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INDIAN CHILD WELFARE ACT PROCEEDINGS – A BASIC PRIMER ON HOW TO PROCEED

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In response to deeply disruptive historical removal policies and practices, Congress enacted the Indian Child Welfare Act of 1978[1] to ensure the primacy of tribal decision-making regarding the welfare of Indian children, and to discourage the unwarranted removal of Indian children from their extended families, communities, and cultures. The law re-orients the focus of what constitutes the "best interests" of an Indian child, finding that they are best served by protecting "the rights of the...child as an Indian."[2] Toward this end, the Act imposes on state courts and child protection systems numerous procedural mechanisms and substantive standards, the intent of which are to anchor the child's future within her/his cultural heritage. Thus, the ICWA establishes a scheme of substantive and procedural requirements that govern throughout the entirety of state child protection proceedings, as well as in some juvenile justice cases. Congress intended that implementation of these standards would eliminate much of the subjectivity embedded in the prevailing practices that led to the cultural disenfranchisement of so many children.

For state judges who conduct child protection, adoption, and/or juvenile proceedings, it is in the Indian child's best interest to comply with the ICWA at the earliest possible stage of the proceedings. This ensures that the child's tribe is able to: participate in the judicial proceedings; offer vital services that will likely be more culturally relevant (and thus more successful); and influence the decision-making that will affect the child's welfare and well-being for her/his lifetime. With this in mind, the most important step that a state judge must take at the outset of any child protection proceeding is to determine whether the ICWA governs the proceeding, and to ensure compliance with the Act's mandates throughout the entirety of the proceedings.

Following is a summary of the ICWA's key provisions and requirements, including some references to the newly revised federal the ICWA Guidelines,[3] all of which will assist in

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[1] 25 U.S.C. §§ 1901 *et seq.* (1978). The Department of the Interior, Bureau of Indian Affairs recently updated Guidelines for implementing the ICWA. *See* Department of the Interior, Bureau of Indian Affairs, Guidelines for State Courts and Agencies in Indian Child Welfare Proceedings, 80 Fed. Reg. 10146 (February 25, 2015).

[2] 25 U.S.C. 1902. H.R. Report No. 1386, 95th Cong., 2nd Sess., 23 (1978), *reprinted in* U.S. Code Cong. & Admin. News 7534 (Legislative History), at 7541.

[3] The Bureau of Indian Affairs recently updated the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings for the first time since they were originally published in 1979. *See* Guidelines, *supra,* note 1, for extensive, detailed guidance in how to implement the ICWA's

protecting vital relationships between Indian children, their families and communities. It would behoove any state judge to become familiar with the detailed requirements of the Guidelines to gain a more comprehensive understanding of what is required to comply with the ICWA. It cannot be underscored enough that if a state judge does not follow the procedures and substantive requirements of the ICWA, the court's final decisions in and disposition of the case may be reversed on appeal (which has happened many times in many jurisdictions across the country). While no judge likes to be reversed for any reason, in cases involving the lives and welfare of children, long delays resulting from the appeals process and a reversal will not serve the best interests of any child – or of their family members.

HOW TO IDENTIFY AN ICWA CASE

The ICWA governs[4] whenever an *Indian child*[5] is the subject of a *child custody proceeding* in state court.[6] To determine whether a child is an *Indian child* under the ICWA, the court needs to hear from the child's tribe whether the child is a member of, or eligible for membership in, that tribe. Membership determinations are within the exclusive purview of a tribe,[7] and state courts lack authority to look beyond a tribe's membership determination.[8]

While in some instances it is immediately known whether a child is an Indian child, it is not always readily apparent or known whether a child is Indian, much less whether the child is a member of, or eligible for membership in, a tribe. A child's physical characteristics may not provide any indication that the child is an *Indian child*. Sometimes a child's parent may not know the child's tribal membership status, or the parent with knowledge about the child's Indian heritage and/or membership status may be absent at the time that the court first exerts jurisdiction over the child, and may even be unaware that there are court proceedings involving the child.

In every child custody proceeding, the Guidelines require the court to ascertain whether there is any "reason to believe" that a child who is the subject of the proceedings is an Indian child.[9] The Guidelines require the court to ask each party to the case to certify on

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substantive and procedural provisions. The Guidelines are also under review for publication as updated federal regulations sometime in the near future.

[4] In any proceeding where applicable state or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than those afforded under ICWA, state courts must apply the higher standard. 25 U.S.C. § 1921; Guidelines, *supra*, 80 Fed. Reg. at10152, § A.5.

[5] 25 U.S.C. § 1903(4). The law does not require that the child be a member of the same tribe as the Indian parent.

[6] A child custody proceeding includes any proceeding that involves foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement, as well as juvenile delinquency or status offense proceedings if any part thereof will result in the need for placement of the child in a foster care pre-adoptive, or adoptive placement, or termination parental rights. 25 U.S.C. § 1903(1). While ICWA expressly exempts custody disputes within *divorce* proceedings where one of the parents will receive custody, it applies in those instances where the parents are not married, *or* where someone other than a parent will obtain custody pursuant to a divorce proceeding.

[7] *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72 n.32 (1978). *See also Guidelines, supra,* at 10153, § B.3(b).

[8] *Id.*

[9] 80 Fed. Reg. at 10152, § B.1(b).

the record whether they know of any information that "suggests or indicates" that the child is or may be an Indian child.[10] Many courts proactively extend this inquiry to all family and friends in attendance *at every hearing*.

If the court has any reason to believe that a child is an Indian child, it must apply the ICWA and treat the child as an Indian child unless or until it is determined otherwise.[11] This best practice ensures the earliest possible detection of a child's tribal membership status, and guarantees an opportunity for new information regarding the child's membership status to surface over time, consistent with the manner in which most information in child welfare cases develops, increasing the likelihood that it will identify the child's tribe. This enables the state court to: 1) determine whether the tribe has already assumed jurisdiction over the child; 2) protect the tribe's opportunity to request transfer of the case to assume jurisdiction over the case; or 3) enable the tribe to intervene in the state proceedings. Tribal involvement will enhance the state court's ability to make decisions that are in the best interests of the child. If any information gives the court *reason to know* that the child is an Indian child, the court must apply the ICWA and treat the child as an Indian child unless or until it is determined otherwise.

If there is any information suggesting the name of the child's tribe, it is incumbent upon state judges to ensure that the state agency contact any and all tribes that are believed to be the child's tribe immediately upon the inception of any investigation into the child's well-being, to ascertain the tribe's determination regarding the child's membership status.

HOW TO PROCEED IF THE ICWA APPLIES

Notice to Child's Tribe

If there is any indication that a child may be an Indian child, the court must confirm that the state agency made *active efforts* to contact and work with the tribe(s) in which the child may be a member to verify the child's membership status.[12] At the earliest possible juncture in the case the court or the agency must send written notice, by registered mail, return receipt requested, to each tribe in which the child may be a member or eligible for membership.[13] The notice must include specific information, including, but not limited to, identifying information about the child, the tribe's and parents' rights under the ICWA, a copy of the petition or complaint, mailing and contact information for the court and state agency, family names/genograms, address for the child, parent and/or Indian custodian, and potential legal consequences of the proceedings.[14] If there is no certainty about which tribe is the child's tribe, the notice must be sent to every tribe in which the child may be eligible for membership.[15] If the child is a member of or eligible for membership in more than one tribe, the court must designate as the child's tribe the tribe with which the child has more significant contacts.[16] It is noteworthy that a request

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[10] *Id.* at 10152, §§ A.3(c) and B.2(b).

[11] *Id.* at 10152, § A.3(d).

[12] 80 Fed. Reg. at 10152 B.2(b)(2).

[13] 80 Fed. Reg. at 10153-53, §B.6.

[14] *See* 25 U.S.C. § 1912, and 80 Fed. Reg. at 10153-54, § B.6, for detailed requirements regarding notice.

[15] It is not unusual for a child to be eligible for membership in, or a member of, more than one federally recognized Indian tribe. The Guidelines provide key information regarding to whom to direct the notice or inquiry. 80 Fed. Reg. at 10152, § A4.

[16] 80 Fed. Reg. at 10153, § B.4(c).

by a parent for anonymity does not relieve the court's obligation to verify the child's status from the tribe, or to provide notice.[17]

While it is fairly easy for a tribe to ascertain whether a child is already a member, determining whether a child is eligible for membership requires more fact finding. To facilitate the tribe's determination, the court should order the state agency to provide the tribe any information it knows regarding the child's family tree, including the mother's maiden name and birthplaces of parents and extended family members. While the state agency should begin collecting family tree information as soon as it begins investigating the case, the court should order the agency to begin doing so no later than the initial shelter or preliminary hearing. This information is critical to questions regarding tribal membership: often a tribe will respond to notice with a request for additional information regarding the child's family. Courts should instruct the state agency to respond as quickly as possible to any tribal request for additional information, as failure to do so can impede the tribe's efforts to ascertain the child's membership eligibility, to intervene, and/or to locate extended family or other potentially appropriate foster or adoptive placements for the child. The party seeking removal should always call the tribe or tribes immediately upon learning that the child might be an Indian child, and to ensure that the notice found its way to the appropriate tribal employee.

Following these procedures is critical to the successful outcome of the case. First, the ICWA guarantees that the child's tribe has an absolute right to intervene in the state proceedings at any time during throughout the case. [18] Failure to provide the child's tribe with timely notice of the proceedings will hamper the tribe's ability to: 1) exercise jurisdiction; 2) intervene and participate in the proceedings; 3) offer the child and family culturally relevant services; 4) provide the state court with critically relevant information about the family; and 5) identify appropriate tribal placement options for the child. Notice must be sent to the tribe at each and every stage of the child custody proceedings. Moreover, and of great significance, failure to notify the tribe might result in unintentional state court interference with an ongoing tribal case. To ensure meaningful tribal participation, and to demonstrate respect for tribal court authority, notice must be sent to the tribe at each and every stage of the child custody proceedings until such time as the termination of the case.[19]

If it appears that the child may be an Indian child, but there is no information available regarding the child's tribal affiliation, notice of the proceedings must be sent to the appropriate Bureau of Indian Affairs Regional Director, including information regarding child's direct lineal ancestors, if known.[20]

When Must the State Court Either Dismiss the Case or Transfer Jurisdiction to the Tribal Court of the Child's Tribe?

Federal law delineates two "bright line" circumstances under which a state court lacks jurisdiction and *must* dismiss an Indian child custody proceeding: 1) the child is already ward of the tribal court, which preempts state jurisdiction; or 2) the child resides or is

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[17] 80 Fed Reg. a t10153, § B.2(d).

[18] 25 U.S.C. § 1911(c); 80 Fed. Reg. at 10148, and 10154 § B.6(c)(4)(iii).

[19] Each year the Bureau of Indian Affairs publishes a list of tribes' designated agent for service of ICWA notices in the Federal Register. A copy of this list can be found at: www.bia.gov. *See* 80 Fed. Reg. 10152, § A.4.

[20] *See* 80 Fed. Reg. at 10154, § B.6(e).

domiciled on an Indian reservation where the tribe has exclusive jurisdiction over child custody proceedings involving its members, but the child was temporarily off reservation.[21] If the state court determines that the child is a ward of a tribal court, the state court lacks jurisdiction[22] and must dismiss the case and immediately notify the child's tribe of the dismissal.[23] If the state court determines that there is reason to believe that a child is a ward of a tribal court, but lacks conclusive proof, the court should immediately contact the tribal judge directly and make this inquiry. To prevent the improper exercise of jurisdiction, best practice suggests that the state court should, at the outset of any child custody proceedings, determine whether the child's residence or domicile is on an Indian reservation where the tribe exercises exclusive jurisdiction, or whether anyone has any information suggesting that the child is already a ward of a tribal court.

In addition to the two instances where the court must dismiss proceedings and defer to tribal authority, § 1911(b) of the ICWA provides that in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the court must transfer jurisdiction to the tribal court if either the child's parent, the Indian custodian, or the child's tribe requests the transfer at any time during the entirety of the proceedings.[24] If the state court receives a request for transfer to tribal court, the state court must promptly notify the tribal court in writing of the request for transfer and provide the tribal court at least 20 days from receipt of notice to decide whether to accept or decline the transfer request.[25] If the tribal court accepts transfer, the state court should, as quickly as possible, forward to tribal court all court records from the proceedings.[26]

There are three caveats to mandatory transfer to tribal court: 1) either parent or the Indian custodian objects (for any reason) to the transfer, which serves as an absolute veto; 2) the tribal court declines to accept the case, thus precluding the transfer; 3) the state court finds that there is "good cause" not to transfer the case.[27]

The ICWA does not define what constitutes "good cause" not to transfer, and the topic has been the subject of much litigation in the decades since passage of the Act. The Guidelines directly address this issue, providing that "it is presumptively in the best interest of the Indian child, consistent with the Act, to transfer the case to tribal court upon request of the child's parent or tribe."[28] The burden of establishing good cause is on the party opposing transfer.[29] In determining whether there is good cause not to transfer a case, the court may *not* consider the child's contacts with the tribal community, socioeconomic conditions or perceived inadequacy of tribal social services

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[21] 25 U.S.C. § 1911(a). *See also* ……;

[22] ICWA mandates that state courts must give full faith and credit to the public acts and judicial proceedings of any Indian tribe that relate to child custody proceedings to the same extent that they do so for any other jurisdictional entity. 25 U.S.C. § 1911(d).

[23] *Guidelines, supra,* 80 Fed. Reg. at 1-156, § C.1.

[24] 25 U.S.C. § 1911(b). *See also* Guidelines, *supra,* 80 Fed. Reg. at 10156, § C.1.

[25] *Id.* at § C.4(a).

[26] *Guidelines,* supra, 80 Fed. Reg. at § C.4(c).

[27] 25 U.S.C. § 1911(b); *Guidelines*, *supra,* 80 Fed. Reg. at 10156, § C.2.

[28] *Id.,* 80 Fed. Reg.10156, § C.3(c).

[29] *Id.* at § C.3(e).

or judicial systems, or perceptions regarding the tribal court's perspective regarding placement of the child.[30]

In any of the three scenarios, once the state court has ordered either transfer or dismissal of the proceedings, the court should immediately forward to the tribal court all court records in the proceedings. In addition, the court should order the state agency to forward all available documents and information relating to the state child custody proceeding.[31]

Temporary Emergency Removal Of Child Domiciled On, Or Resident Of, An Indian Reservation

In those instances where an Indian child is a resident of, or domiciled on, a reservation, but is *temporarily* located *off reservation*, the state may remove the child from his/her parent or Indian custodian and make an emergency placement of the child in order to prevent *imminent* physical damage or harm to the child.[32] Under such circumstances, the court must "promptly" conduct a hearing to evaluate whether the removal or placement continues to be necessary, or to confirm that the emergency situation no longer exists. [33] The court must ensure that the duration of any emergency removals/placements is no longer than is absolutely necessary (the duration should, according to the Guidelines, be as short as possible)[34] should not to continue for more than thirty days), and should order immediate termination of the removal or placement when the removal is no longer necessary to prevent imminent physical damage or harm.[35] At that point, the state must: 1) initiate a child custody proceeding pursuant to the ICWA; 2) transfer the child to the jurisdiction of the child's tribe; or 3) return the child to the custody of the parent or Indian custodian.[36]

State courts should remain aware that the notice requirements apply to all emergency removals and/or placements.

Active Efforts[37]

The ICWA mandates a higher level of effort - and scrutiny - than the "reasonable efforts" standard applied to non-ICWA cases to justify either legal or physical removal of a child from a parent or Indian custodian. The court may not order removal of physical or legal custody from the child's parent or Indian custodian without first determining that: 1) "*active* efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; 2) the active efforts were unsuccessful; and 3) "continued custody of the child by the parent or Indian custodian is

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[30] *Id.*

[31] 80 Fed. Reg.10153, § B.5.

[32] 25 U.S.C. § 1922. *See also Guidelines,* 80 Fed. Reg. 10155, § B.8. This provision does not, however, permit the state to remove a child from a reservation where the tribe has exclusive jurisdiction, as the state lacks any jurisdiction under those circumstances.

[33] 80 Fed. Reg. at 10155, § B.8(b)(2).

[34] The Guidelines provide extensive guidance as to how state courts can ensure that emergency removals/placements are as short as possible. *See* 80 Fed. Reg. at 10158, § B.8.

[35] *Id.* at § B.8(b)(2 and 3).

[36] *Id.* Section B.8. of the Guidelines sets forth the information that must be included in any petition requesting the court to authorize emergency removal. 80 Fed. Reg. at 10155.

[37] For additional information regarding active efforts, please refer, as well, to the article in this journal authored by Judge Leonard Edwards, "The Indian Child Welfare Act and Active Efforts."

likely to result in serious emotional or physical damage to the child."[38] The court's determination must be supported by clear and convincing evidence, including testimony of a qualified expert witness,[39] that there is a "causal relationship between the [conditions] in the home that are likely to result in serious emotional or physical harm to the child."[40] The requirement that the agency make active efforts "begins from the moment the possibility arises that any agency case or investigation may result in the need for the Indian child to be placed outside of the custody of either parent or Indian custodian..."[41]

While the ICWA does not define precisely how active efforts differ from reasonable efforts required by other federal law, the Guidelines offer a non-exhaustive list of those efforts that constitute active efforts.[42] Active efforts "constitute more than reasonable efforts" and are separate and distinct from the requirements of the Adoption and Safe Families Act. In short, efforts must affirmatively assist the parent or Indian custodian in addressing the behaviors that put the child at risk of harm, and must include a comprehensive effort to assess the circumstances and, if out of home placement seems necessary, must focus on safe reunification of the family. There must be a reasonable nexus between the service offered and the issue that may lead to the child's removal, i.e. the affirmative effort must be designed to prevent removal, or facilitate reunification of the child and the family.

The ICWA requires state agencies to make active efforts "from the moment" the agency considers the possibility of removing physical or legal custody of the child from her/his parent or Indian custodian.[43] If removal becomes necessary, the agency must engage the child, parent, extended family, custodian, and tribe, and make an effort to keep siblings together; must conduct a diligent search for possible family or tribal placement; take into account prevailing cultural and social conditions and employ culturally appropriate family preservation strategies, supporting regular visits and trial home visits consistent with the child's safety.

To prevent unwarranted removals of an Indian child from his/her home, the requirement to engage in active efforts begins from the moment the possibility arises that an agency investigation or case my result in the need to place the child outside the custody of either parent or Indian custodian, and applies throughout the entirety of the Indian child custody proceedings. Agency notice to, and consultation with, the child's tribe at the onset of the case is at the core of the active efforts requirement. Tribal consultation provides the tribal caseworker with all relevant information regarding the family's case[44] and assures that the child's tribe has an opportunity for active and early participation in all case planning and decision-making that will affect the child's health and welfare. Tribal participation ensures identification of all available culturally relevant resources, including the child's extended family, tribe, other members of the Indian

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[38] 25 U.S.C. § 1912(d); *see also Guidelines*, *supra,* at § 10150, §A.1.

[39] 25 U.S.C. § 1912(e); *see also Guidelines, supra,* at 10157, § D.4, for further explanation of who qualifies as an expert witness under ICWA.

[40] *Guidelines, supra,* 80 Fed. Reg. at 10156, § D.3.

[41] 80 Fed. Reg. at 10152 § B.1(a).

[42] *Id.* at 10150, § A.2.

[43] 80 Fed. Reg. at 10152, § B.1(a).

[44] *See* 25 U.S.C. § 1911(d).

community, and other Indian social service agencies.[45] This may greatly expand the relevant rehabilitative services available to the parent or Indian custodian to assist toward reunification with the child, thereby increasing the likelihood of success. It also ensures that the child retains access to his/her culture, which is vital to the best interests and overall health and well-being of the child.

Finally, the ICWA does not exempt, or excuse the need for active efforts in, those cases where the court determines that there are aggravated circumstances or extreme conduct. In fact, the Adoption and Safe Families Act's exceptions to reunification efforts do not apply to ICWA proceedings.[46] In those cases where return of the child to the parent or Indian custodian may result in serious emotional or physical harm to the child, thus preventing reunification, active efforts must be made unless or until the parent/Indian custodian refuses to engage in rehabilitative services.

