

# **Indian Children in State Family Courts: Scenarios**

Hon. Hugh Gilbert  
Hon. Barbara (Cree) Potter  
Margaret Burt, Esq.  
Jamie Bay  
Jamie Gilbert

Indian Children in State Family Courts:

Understanding and Applying the Indian Child Welfare Act:

Scenarios

Recognizing that the provisions of the Indian Child Welfare Act (ICWA) are numerous and complex, and that this panel has been allotted an hour and a half, we decided to identify some issues and situations that might arise in the context of ICWA cases. The New York State Office of Children and Family Services has prepared a Desk Aid which is in the back pocket of the binder and which provides an excellent outline and overview of relevant ICWA provisions. ICWA applies to foster care cases, parental termination and adoption cases and to J.D. cases involving termination of parental rights. ICWA does not apply to proceedings affecting private custody following divorce or separation.

I. In What Forum is the Proceeding Brought?

A. Following an investigation by an appropriate agency, a Native child living within the Nation's territory is found to have been neglected or abused:

1. Where should/can an abuse or neglect proceeding be initiated and what notice is required?

(a) Relevant ICWA section(s): 25 USC 1911(a); 25 USC 1918; 25 USC 1919

New York State - 25 U.S.C.233; Social Services Law § 39

Comments: Under section 1911 (a) if the child is domiciled or resides in the Nation's territory, the Tribe shall have exclusive jurisdiction. The practical question is whether the Nation exercises such jurisdiction.

Notes:

B. Following an investigation by an appropriate agency, a Native child living outside of the Nation's territory is found to have been neglected or abused:

1. Where should/can an abuse or neglect proceeding be initiated and what notice is required?

(a) Relevant ICWA sections(s): 25 U.S.C. § 1911 (a)(b)(c); 25 USC 1912 (a)(b); see In Re Baby Boy C, 805 N.Y.S. 2d 313 (1<sup>st</sup> Dept. 2005)

Comments: If a proceeding is brought in state court with respect to an Indian child, the Nation is entitled to intervene in the proceedings. Section 1912(a) requires that the party seeking foster care placement or a termination of parental rights notify the parent or Indian custodian and the Indian child's tribe of the proceeding. Note that 18 NYCRR § 431.18(c) requires a more detailed notice than the federal statute.

Section 1911(b) provides that any state court proceeding for the foster care placement or termination of parental rights of an Indian child not domiciled on a reservation of the child's tribe is to be transferred to the tribe's jurisdiction except for good cause shown or absent the objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe. Furthermore, even if there is a transfer, the tribal court can still decline to accept such transfer.

Notes:

C. If the proceeding is brought in state Family Court, what can be accomplished regarding foster care placement?

(a) Relevant ICWA sections(s): 25 U.S.C. § 1912; 25 U.S.C. § 1915(b); 18 NYCRR § 431.18 (a) (5); NYCRR § 431.18(c)

Comments: Section 1912(e) states that the court cannot order a foster care placement absent a determination by clear and convincing evidence including the testimony of a qualified expert witness that the continued custody of the child with the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Section 1915(b) states that when placing a child in foster care such child "shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. A court must place a child, unless good cause is shown, with

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved or specified by the Indian child's tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

A tribe can opt out of the order of such preference (25 USC 1915(c)).

Section 1915(d) states that in order to meet the preference requirements of the section a court must apply the prevailing social and cultural standard of the Indian community to which the parent or extended family belongs.

Section 1915(e) states that each placement made under state law must be recorded and maintained, demonstrating the efforts made to comply with such section.

Notes:

## II. How does a Child's Tribal Membership Affect the Application of ICWA?

A. A child who is a member of a state recognized tribe appears in court - the tribe is not federally recognized - does ICWA apply?

Comments: Yes. Although federal ICWA law only applies to federally recognized tribes, New York State law extends ICWA provisions to all state recognized tribes as well. N.Y. Social Services Law § 2 (35)

Notes:

B. A child is a member of a tribe that is located in Canada - under what circumstances would the court have to apply ICWA? What if the tribe crosses borders?

Comments: The court would have to apply ICWA if this tribe is recognized by the United States federal government, and that could happen as sometimes tribes are physically located in the United States and Canada and therefore the tribe may be recognized by the United States federal government even though parts of the

reservation or parts of the tribe physically are located in Canada. The question is not if the child is Canadian but if the child is a member or eligible to be a member of a United States federally recognized tribe. The same would be true if the tribe was not federally recognized but was state recognized. The St. Regis Mohawk Tribe is a federally recognized tribe that has lands and tribal members in both the United States and Canada.

Notes:

C. A child has an African American father and a Seneca mother - does ICWA or MEPA (Multiethnic Placement Act of 1994, 42 USCA § 1996 (b)(3)) apply?

Comments: No child has both ICWA and MEPA apply to them. The first question is always - is this an ICWA child? The child is an ICWA child if he or she meets the federal or New York State definitions of being unmarried and under 18 (or under 21 and came into care before 18) and a member of a federally or state recognized tribe or is eligible to be a member of a tribe and is the biological child of a member or is the biological child of a member and the child and member live on a reservation. NYS Social Services Law Section 2 (35) (36) and NYS Social Services Law § (39). The key for ICWA is if the Tribe recognizes the child as being a member of the Tribe. If not, then MEPA would apply. The analysis for the question is: does the Seneca Nation say that the child is a member of the Nation or eligible to be one under the Nation's enrollment rules? If so, then ICWA applies; if not, then MEPA applies.

