

# The Indian Child Welfare Act

## What Do I Really Have to Know?



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# ICWA IS ABOUT...

- The rights of the tribe\* – a separate government
  - The preservation of tribes and native culture
  - The child's right to political identity
- \* “Tribe” can also be “band”, “nation”  
“community” § 1903 (8)



FEDERAL LAW  
ICWA 25 U.S.C.A.  
§1901 -1963  
1978

Predates the federal child welfare laws we all work with everyday!

# STATE LAW

- State can incorporate ICWA into state law
- State can add to fed  
ICWA law
- State cannot subtract from fed ICWA law
- Fed law applies to states even if there is no reference in state law

An ICWA child welfare case that remains in state court requires following state law and federal ICWA.



# What is “purpose”?

- Feds determined that stats clearly showed :  
“an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children...by nontribal public and private agencies...”

# WHAT?

Special requirements on state courts when Indian children are to be placed outside the home or freed for adoption.

# Requires

- Courts to make decisions that reflect value of tribe and Indian family connections – requires expert testimony to be heard and considered
- Agency to provide more than diligent efforts - “active efforts” to compensate for children having been more likely to be placed outside of the home
- Higher burdens of proof to remove children and free them for adoption

# The Key Questions

- 1. Is this an ICWA child?
- 2. Is this an ICWA action?
- 3. What is the proper jurisdiction?
- 4. Who needs to be noticed?
- 5. What are the special evidentiary rules if the matter stays in state court?
- 6. What are the placement preferences?

# Question 1

- Is this an Indian child under the Indian Child Welfare Act?
- § 1903 (4)

# WHO IS AN INDIAN CHILD? A POLITICAL QUESTION

- Unmarried and
- Under 18 years old and
- Member in a federally recognized tribe or
- Eligible to be a member and the biological child of a member
- NOTE: Statute uses term “member” some tribes use other terms like enrolled

# Biggest Confusion and Misconception

Bottom Line:

- Only the sovereign entity of the tribe can determine if the child is an ICWA child as only they can determine if child is a member or enrollable as a member and a child of a member

What makes a child a “member”  
or eligible to be a member?

Each tribe has it's own membership  
criteria and they decide as a sovereign  
nation

Again – may use different terms ,  
such as enrollment

# ISSUES

- Isn't membership/identity about blood quantum?
- What do federal guidelines say? "B.1."
- What about MEPA?

# MORE ISSUES

- What about Canadian tribes?
- What if one sibling is an Indian child but the other is not?
- What if the child is raised in tribal culture but is not eligible for being considered a member?
- Do tribes have to follow ICWA?

## Question 2

- Is this an action or proceedings that requires the application of the Indian Child Welfare Act?
- § 1903(1)

## WHEN DOES IT GET APPLIED?

- Child being placed in foster care due to abuse/neglect (or transferred)
- Child being placed on status offenses or voluntary where child cannot be returned upon demand

# MORE APPLICATIONS

- Child custody with non-parent
- Termination proceedings
- Pre-adoptive placements
- Adoptions—including stepparent, public and private

## DOES NOT APPLY :

- Divorce or Custody Between Two Parents
- Juvenile Delinquency
- Paternity /Support
- Domestic Violence
- Totally Voluntary/At Will Placements

# Question 3

- Where is the case heard? Who has jurisdiction? State court? Tribal court? Both?
- § 1911

# Concepts

- Exclusive jurisdiction – only can be handled by a tribal court
- Transfer – can be moved from state court to tribal court
- Right to Intervene – tribe can be involved in the state court action

§ 1911

# INDIAN TRIBE EXCLUSIVE JURISDICTION

- § 1911(a)
- Indian child who is a ward of a tribal court
- Indian child who resides or domiciled on a tribal reservation – state court can determine residence or domicile

Mississippi Band of Choctaw v Holyfield

490 US 30 (1989)

State CPS can do emergency removal of an Indian child who is temporarily located off the reservation BUT then the matter must be returned to tribal jurisdiction

§ 1922

# STATE COURT JURISDICTION

Indian child who does not live on the reservation BUT subject to transfer to a tribal court or to intervention by tribe in state court proceeding

So if it is not exclusive jurisdiction to tribal court the two options are:

Transfer or Intervention

§ 1911 (b) and (c)

## Transfers to Tribal Court

- Tribe or parent can ask for the transfer at any time
- Either parent (tribal or not) can oppose and stop the transfer
- State court must transfer if both tribe and parents want it and can only retain jurisdiction if there is “good cause”
- Court can transfer case but child can stay in state care
- Adoptive placement transfers?—courts have split

# GOOD CAUSE TO REFUSE TRANSFER

## Guidelines “C3”

- Inconvenient forum
- Advanced stage/motion untimely
- Child over 12 who opposes
- Child over 5, parents gone and no tribal contact
- No tribal court
- Is lack of an “Existing Indian Family” good cause to refuse transfer?
- Is “bonding” good cause to refuse a transfer?

# TRIBAL INTERVENTION IN STATE COURT

- Tribe's right
- At any time – including appeals!
- Parent, agency, child, court cannot prevent
- Even where not going to appear in person
- Not specifically listed for adoption proceedings

# REMEMBER

ICWA APPLIES EVEN IF TRIBE  
DOES NOT APPEAR OR IS  
UNABLE TO BE INVOLVED

# Question 4

- Who gets noticed?
- § 1912
- The parent or custodian
- The child's tribe
- By registered mail with return receipt requested

BEST PRACTICE:



If not sure, NOTIFY!

# Question 5

- What are the special evidentiary rules that have to be applied if the matter stays in state court?

# REMOVAL ISSUES

- § 1912 (d) and (e) – guidelines D4, D3c, B6
- Qualified expert witness
- Likely to result in serious emotional or physical damage if child remains
- Clear and convincing burden of proof
- “Active efforts”



# What are “active efforts”?

- Efforts by the state to provide remedial services and rehabilitative programs that have not been successful
- MORE than “reasonable efforts”
- CLEARLY meant to include working with tribe and seeking tribal resources

# Who is this QEW and what are they supposed to do?

- Member of Indian child's tribe who is recognized by tribal community as knowledgeable in tribal customs as they pertain to family organizations and childrearing practices

OR

- A 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

- A professional person having substantial education and experience in the area of his or her specialty

Who has to offer the expert's testimony?

Court should determine if offered person is proper QEW and make that ruling

# What is the expert supposed to testify about?

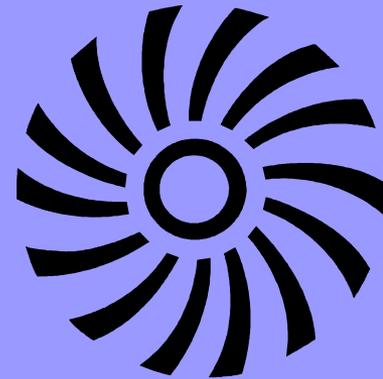
- Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody or return to custody of parent or Indian custodian is likely to result in serious physical or emotional damage to the child

# VOLUNTARY PLACEMENT OR SURRENDER ISSUES

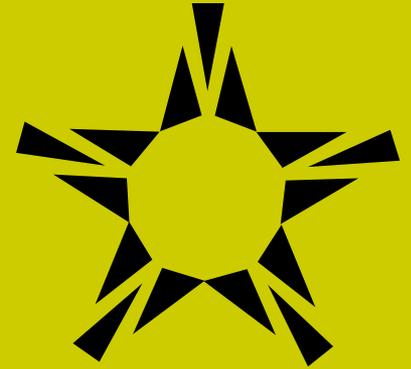
- § 1913
- Consent must be in writing and before a family court judge who certifies
- Language of parent
- More than ten days after the birth
- Can withdraw consent to a voluntary placement--child is returned
- Can revoke surrender before an adoption--child is returned (unless some other order)

## TPR ISSUES

- ASFA applies
- Timing
- § 1912 (f) -
- Qualified expert
- Return home would likely result in serious emotional or physical damage
- Beyond a reasonable doubt burden of proof



# ADOPTION ISSUES



- Surrenders are revocable before final decree of adoption --return to parent
- Adoption can be vacated on fraud/duress grounds--return to parent
- No adoption can be vacated after two years

WHAT IF ADOPTIVE PARENT  
LATER has adoption vacated OR  
SURRENDERS INDIAN CHILD?

There can be a petition to return the  
child to the birth parent

§ 1916

# Question 6

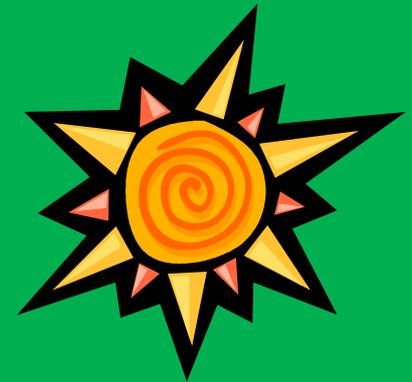
- What are the placement preference?

# Concepts

- Placements in descending order
- Don't move to next one without reason that earlier one can't be done
- Specify why moving to next level in court order
- There are good cause arguments but be cautious
- Tribe can change the preferences and child or parent's preference can be considered

# § 1915(b) FOSTER CARE PLACEMENTS

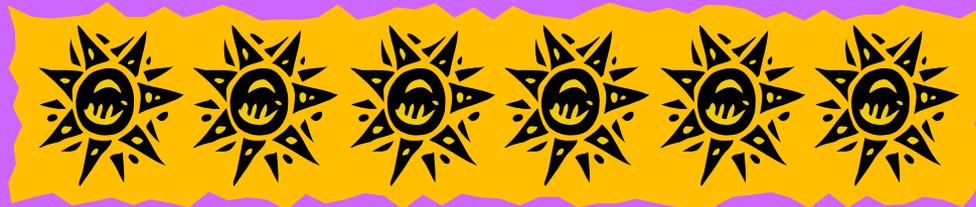
- Least restrictive setting
- Reasonable proximity to their home
- Special needs
- Preferences
  - 1. extended family
  - 2. foster home specified, approved, or licensed by tribe
  - 3. Indian foster home licensed by state authority
  - 4. Indian Institution
  - Last – state licensed non Indian foster homes



# ADOPTIVE PLACEMENTS

## §1915(a) Preferences:

- 1. Extended family members
- 2. Tribal members of child's tribe
- 3. Other Indian families of other tribes
- Other adoptive homes



# GOOD CAUSE TO MODIFY PLACEMENTS

## Guidelines “F3”

- Parents or child have different wishes
- Tribe has different preferences
- Child has extraordinary needs
- Anonymity
- Can't find placement



§ 1912(b) RIGHT TO  
COUNSEL FOR PARENTS  
AND CUSTODIANS



RIGHTS OF  
ADULT ADOPTEES  
TO RECORDS

§ 1917



# FAILURE TO FOLLOW ICWA?

§ 1914 - Parent, Indian custodian  
or tribe may petition to invalidate the order.

Thank you

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