removed from the family.[44] In the remaining 99 percent of the cases, the state gave vague reasons such as "neglect" or "social deprivation" or presented evidence that somehow living with the parents damaged the child emotionally.[45] By imposing strict standards and requiring expert testimony, the ICWA seeks to limit the circumstances in which Indian children are removed from their homes to those that present a real danger to the child.

Most state courts do not require expert testimony when the evidence justifying removal of the child is "culturally neutral."[46] Therefore, a state court will not get expert testimony if the basis for removal is physical abuse such as shaken baby syndrome or newborn drug addiction.[47]

The ICWA's Placement Preferences

In the interest of maintaining Indian children within the Indian community and tribe, section 1915 establishes the order of preference for placement of Indian children that state courts must follow. Indian tribes may alter the order of preference by resolution.[48]

Section 1915(a) provides that in "any adoption proceeding" in a state court, "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[49] By its terms, Section 1915 applies to all adoptions, voluntary and involuntary. Some view these preferences as a departure from the general federal policy of disfavoring race matching in adoptions and foster placements.[50]

The *BIA Guidelines* identify the following considerations for determining good cause: the request of the parents or the child, if the child is of sufficient age; "the extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness," and the unavailability of suitable families for placement after "diligent" search.[51] The party seeking to avoid the statutory preferences bears the burden of establishing good cause.[52] The states are

[42] *BIA Guidelines*, *supra* note 12, at 65,953.

[43] Cohen, §11.04[4]; Cynthia R. Mabry and Lisa Kelly, Adoption Law: Theory, Policy, and Practice (2006) 399 (Adoption Law), quoting *Matter of Welfare of B.W.*, 454 N.W.2d 437 (Minn. App. 1990).

[44] H.Rept. 95-1386, *supra* note 3 at 10.

[45] *Id.*

[46] Atwood, *supra* note 2 at 178.

[47] *Id.*

[48] 25 U.S.C. §1915(c).

[49] 25 U.S.C. §1915(a).

[50] Atwood, *supra* note 2 at 185-193; Adoption Law, *supra* note 43 at 411-413 (explaining that the federal Interethnic Adoption Provisions, Section 1808 of P.L. 104-188, prohibit placement agencies from denying any individual the opportunity to be an adoptive or foster parent on the basis of race.)

[51] *BIA Guidelines*, *supra* note 12 at 67,594.

[52] *Id.*

divided on whether the best interests of the child constitute good cause to depart from the placement preferences.[53] Those state courts that find good cause based on the child's best interests generally place greater importance on the child's permanent placement,[54] while those state courts that reject the child's best interests as a basis for a good cause finding generally place greater importance on the child's identity as an Indian and the tribe's interest in that identity.[55]

Procedural Protections

The House Report from the Committee on Interior and Insular Affairs stated point blank: "[t]he decision to take Indian children from their natural homes is, in most cases, carried out without due process of law."[56] One commentator has stated that the ICWA provides greater procedural protections for parents, tribes, and Indian custodians than are provided to non-Indian parents.[57] These protections are designed to ensure that parents, tribes, and Indian custodians are fully informed and may participate in state court proceedings, and that federal courts may review state court judgments.

Consent

In response to the conclusion by Congress that states were coercing waivers of parental rights and obtaining consent from uninformed parents, Section 1913(a) of the ICWA requires that in cases of voluntary placement in foster care or voluntary termination of parental rights, consent will not be valid unless it is in writing, recorded before a judge, and accompanied by a certificate from the judge that the "the terms and consequences of the consent were fully explained in detail and were fully understood" by the consenting person.[58] Section 1913(a) requires also that the court must certify that the parent understood the explanation, either in English or as translated in a language he or she did understand.[59] Consent given within ten days after birth of a child is not valid.[60]

The ICWA also gives Indian parents opportunity to withdraw their consent. Parents of an Indian child may withdraw their consent for termination of parental rights at any time before the final decree of termination or adoption.[61] Upon withdrawal of consent, the child must be returned to the parent.[62] Even after the final decree of termination or adoption has been entered, the parents have two years to withdraw consent and petition the court to vacate the decree on the ground that

[53] Atwood, *supra* note 2 at 228.

[54] *Id.* at 228-229. See also Christine Metteer, Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act, 38 Santa Clara L. Rev. 419, 445 (1998) (Metteer) (citing *In re Adoption of F.H.*, 851 P.2d 1361, 1365 (Alaska 1993) as an example of a court finding good cause for deviation from the ICWA's placement preferences partly based on avoiding uncertainty in favor of adoption).