Notes:

### III. Competing Considerations:

A. In a PINS placement, what if the parent wants the child placed in Indian foster

care, but the child who is 14 or older does not want to be so placed? What if the child wants the Indian foster care, but the parent does not?

Comments: ICWA applies to PINS placements (but not JDs). Assuming that there is no exclusive tribal jurisdiction (25 U.S.C. § 1911(a)), and assuming that there is no request to transfer the case to Tribal Court (25 U.S.C. § 1911(b)), then the state court can decide on the placement of the child. The foster care placement preferences for the child require the court to look first at the extended family, then a foster home approved by the tribe, then a licensed Indian

foster home and then an approved Indian foster home (25 U.S.C. § 1915(b)). The guidelines do discuss "good cause" to deviate from the preferences (see BIA Guidelines 11/26/79 F.3) and they include the request of a child of suitable age or a biological parent to the court. The court may consider the wishes of the child or the parent and determine if there is good cause to deviate from the preferences. Obviously the tribe's position on this, as intervener as of right, should be heard.

Notes:

B. Would it make a difference if the parent with whom the child resides (when only one parent) is non-Indian?

Comments: NO - Non-Indian parents are still "protected" by ICWA rules.

Notes:

C. What if the child is registered in a federally-recognized tribe, but lives with the non-Indian parent and knows nothing of his/her native culture and does not know the Indian parent's family?

Comments: This refers to what some call the "existing Indian Family exception" (EIF) to ICWA, which has been recognized by a few states. The First Department has just ruled on this in a case of first impression for New York and specifically and clearly ruled against recognizing the EIF exception. In Re Baby Boy C, 805 N.Y.S. 2nd 313 (1<sup>st</sup> Dept. 2005). Even though ICWA still applies, the court could look to the various "good cause" issues raised in the Guidelines on the placement preferences, listening to all, including the tribe on this issue. The party who seeks the deviation has the burden of proving the good cause.

Notes:

## D. Specific Cases:

1. The state Family Court receives a TPR petition from the local child protective agency for parental termination where the child is a member of a New York Indian Nation.

a. Who must participate in making that recommendation?

Comments: There is no ICWA requirement as to who must "participate in making a recommendation", that is, if the child is in DSS custody, DSS can file the TPR petition without needing the tribe's approval. However, DSS would want to carefully consider the tribe's position as under ICWA, they will be involved and of course may offer evidence to the contrary of the DSS petition. If there is a TPR, then the burden of proof is beyond a reasonable doubt and a qualified expert witness must testify and there must be proof that the child would likely have serious emotional or physical damage if returned to the custody of the parent. (25 U.S.C. § 1912(f))

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b. Who must testify at a permanency planning hearing?

Comments: There is no specific requirement in either federal or state law as to who must testify at a permanency hearing. If the child is an ICWA child, the court would certainly want to hear the tribe's position.

Notes:

c. What is the level of proof that the protective agency must satisfy?

Comments: The level of proof in an Article 10 placement for an ICWA child is clear and convincing, including testimony by an expert that the child will likely suffer serious emotional or physical damage if he or she remains at home, 25 U.S.C. § 1912(e), and the level of proof in an ICWA TPR is "beyond reasonable doubt plus." See supra (E1)(a))

Notes:

2. Does ICWA apply to custody cases involving two parents?

Comment: NO - but of course the court may want to consider the child's cultural issues in the context of a parental custody battle.

Notes:

3. What if the petitioner is a non-Indian relative?

Notes:

## VI. Discussion

### A. Indian Representatives in State Courts

1. A clan mother appears in Family Court and identifies herself as such, what is the response of each of the following:

a. The child protective worker?

Notes:

b. An attorney assigned to the parents?

Notes:



c. A law guardian?

Notes:

d. The Judge?

Notes:

2. A Clan Mother appears in court as a representative of an Indian Nation, and no one acknowledges her. What can/should she do?

Notes:

3. A Clan Mother attempts to appear in court as a representative of the Nation, and the courtroom deputy does not let her into the courtroom. What should she do? How can a

scenario like this be prevented?

Notes:

4. A Clan Mother attempts to appear in court as a representative of the Nation, and the judge asks to see all counsel in chambers; what can/should the Clan Mother do?

Notes:

## B. Enforcement of Orders

1. How can the state court oversee the provisions for a child who is placed in the custody of relatives in Canada?

Notes:

2. How can the State court see that its Orders are enforced where the child is placed in the custody of relatives in Canada?

Notes:

C. Notice Issues:

1. When ICWA applies, who should get notice of the proceeding and when?

Notes:

2. A child is registered upon birth with a Canadian tribe, and subsequently she is registered in a federally-recognized tribe. Which tribe gets notice, or do they both?

Notes:

3. What if the child is registered with two different federally-recognized tribes? Do both get notice?

Notes:

4. Does it matter if the child is registered in two tribes and lives on one tribe's reservation?

Notes:

5. In a PINS or JD case, whose responsibility is it to notify the Tribe?

Notes:

6. A Law Guardian is advised by a child that he is a member of an Indian nation; no one involved in the case has mentioned that. What does the Law Guardian do next?

Notes: