No. 78790-0-I

98003-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF Z.J.G. AND M.G., Minors,

WASHINGTON STATE DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES,

Respondent,

v.

SCOTT JAMES GREER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Patrick Oishi, Judge

PETITION FOR REVIEW

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I. INTRODUCTION

Mr. Greer seeks review of the decision below which upheld the removal of his children, without the protections of ICWA, even though they are Indian Children.[1] The lower court's decision undermines ICWA, a statutory scheme put in place for the purpose of protecting people like Mr. Greer and his children.

Congress enacted ICWA to address policies and practices that resulted in the ''wholesale separation of Indian children from their families.'' H. Rep. 95-1386 (July 24, 1978) at 9. "In particular, Congress recognized that many Indian children were removed from their homes because of poverty, joblessness, substandard housing, and related circumstances." 81 Fed. Reg. 38778, 38790 (June 14, 2016).

In 2016, the BIA recognized the continuing need for ICWA acknowledging that Native American children "are still disproportionately more likely to be removed from their homes and communities than other children." 81 Fed. Reg. 38778, 38779 (June 14, 2016). The BIA also

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[1] This petition refers to the federal Indian Child Welfare Act as "ICWA" (25 U.S.C. § 1901 et seq.); the Washington State Indian Child Welfare Act as "WICWA" (RCW 13.38.010 et seq.); the 2016 regulations of the Bureau of Indian Affairs (BIA) as "BIA Regulations" or "federal regulations" (25 C.F.R. § 23 et seq.); and the Bureau of Indian Affairs, U.S. Dep't of Interior, Guidelines for Implementing the Indian Child Welfare Act (Dec. 2016) as "BIA Guidelines."

acknowledged that updated regulations were necessary because "some State court interpretations of ICWA have essentially voided Federal protections for groups of Indian children to whom ICWA clearly applies." *Id.*

The lower court's decision in this case presents an issue of significant public interest because it undermines core aspects of this statutory scheme, weakening ICWA's protection of Native American families and undermining Tribal sovereignty.

II. IDENTITY OF PETITIONER

The petitioner, Scott Greer, is the father of Z.G. and M.G. RP 35. Mr. Greer's children are Indian Children as defined by federal and state Indian Child Welfare laws. They were removed from his care at a shelter care hearing on July 3, 2018, where the court failed to apply ICWA. CP 12.

III. DECISION BELOW

Mr. Greer is seeking review of the Court of Appeals Division I decision of September 3, 2019. Mr. Greer moved to reconsider the appellate decision because, among other things, the decision changed the long-standing meaning of key provisions of ICWA without addressing the impact of those changes on notice to Tribal governments. Reconsideration was denied on November 19, 2019.

IV. ISSUES PRESENTED FOR REVIEW

1. Does the lower court's decision, which undermines state and federal Indian Child Welfare statutes, create an issue of significant public interest warranting review?

2. Did the lower court err in its construction of federal law by narrowly interpreting "reason to know" such that it undermined Tribal sovereignty, raising an issue of significant public interest?

3. Is review required because the lower court erred in failing to give effect to the plain language of WICWA, contrary to this Court's decision in *T.A.W.*?

4. Will the lower court's decision deprive Tribes of notice of future dependency cases involving their members, raising an issue of significant public interest?

5. Is review required to address the inconsistency between the lower court's decision and prior decisions of the Court of Appeals, including *T.L.G.*?

V. STATEMENT OF THE CASE

Mr. Greer is the father of Z.G. and M.G. RP 35. During a time in June 2018 when his family was struggling with housing and was living in an R.V., his children were placed in protective custody due to concerns of neglect and unsanitary living conditions. RP 15-16.

The state filed a dependency petition requesting out-of-home placement. CP 3. The petition alleged the following regarding the children's Indian status:

> Based on the following, the petitioner knows or has reason to know the child is an Indian child as defined in RCW 13.38.040 and 25 U.S.C. § 1903(4), and the Federal and

> Washington State Indian Child Welfare Acts do apply to this proceeding:
>
> Mother has Tlingit-Haida heritage and is eligible for membership with Klawock Cooperative Association. She is also identified as having Cherokee heritage on her paternal side. Father states he may have native heritage with Confederate Tribes of the Umatilla in Oregon.
>
> The petitioner has made the following preliminary efforts to provide notice of this proceeding to all tribes to which the petitioner knows or has reason to know the child may be a member or eligible for membership if the biological parent is also a member:
>
> Inquiry to tribes has been initiated. Worker has called Central Council Tlingit Haida regarding this family and petition. Further inquiry and notification to tribes is ongoing.

CP 2.[2]

At the beginning of the shelter care hearing the trial court did not ask each participant whether they knew or had reason to know if the children were Indian children. RP 4-9.

The state called social worker Richard Summers who testified that he filed the petitions and that the information in the petitions was correct. RP 9-10. During the direct examination of Summers, the state asked whether the children "qualified" under WICWA. RP 11. Summers testified

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[2] The Central Council of Tlingit and Haida Indian Tribes of Alaska (CCTHITA) has 21 communities that are recognized as Community Council Chapters, including Klawock, www.ccthita.org/government/delegates/chapters/index.html (last viewed 12/17/2019) (hereafter Tlingit and Haida Tribe).

he had called the Tlingit and Haida Tribe and "they gave me information that the maternal grandmother is an enrolled member, but the mother is not enrolled, and the children are not enrolled." RP 11. Summers also stated, "To my knowledge, the father is not enrolled in a federally recognized tribe either." RP 11-12.

The children's mother, L.G., testified at the shelter care hearing that she and the children are eligible for membership in the Tlingit and Haida Tribe, but she is not an "enrolled" member of a federally recognized tribe. RP 88, 90. L.G. was never directly asked about her Cherokee heritage. RP 83-91. During his testimony, Mr. Greer confirmed that L.G. has Cherokee heritage and that he has Native American heritage through the Confederated Tribes of the Umatilla in Oregon. RP 66-67. Both parents testified the children are eligible for tribal membership. RP 67, 88.

During closing arguments, both parents asked the court to apply ICWA's heightened standard for removal, which requires proof of imminent physical danger or harm, because there was a reason to know that the children are Indian Children. RP 110, 113. In response, the state argued ICWA did not apply because there was no proof the children in fact met the definition of an Indian Child at that time. RP 117. The trial court ruled ICWA did not apply based on "the testimony in this case and the reasonable cause standard." RP 118.

On July 30, 2018, the dependency court granted the Tlingit and Haida Tribe's motion to intervene and, at subsequent proceedings, the court determined there was a "reason to know" that Z.G. and M.G. were Indian Children and applied ICWA and WICWA. CP 59.

S.G. sought discretionary review, challenging the trial court's failure to comply with ICWA at the shelter care hearing. CP 20-31. After the Commissioner granted review, the Court of Appeals affirmed the trial court's order on September 3, 2019. Mr. Greer moved to reconsider and reconsideration was denied on November 19, 2019.

VI. ARGUMENT

The "reason to know" finding serves a critical gatekeeping function in Indian Child Welfare Act (ICWA) cases. Under ICWA, when a state court finds there is a "reason to know" that a child is or may be an Indian child, it triggers the legal requirement that the petitioning party provide legal notice to the Tribe. 25 U.S.C. § 1912(a); RCW 13.38.070. Without this finding, Tribes are not entitled to formal notice and may never learn about a case involving their members.

In addition, when a state court finds a "reason to know," federal regulations require courts to apply all of ICWA's protections to the case until the relevant Tribe determines whether ICWA applies. 25 C.F.R. § 23.107. "This requirement … ensures that ICWA's requirements are

followed from the early stages of a case and that harmful delays and duplication resulting from the potential late application of ICWA are avoided." BIA Guidelines at 12.

The lower court's decision in this case sharply restricted the definition of a "reason to know," holding that the mother's testimony that both she and her children were eligible for membership in the Tlingit and Haida Tribe was insufficient to establish even a "reason to know" that the children were Indian Children. *Matter of Dependency of Z.J.G.*, 448 P.3d 175, 184 (Wash. Ct. App. 2019). The lower court required proof that the children met the definition of "Indian Child"[3] rather than treating the testimony as a "reason to know" that the children may meet that definition. *Id.* Yet, the children are members of the Tlingit and Haida Tribe, and Indian Children, which was confirmed when the Tribe subsequently intervened.

The lower court erred by creating a rule that denies Indian Children protection under ICWA. This Court should accept review because the lower court has misconstrued federal and state laws in a manner that undermines the integrity of both statutes and Tribal sovereignty.

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[3] An "Indian child" is child who is "(a) A member of an Indian tribe; or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." RCW 13.38.040.

A. REVIEW SHOULD BE GRANTED BECAUSE THE LOWER COURT DECISION REQUIRES THAT STATE COURTS "KNOW" A CHILD IS AN INDIAN CHILD WHEN THE STATUTE REQUIRES ONLY A "REASON TO KNOW"

The lower court's decision undermines the foundations of ICWA by empowering state courts, rather than Tribes, to decide Tribal membership. Under the lower court's decision there is not a "reason to know" until proof establishes to the satisfaction of the state court that the child meets the definition of an Indian Child. *Matter of Dependency of Z.J.G.*, 448 P.3d at 184. This reasoning conflates the term "knows" with "reason to know."

It is well-established that state courts cannot make determinations about Tribal membership because, to do so, would impermissibly intrude on tribal sovereignty. 25 C.F.R. § 23.108 ("The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe."). Here, the lower court erred in allowing state courts to usurp this function, allowing the state court to investigate whether children are members of a Tribe rather than relying on legal notice to Tribes.

More importantly, the lower court's interpretation of "reason to know" also prevents Tribes from ever learning of the case because state agencies are only required to send Tribes legal notice of a dependency case when the state court makes a "reason to know" finding. 25 U.S.C. § 1912(a);

RCW 13.38.070. Accordingly, the lower court's decision has put state courts in the position of guessing at tribal membership criteria, rather than sending notice to the Tribe's chosen representative.[4]

Contrary to the holding of the lower court, ICWA and its regulations are written to further Tribal sovereignty by 1) requiring notice to the relevant Tribe even when the court lacks sufficient evidence to determine that the child is an Indian child, and 2) creating a process for determining whether there is a "reason to know" that limits the discretion of state courts.

1. The Lower Court Incorrectly Interpreted Federal Regulations Narrowly, Not "Expansively," as Required.

The lower court was incorrect when it required proof the child was an "Indian Child" prior to finding there was a "reason to know" because under federal regulations information that suggests the child is an Indian Child creates a "reason to know," until the Tribe makes the ultimate determination. In fact, the regulations specifically contemplate that there will be a "reason to know the child is an Indian child," even where "the court *does not have sufficient evidence* to determine that the child is or is

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[4] Membership is a distinct concept from enrollment; state courts lack sufficient information to make those determinations. *See In re Termination of Parental Rights to Arianna R.G.*, 259 Wis.2d 563, 657 N.W.2d 363, 369 (2003) (while many tribes require registration or enrollment as a condition of membership, some automatically include descendants of members).

not an 'Indian child.'" 25 C.F.R. § 23.107(b) (emphasis added). The BIA regulations establish a list of six factors for state courts to apply to determine that there is a "reason to know." 25 C.F.R. § 23.107. For example, there is a "reason to know" when "[a]ny participant in the proceeding…informs the court that it has *discovered information indicating* that the child is an Indian child." 25 C.F.R. § 23.107(c)(2). BIA Guidelines encourage state courts to interpret the factors "expansively." BIA Guidelines at 11.[5]

Interpreting the regulations "expansively" ensures the correct determination will be made by giving Tribes the opportunity, through legally sufficient notice, to determine their own membership.

2. The Lower Court Decision Articulated a Process for Determining "Reason to Know" That Violated Federal Regulations.

In order to further the broader purpose of protecting Tribal sovereignty, federal regulations lay out a process for determining when there is "reason to know" that limits the discretion of state courts.

According to federal regulation, "at the commencement of the proceeding" state courts "must ask each participant" whether the participant

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[5] Factor number six explicitly allows a "reason to know" finding to be made in a situation in which there is no proof the child is an Indian Child. Under this factor there is "reason to know" when only the parent possesses an identification card indicating membership in an Indian Tribe. 25 C.F.R. § 23.107(6). With that information it is impossible to know whether a child "is" an Indian Child, but there is still sufficient "reason to know."

knows or has reason to know that the child is an Indian child. 25 C.F.R. § 23.107.[6] Once *any* participant provides the court information that *indicates* the child is an Indian Child (or satisfies another one of the factors) the inquiry ends. 25 C.F.R. § 23.107. There is no provision that allows a state court to weigh the testimony of one participant over another participant, and no provision that allows the state court to consider competing sources of evidence as to Tribal membership.

In this case, the social worker swore in the dependency petition that there was "reason to know" that the children were Indian Children and then swore again at the shelter care hearing that his petition was correct. (CP 2, RP 11-12). At that point, the inquiry should have ended because continuing to litigate the precise nature of the relationship between the family and the Tribe was mere guesswork that violated the federal regulations. Tribal membership is not for the state court to determine.

Requiring families or the state to provide absolute proof that the child meets the definition of an "Indian Child" at a 72-hour shelter care hearing is unreasonable. These are emergency proceedings, stressful events in which the state is seeking the removal of children. Families themselves

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[6] The trial court did not make the required inquiry at the start of the hearing in this case; the appellate court affirmed the result using the doctrine of "substantial compliance."

may not understand the exact relationship between membership, eligibility, and enrollment at their own Tribe, or whether their children meet the criteria for membership.