[55] Metteer, *id.* at 447 (citing *In re Custody of S.E.G.*, 521 N.W.2d 357, 365 (Minnesota 1994) as rejecting the good cause exception based simply on the child's best interests and considering cultural needs in the placement).

[56] H.Rept. 95-1386, *supra* note 3 at 11.

[57] Atwood, *supra* note 2 at 174.

[58] 25 U.S.C. §1913(a).

[59] *Id.*

[60] *Id.*

[61] 25 U.S.C. §1913(b).

[62] *Id.*

his or her consent was obtained through fraud or duress.[63] Upon a finding of fraud or duress, the court shall vacate the decree and return the child to the parent.[64] By providing that parents may withdraw their consent and petition the court to vacate the adoption upon an allegation of fraud or duress, the ICWA creates incentives to ensure that parents give their consent knowingly and freely. However, these provisions also generate uncertainty about the security and finality of adoptions of Indian children.

Based on all these procedural protections, one commentator has stated that Indian birth parents are afforded more procedural protections than non-Indian birth parents in voluntary termination proceedings.[65]

Notice

An important element of due process is notice of the action that the state is proposing to take.[66] The House Report from the Committee on Interior and Insular Affairs pointed to the importance of notice in the context of Indian children.

The conflict between Indian and non-Indian social systems sometimes operates to defeat due process. The extended family provides an example. By sharing the responsibility of child rearing, the extended family tends to strengthen the community's commitment to the child. At the same time, however, it diminishes the possibility that the nuclear family will be able to mobilize itself quickly enough when an outside agency acts to assume custody. Because it is not unusual for Indian children to spend considerable time away with other relatives, there is no immediate realization of what is happening—possibly not until the opportunity for due process has slipped away.[67]

Section 1912(a) provides that in an involuntary proceeding in state court, the party seeking termination of parental rights must notify the parent and the child's tribe by return receipt registered mail.[68] If the identity or location of the Indian child's parent is not known, the party seeking foster care placement or termination of parental rights must notify the Secretary of the Interior (Secretary).[69] The Secretary has 15 days in which to notify the parents.[70] The court cannot hold a proceeding for ten days after the parent or Indian custodian and tribe or the Secretary received notice.[71] State courts must grant up to 20 additional days upon request from the parent, Indian custodian, or tribe before proceeding.[72] Section 1912(a) is intended to provide meaningful notice to both the parents and the tribes so that they may participate in the proceedings and, if they wish, challenge the involuntary termination of parental rights or the removal of the child from the family.

[63] 25 U.S.C. §1913(c).

[64] *Id.*

[65] Atwood, *supra* note 2 at 174.

[66] *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

[67] H.Rept. 95-1386, *supra* note 3 at 11.

[68] 25 U.S.C. §1912(a).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

Right to Intervene

Section 1911(c) establishes the right of the Indian child's Indian custodian or tribe to intervene in any state court proceeding for termination of parental rights at any point in the proceeding.[73] This right of intervention applies in both involuntary and voluntary terminations. However, because the ICWA requires that tribes get notice of involuntary proceedings only, tribes are more likely to know about, and therefore intervene in, involuntary proceedings than in voluntary proceedings.

The House Report from the Committee on Interior and Insular Affairs noted that frequently Indian parents leave their children with members of their extended families.[74] Under 1911(c) such a family member has a right to intervene, even though he or she has no recognized legal relationship with the child. Section 1911(c) recognizes the importance of that relationship and ensures that such a family member, as well as the child's tribe, has the opportunity to be a party to the termination proceedings. Granting Indian custodians and tribes the right to intervene as parties provides another mechanism that increases the likelihood that Indian children will remain in Indian communities and maintain ties to their tribes.

Right to Counsel

For indigent parents or indigent Indian custodians challenging the removal of a child or the termination of parental rights, the ICWA provides the right to counsel. Section 1912(b) provides that when a court determines indigence, the parent or Indian custodian has a right to a court-appointed counsel in any placement or termination proceeding.[75] A state court has discretion to appoint counsel for the child if it determines it to be in the best interest of the child.[76] If state law does not provide for appointment of counsel, the state court must notify the Secretary of the Interior who will pay reasonable fees and expenses upon certification from the presiding judge.[77]

Reports and Other Documents

One of the complaints voiced in the legislative history was that state court judges were making decisions about Indian children based on evidence that the Indian parties could not see.[78] Section 1912(c) seeks to remedy this by providing any party to a foster care placement or termination of parental rights proceeding with the right to examine "all reports or other documents filed with the courts upon which any decision with respect to such action may be based."[79] This provision seeks to ensure that the court bases its decision on evidence in the record filed with the court that all parties have had an opportunity to examine.