Appointment of Counsel and Notice to Parents/Indian Custodian

In addition to the rights accruing to the child's tribe under the ICWA, the ICWA guarantees the parents and/or Indian custodian certain protections, as well. In involuntary proceedings, the court must also send notice to the parents/Indian custodian, via registered mail, return receipt requested, advising them of their right to participate/intervene, and of the potential legal consequences of the proceedings. The court must also grant the parent(s)/Indian custodian an additional 20 days in which to prepare for the proceedings if they request the additional time.[47] If the court determines that either the parent or Indian custodian of the child is indigent, and removal and/or placement or termination of parental rights to the child is at issue, the ICWA provides that the parent or Indian custodian has a right to court-appointed counsel.[48] In addition, all parties to the proceedings, including the parents or Indian custodian, have a right to examine all reports and documents upon which the court might base its decisions.[49]

Placement of Child Out of Home

While the ICWA contains numerous procedural provisions to protect an Indian child's tribal and familial connections, the most important substantive provisions within the Act are the placement preferences established by § 1915.[50] Section 1915(b), which governs foster care[51] or pre-adoptive placements, requires placement of the Indian child in the "least restrictive setting which most approximates a family and in which [the child's] special needs, if any, may be met." It establishes explicit preferences for placement of the child in the following descending order: 1) with a member of the child's extended family; 2) in a foster home that is licensed, approved or specified by the child's tribe; in an Indian foster home licensed or approved by an authorized non-Indian licensing

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[45] The Guidelines for State Courts; Indian Child Custody Proceedings published by the federal Department of the Interior, Bureau of Indian Affairs. 44 Fed. Reg. 67584 (Nov. 26, 1979)

[46] 80 Fed. Reg. at 10152.

[47] 25 U.S.C. § 1912(a).

[48] 25 U.S.C. § 1912(b).

[49] 25 U.S.C. § 1912(c).

[50] *Mississippi Choctaw Band of Indians v. Holyfield,* 490 U.S. 30, 36 (1989).

[51] The term "foster care placement" means any 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." 25 U.S.C. § 1903(1).

authority; or an institution for children approved by an Indian tribe or operated by an Indian organization that has programs to meet the child's specific/special needs.[52] Similarly, § 1915(a), establishes an order of placement preferences for adoptive placements, again in descending order of preference: 1) with a member of the child's extended family; 2) other members of the child's tribe; or 3) other Indian families.[53] The child's tribe, however, may issue a resolution reflecting a different preference for placement.[54]

Absent good cause to deviate from these preferences as outlined in the Guidelines, state courts must adhere to them in descending order.[55] Any party seeking to establish that there is good cause to depart from the placement preferences bears the burden of establishing, by clear and convincing evidence, that good cause exists.[56] Good cause may include the request of the parents under certain circumstances, the request of a child who is able to understand the decision, or the unavailability of a suitable placement to address the child's extraordinary physical and/or emotional needs.[57] If the agency has made diligent efforts to comply with §§ 1915(a) and/or (b) and cannot meet the preferences, the court must conduct a hearing pursuant to the Guidelines to authorize deviation from the preferences.[58] Finally, if the child's tribe decides to establish a different order of preference, the court must follow the tribe's decision if satisfied that the placement is the least restrictive setting appropriate to the child's needs. The court should also consider the preferences of the child or parent, where appropriate.[59] Courts should be aware that these preferences and all other provisions of the Act apply to all placements for foster care, pre-adoptive, and adoptive placements, even if the subsequent removal is from one out of home placement to another.[60]

Finally, it cannot be emphasized enough that placements outside of the child's family or culture violate both the spirit and letter of the ICWA, as they do not reflect the best interests of the Indian child.[61] State courts should only approve placements that fall outside of the preferences when there are no other viable options under the law.

Voluntary Placement Proceedings

In voluntary foster care or termination of parental rights proceedings, courts must follow all of the procedures that govern involuntary proceedings regarding determination of a child's status as an Indian child, including notifying the child's tribe of any potential action, and of the tribe's right to intervene in the proceedings. Before a state court may accept either a voluntary foster care placement or a voluntary termination of parental rights, the court must first ensure that the parent/Indian custodian fully understands the totality of the consequences of the pending action, including any limitations for

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[52] 25 U.S.C. § 1915; 80 Fed. Reg. at 10158 § F.2.

[53] 25 U.S.C. 25 U.S.C. § 1915(a); 80 Fed. Reg. at 10158 § F.2.

[54] 25 U.S.C. 25 U.S.C. § 1915(c); 80 Fed. Reg. at 10157, § F.1.

[55] 25 U.S.C. § 1915(a) and (b); 80 Fed. Reg. 10158, § F.2, F.3, and F.4.

[56] 80 Fed. Reg. 10158, § F.4.

[57] *Id.*

[58] *See* 80 Fed. Reg. 10157 F.3. and10158, § F.4.

[59] 25 U.S.C. § 1915(c).

[60] 25 U.S.C. 1916(b).

[61] H.R. Report No. 1386, 95th Cong., 2d Sess. 23 (1978), reprinted in *U.S. Code Cong. & Admin. News* 7530, 7534 ("Legislative History").

withdrawal of such consent and the point at which the consent becomes irrevocable.[62] The consent must be presented in writing before a judge of a court of competent jurisdiction, and the parent/Indian custodian must be present. The judge presiding over the matter must issue a certificate assuring that the parent or Indian custodian understood the consequences of their action, and that the consequences were explained in advance either in English, or in another language that the parent/Indian custodian understood. Any document reflecting the consent must clearly set out any specific conditions upon which the consent is premised.[63]

Courts should be aware of two important restrictions that govern voluntary consents. First, any consent given prior to or within 10 days after birth of the child is facially invalid.[64] This provision is a direct result from the common historical practice of pressuring young, often single and vulnerable Indian mothers who just gave birth into placing their children for adoption to "give the child a better life." The Act also guarantees that any parent/Indian custodian may withdraw a voluntary consent to foster placement at any time – requiring the court to order the immediate return of the child to the parent/Indian custodian.[65] In addition, a parent/Indian custodian may, for any reason, withdraw consent to termination of parental rights to, or adoptive placement of the child, prior to the entry of the final decree of termination or adoption. Again, under these circumstances, the child must be returned to the parent/Indian custodian.[66]

CONCLUSION

There is no doubt that following the requirements of the ICWA will assist state judges in making the best possible decisions to serve the best interests of Indian children whose future well-being is in their hands. Tribal agencies and courts often have information, as well as cultural understanding, that give them unique insights into family dynamics. They can often offer culturally relevant resources to parents and families that offer a better "fit" – increasing the likelihood that a parent will successfully meet the demands of the state agency's plan for reunification. Many a state case has successfully resolved simply *because* of information gleaned from conversations with the child's tribe – reuniting families after appropriate services were offered to remedy the behaviors that threatened the child's welfare.

In addition, state judges throughout the country are finding that working with, and often *deferring* to, their tribal colleagues and counterparts has opened up new worlds to them, increasing their understanding of what is in the best interests of Indian children, and improving their own approaches in court. The ICWA offers an opportunity for tribal and state jurisdictions to cooperate in so many important ways, enhancing the opportunity to save the lives of those families who come before them.

AUTHOR'S BIO

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[62] *See* 25 U.S.C. § 1913; 80 Fed. Reg. at 10157, § E.2.

[63] *Id.* at § E.3.

[64] 25 U.S.C. § 1913(a).

[65] 25 U.S.C. § 1913(b)

[66] 25 U.S.C. § 1913 (c); 80 Fed. Reg. § E.4.

tribal child protection courts in Canada, as well. Ms. Goldsmith served for many years on the NCJFCJ Permanency Planning Department, was Chairwoman of the NCJFCJ Tribal Courts/ICWA Liaison Committee, Co-Chair and Chair of the Tribal Courts and ICWA Subcommittees, and worked extensively with the Council to develop written judicial training materials, including ICWA Checklists. She also chaired the Federal Bar Association Indian Law Section, initiated and developed the Federal Bar Association's Tribal-State-Federal Judicial Forum, and served as a Special Assistant Attorney General for the State of Alaska, facilitating the government to government relationships between the tribes in Alaska and the State of Alaska.