[73] 25 U.S.C. §1911 (c).

[74] H.Rept. 95-1386, *supra* note 3 at 10, 11.

[75] 25 U.S.C. §1912(b).

[76] *Id.*

[77] *Id.*

[78] H.Rept. 95-1386 22 (1978).

[79] 25 U.S.C. §1912(c).

Remedial Services and Rehabilitation Programs

The ICWA requires that before a state court terminates parental rights, the state must take steps to try to maintain the Indian family. Section 1912(d) requires the state to demonstrate 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" before terminating parental rights.[80] Such active efforts should extend to the extended family and the tribe and may include "providing transportation, arranging appointments with providers, assisting with childcare, and taking other rehabilitative measures, optimally in collaboration with the child's tribe."[81] This provision is intended to protect the integrity of Indian families and increases the likelihood that a child will remain in the Indian community by requiring that states involve the extended family and the tribe.

Federal Court Review

The ICWA provides for federal court review of state court decisions. Section 1914 states that a child who is the subject of a state court proceeding, the parent or Indian custodian, or the child's tribe "may petition any court of competent jurisdiction" to invalidate an action based on a violation of the ICWA's jurisdictional provisions, procedural provisions, or consent provisions.[82] A "court of competent jurisdiction" includes a federal court.[83] Thus, federal courts may review and invalidate state court decrees, upon a showing that the state court improperly exercised jurisdiction, failed to allow the Indian custodian or tribe to intervene, failed to give full faith and credit to a tribal court decree, failed to respect the procedural rights of the Indian custodian or tribe, or failed to obtain informed and knowing consent from the parents. However, when tribes or Indian parties have tried to use federal courts to invalidate state court decisions rendered in violation of the ICWA, they have met with mixed results.[84]

Federal courts may review tribal court decrees, but only after the party seeking review has exhausted his or her remedies in the tribal court.[85] Thus, a party seeking review of a tribal court decree must appeal the challenged decision through the tribal court system and obtain a decision from the highest tribal court before challenging the decree in federal court.

[80] 25 U.S.C. §1912(d).

[81] Atwood, *supra* note 2 at 176.

[82] 25 U.S.C. §1914 provides for invalidation based on violations of §§1911, 1912, or 1913. Section 1911 governs jurisdiction of tribal and state courts and provides a right of intervention for Indian custodians and tribes and for full faith and credit of tribal court decrees. Section 1912 provides procedural protections: notice; counsel; examination of reports; remedial service and rehabilitation programs; and standards of proof. Section 1913 governs consent by parents to voluntary termination of parental rights and foster care placement.

[83] *Doe v. Mann*, 415 F.3d 1038, 1046-1047 (9th Cir. 2005).

[84] *See, e.g.*, *Kiowa Tribe v. Lewis*, 777 F.2d 587 (10th Cir. 1985) (declining review of state court judgment because ICWA did not affect full faith and credit due state court decisions); *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1909 (2006) (finding section 1914 authorized federal court review of state court decision).

[85] *Boozer v. Wilder*, 381 F.3d 931 (9th Cir. 2004).

Foster Care Placement Under the ICWA

Foster care is the term applied to the temporary placement of a child with a licensed caregiver when a child is removed, voluntarily or involuntarily, from his or her home and made a ward of the state or tribe. The foster care giver has day-to-day responsibility for the child and the state or tribe makes the legal decisions for the child.

Section 1912(e) establishes the standard of proof, the type of evidence, and the substantive standard that state courts must apply in removing an Indian child from his or her home and placing the child in foster care. Section 1912(e) provides that for involuntary proceedings, state courts must find, based on "clear and convincing evidence," including the testimony of qualified expert witnesses, that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" before placing the child in foster care.[86] The "clear and convincing evidence" standard is higher than the "preponderance of the evidence" standard necessary for due process and employed by most states in foster care placement proceeding for non-Indian children.[87] The *BIA Guidelines* provide that "[e]vidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical harm to the child."[88] Rather, in order to meet the standard, "the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child."[89]

Section 1915(b) provides that for foster care or preadoptive placement, a state court must place the child "in reasonable proximity to his or her home," "in the least restrictive setting which most closely approximates a family, and in which his special needs, if any, may be met."[90] These standards are similar to the standards applied under state law for foster placement of non-Indian children. The ICWA, however, provides a hierarchy of preferences. Placement should be: with a member of the child's extended family; a foster home licensed, approved, or specified by the child's tribe; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or, an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.[91] Like the preferences for adoption, these preferences make it more likely that Indian children will not be removed from an Indian environment.

Parents and tribes enjoy the same procedural rights in foster care placement proceedings as they have in parental rights termination proceedings.

[86] 25 U.S.C. §1912(e).

[87] Atwood, *supra* note 2 at 177.

[88] *BIA Guidelines*, *supra* note 12 at 67,593.

[89] *Id.*

[90] 25 U.S.C. §1915(b).

[91] *Id.*

The ICWA's Jurisdictional Scheme

By recognizing both exclusive and concurrent tribal court jurisdiction over custody proceedings involving Indian children, the ICWA provides an important mechanism by which tribes may participate in the placement of Indian children. The ICWA recognizes that tribal courts have exclusive jurisdiction over child custody proceedings involving Indian children who are residing on the reservation or who are wards of the tribal court, regardless of residency. It recognizes that tribal courts have concurrent jurisdiction over child custody proceedings involving children who reside off the reservation. To ensure that other jurisdictions respect tribal court orders, the ICWA provides that "[t]he United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records and judicial proceedings of any other entity."[92]

Exclusive Jurisdiction

Before Congress passed the ICWA, the U.S. Supreme Court recognized that tribal courts have exclusive jurisdiction over adoptions involving tribal members residing on the reservation. In *Fisher v. District Court of the Sixteenth Judicial District of Montana*,[93] members of the Northern Cheyenne Tribe (Tribe) had gained custody of a member child through a tribal court proceeding.[94] The members sought to adopt the child through a state court proceeding. The biological mother of the child, who was also a member of the Tribe, moved to dismiss the state court proceeding on the ground that the tribal court had exclusive jurisdiction over the proceeding.[95] The Supreme Court stated the test for whether the state court could exercise jurisdiction was at the least, "whether the state action infringed on the right of the reservation Indians to make their own laws and be ruled by them."[96] The Court concluded that the tribal court had exclusive jurisdiction owing to the Tribe's right to govern itself independent of state law.[97] In response to the argument that the Tribe could not divest the state of jurisdiction it exercised over tribal adoptions prior to organization of the Tribe in 1935, the Court noted the tribal courts were established pursuant to the Indian Reorganization Act. If the state courts in fact exercised jurisdiction over tribal adoptions, that jurisdiction has been preempted by federal statute.[98] Finally, the Court rejected the members' assertion that depriving them of access to state courts constituted impermissible racial discrimination, noting that the tribal court's exclusivity derives from the "quasi-sovereign status" of the Tribe under federal law.[99] "Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of

[92] 25 U.S.C. §1911(d).

[93] *Fisher v. District Court of the Sixteenth Judicial District of Montana*, 424 U.S. 382 (1976).

[94] *Id.* at 383.

[95] *Id.* at 383-384.

[96] *Id.* at 386 (internal quotations and citations omitted).

[97] *Id.* at 387.

[98] *Id.* at 390.

[99] *Id.*

the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government."[100]

The ICWA recognizes this exclusive jurisdiction over child custody proceedings involving Indian children residing or domiciled on the reservation.[101] It explicitly provides in section 1911(a) that "[a]n Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe."[102] Thus, a parent of a child residing or domiciled on the reservation cannot circumvent tribal jurisdiction by going to state court.[103] Section 1911(a) provides for exclusive tribal court jurisdiction over Indian children who are wards of the tribal court, regardless of the child's residence or domicile.[104]

Section 1911(a) provides an exception for states in which a federal law, such as P.L. 280,[105] vests civil jurisdiction over the reservation in the state. Under Section 1918(a), tribes in P.L. 280 states may reassume exclusive jurisdiction over child custody proceedings upon approval by the Secretary of the Interior (Secretary) of a petition for reassumption.[106] Reassumption, however, is not necessary in order for tribes in P.L. 280 states to exercise concurrent inherent jurisdiction over child custody proceedings[107]

For the ICWA, the child's domicile or residence is determined, under federal law, by the domicile or residence of the parents. In *Mississippi Band of Choctaw v. Holyfield*,[108] the only Supreme Court case to consider the ICWA, the Court considered whether the tribal court had exclusive jurisdiction over the voluntary termination of parental rights and subsequent adoption of twin Indian children whose biological parents resided on the reservation but who purposefully left the reservation so that the children would not be born on the reservation, thereby avoiding the ICWA's reach. The Court held that the tribal court had exclusive jurisdiction over the proceedings. The state supreme court had held that domicile or residence was a matter of state law and that under state law, the children were never domiciled or residing on the reservation. The Supreme Court reversed, holding that Congress intended that domicile or residence would be determined by a uniform federal standard, and the standard looked to the residence of the parents to determine the residence of the children. "Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes

[100] *Id.* at 390-391.

[101] 25 U.S.C. §1911(a).

[102] 25 U.S.C. §1911(a).

[103] Atwood, *supra* note 2 at 170.

[104] 25 U.S.C. §1911(a).

[105] 28 U.S.C. §1360. P.L. 280 "mandated the transfer of civil and criminal jurisdiction over 'Indian country' from the federal government to the governments of five states [(California, Minnesota, Nebraska, Oregon, and Wisconsin)], and permitted other states to assume such jurisdiction voluntarily. In 1958, Alaska was added to the list of mandatory Public Law 280 jurisdictions." *Native Village of Venetie v. Alaska*, 944 F.2d 548, 559-560 (9th Cir. 1989). P.L. 280, therefore, vests jurisdiction over custody proceedings involving Indian children residing on a reservation in state court.

[106] 25 U.S.C. §1918(a).

[107] Atwood, *supra* note 2 at 171. The Alaska state supreme court and the federal Court of Appeals for the Ninth Circuit have held that Alaska Native village tribal courts have inherent original jurisdiction, concurrent with the state's jurisdiction, to initiate child custody proceedings for Alaska Native children residing off a reservation. *State of Alaska v. Native Village of Tanana*, 249 P.3d 734 (Alaska 2011); *John v. Baker*, 982 P.2d 738 (Alaska 1999); *Native Village of Venetie*, 944 F.2d at 561-562.

[108] 490 U.S. 30 (1989).

themselves of the large number of Indian children adopted by non-Indians."[109] The Court noted, "[t]he protection of this tribal interest [in Indian children] is at the core of ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on parity with the interest of the parents."[110]

Concurrent Jurisdiction

The ICWA ensures concurrent tribal-state jurisdiction by providing that in state child custody proceedings involving Indian children residing off the reservation, state courts must transfer the proceeding to tribal court upon petition of the Indian child's parent, Indian custodian, or tribe, unless either parent objects, the tribal court declines jurisdiction, or good cause is shown.[111] The Supreme Court said in *Holyfield* that when there is concurrent jurisdiction, tribal court jurisdiction is presumed.[112] The fact that either parent may object to transfer to tribal court means that state courts frequently hear cases involving children of mixed heritage.[113]

The ICWA does not define good cause and the legislative history indicates that Congress left it undefined intentionally so that state courts would have flexibility in making good cause determinations.[114] The *BIA Guidelines* identify the following circumstances as constituting good cause: the child's tribe lacks a tribal court; the petition is filed when the proceeding is at an advanced stage and the petitioner did not file the petition promptly; an Indian child older than twelve objects; presenting evidence in tribal courts would present an undue hardship on parties or witnesses; or a child older than five, whose parents are unavailable, has had little or no contact with the tribe or its members.[115] Courts are divided on whether to consider the child's best interest in determining good cause.[116]

Proposed Amendments to the ICWA

Over the years, there have been many bills introduced in Congress to amend the ICWA.[117] In general, the amendments have been aimed at ensuring tribal notice and the opportunity for limited tribal intervention in voluntary adoptions,[118] restricting the time in which parents may revoke

---

[109] *Id.* at 49.

[110] *Id.* at 52 (internal quotations and citation omitted).

[111] 25 U.S.C. §1911(b).

[112] *Holyfield*, 490 U.S. at 36.

[113] Atwood, *supra* note 2 at 173; *see* cases cited *supra* note 24.

[114] *BIA Guidelines*, *supra* note 12 at 67,584, citing S.Rept. 95-597, 95th Cong., 1st Sess. 17 (1977).

[115] *Id.*

[116] Atwood, *supra* note 2 at 173-174, citing *In re Appeal in Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245 (Ariz. Ct. App. 1991)(court considered best interests of the child); *In re Robert T.*, 246 Cal. Rptr 168 (Ct. App. 1988) (same); *In re Alexandria Y.*, 53 Cal. Rptr2d 679 (Cal. App. 1996)(same); *In re Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993) (same). *See, e.g.*, *Shageluk IRA Council v. State of Alaska*, (S.Ct. Alaska March 18, 2009) (affirming lower court decision not to transfer case to tribal court because lower court did not consider best interests of the child); *In re M.A.*, 40 Cal. Rptr. 3d 439 (Ct. App. 2006) (court did not consider best interests of the child).

[117] *See, e.g.,* H.R. 4733, 107th Cong. (2002); S. 1213, 106th Cong. (1999); H.R. 1082, 105th Cong. (1997); S. 569, 105th Cong. (1997); H.R. 3275, 104th Cong. (1996); H.R. 3828, 104th Cong. (1996); H.R. 1448, 104th Cong. (1995); S. 1962, 104th Cong. (1995); S. 764, 104th Cong. (1995).

[118] H.R. 4733, 107th Cong. (2002), sec. 9, 10, 11; S. 1213, 106th Cong. (1999), sec. 6-8; H.R. 1082, 105th Cong. (1997), (continued...)

their consent to voluntary termination of their rights,[119] and providing criminal penalties for misrepresentation regarding an Indian child.[120] In addition, many of the proposed amendments have clarified when tribal courts have exclusive jurisdiction; extended exclusive jurisdiction to tribes with reservations located in P.L. 280 states and to tribes without reservations, including tribes in Oklahoma; and, made clear that tribes in Alaska have jurisdiction concurrent with state courts.[121] Only one bill has been introduced to limit the applicability of the ICWA.[122]

There were no bills introduced in the 112th Congress to amend the ICWA.

Conclusion

The ICWA has achieved success in reducing the rate at which Indian children are removed from their homes and the rate at which Indian children are placed in non-Indian homes.[123] Nonetheless, Indian children are still removed from their homes and placed in foster care at a rate higher than that for non-Indian children.[124] In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act,[125] which made tribes eligible for direct funding for foster care and adoption assistance under Title IV-E of the Social Security Act,[126] the act under which states receive federal funding for foster placement and adoption assistance. It is too early to know the results of this access to increased funding, but it may improve the tribes' ability to protect their children in a way that also protects the tribes.

(...continued)

sec.6-8; S. 569, 105th Cong. (1997), sec. 6, 7, 8; H.R. 3828, 104th Cong. (1996), sec. 6, 7, 8; S. 1962, 104th Cong. (1995), sec. 6, 7, 8.

[119] H.R. 4733, 107th Cong. (2002), sec. 8; S. 1213, 106th Cong. (1999), sec. 5; H.R. 1082, 105th Cong. (1997), sec. 5; S. 569, 105th Cong. (1997), sec. 5; H.R. 3828, 104th Cong. (1996), sec 5; S. 1962, 104th Cong. (1995), sec. 5.

[120] H.R. 4733, 107th Cong. (2002), sec. 18; S. 1213, 106th Cong. (1999), sec. 10; H.R. 1082, 105th Cong. (1997), sec. 9; S. 569, 105th Cong. (1997), sec. 10; H.R. 3828, 104th Cong. (1996), sec. 9; S. 1962, 104th Cong. (1995), sec. 9.

[121] H.R. 4733, 107th Cong. (2002), sec. 2(5),(6),(7); H.R. 1082, 105th Cong. (1997), sec. 2; H.R. 3828, 104th Cong. (1996), sec. 1; S. 1962, 104th Cong. (1995), sec. 2.

[122] H.R. 3275, 104th Cong. (1996).

[123] Atwood, *supra* note 2 at 193; Ann E. MacEachron, Nora S. Gustavsson, Suzanne Cross, Allison Lewis, The Effectiveness of the Indian Child Welfare Act of 1978, 70 Social Service Review 451 (1996). MacEachron et al. report that between 1975 and 1986, there was a 93 percent drop in adoption rates of Indian children and a 31 percent decrease in the placement of Indian children in foster care. *Id.* at 457. They also report that the discrepancy between foster care placement rates for Indians and non-Indians was smaller in 1986 than it was in 1975. *Id.* at 458.

[124] Atwood, *supra* note 2 at 194.

[125] P.L. 110-351, 110th Cong., 2d Sess. (2008).

[126] 42 U.S.C. §§601, 670-679a.

Author Contact Information

Jane M. Smith
Legislative Attorney
jmsmith@crs.loc.gov, 7-7202