The regulations allow "any participant" to trigger ICWA's protections, casting a wide net to ensure that Tribes receive notice. In this situation, casting a wide net does not disadvantage anyone. If the child is not an Indian Child, then early legal notice will resolve that question dispositively. In the meantime, ICWA is "designed to keep children, when possible, with their parents, family, or Tribal community—[which] should benefit children regardless of whether it turns out that they are Indian children." 81 Fed. Reg. 38778, 38803 (June 14, 2016).

The lower court erred by endorsing a process that violated federal regulations by expanding state court discretion and limiting Tribal sovereignty. Review should be granted to address this issue of significant public interest.

B. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION BELOW FAILED TO GIVE EFFECT TO THE PLAIN LANGUAGE OF WICWA

The lower court must be reversed because it failed to give effect to the plain language of WICWA, which is even broader and more protective than federal law. The lower court incorrectly "harmonized" WICWA down

to the floor set by the federal law, rather than giving effect to the important textual differences between the statutes, as required. *See* 25 U.S.C. § 1921.

There are two areas in which WICWA offers significantly more protection to Native American families than the federal statute, both of which the lower court incorrectly read out of the statute. First, according to WICWA there is "reason to know" where the child "is *or may be*" an Indian child. RCW 13.38.070(1). The addition of the words "may be" makes WICWA broader than the same provision in the federal statute. *Compare* RCW 13.38.070(1) *with* 25 U.S.C. § 1912(a).

Second, unlike the federal statute, WICWA defines Indian Child as a child who is "eligible for membership" regardless of whether a parent is a member. According to WICWA, "written determination by an Indian tribe *that a child is a member of or eligible for membership in that tribe*…shall be conclusive that the child is an Indian child." RCW 13.38.070(3)(a). Unlike the federal statute, WICWA contains a definition of "member" and "membership." RCW 13.38.040(12) (defining membership as "a determination by an Indian tribe that a person is a member *or eligible for membership* in that Indian tribe."). WICWA amends the definition of "Indian Child" by clarifying the meaning of the word "member."

These differences between the state and federal statutes inform the outcome of this case since they expand the application of both "reason to

know" and the definition of "Indian Child." WICWA makes plain that there is "reason to know" even without evidence that the child *is* an Indian child – all that is required is that the child "*may be*." Significantly, the parents in this case testified that the children were eligible for membership and therefore satisfied WICWA's definition of Indian Child, which does not require that a parent also be member.

The lower court's reading of WICWA, overlooked these textual differences and is contrary to this Court's decision in *Matter of Adoption of T.A.W.*, which held that ICWA and WICWA "should be read as coextensive *barring specific differences in their statutory language*." 186 Wn.2d 828, 844, 383 P.3d 492, 498-99 (2016). Because there are specific differences in the statutory language, the choice of the state legislature to provide additional protections must be given effect. *Spokane Cty. v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655, 658 (2018) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.").

The same result is required by ICWA itself. ICWA specifically directs courts to apply state law when it is more protective of the parents' rights. 25 U.S.C. § 1921; *see also United States v. Errol D., Jr.*, 292 F.3d 1159, 1163-64 (9th Cir. 2002) (recognizing the unique trust relationship

between the United States and Indian tribes requires that ambiguous provisions be "construed liberally in favor of the Indians.").

Giving full effect to the words "may be" is also consistent with WICWA's purpose: to "prevent out of home placement of Indian Children…." RCW 13.38.030. Applying WICWA at an emergency proceeding when a child "may be" an Indian Child, protects Tribal members in the period before the Tribe has had an opportunity to intervene. The heightened standard for removal in an ICWA case, requiring a showing of "imminent physical damage or harm," is of little use after the emergency hearing. *See* 25 U.S.C. § 1922; RCW 13.38.140.

The Court should accept review to correct the lower court's interpretation of WICWA, which is contrary to a prior decision of this court, *T.A.W.*, which mandates that textual differences between the state and federal statutes be given meaning.

C. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION WILL PREVENT TRIBES FROM RECEIVING LEGAL NOTICE OF DEPENDENCY CASES INVOLVING THEIR MEMBERS, RENDERING ICWA "MEANINGLESS"

The lower court's holding, limiting the application of "reason to know," will prevent Tribes from receiving notice of pending dependency cases, undermining all of the rights guaranteed by ICWA. Without notice, the rights guaranteed by ICWA are "meaningless."

> Notice is a key component of the congressional goal to protect and preserve Native American families. It ensures that the tribe will be afforded the opportunity to assert its rights under the act. *Without such notice, the rights guaranteed by the ICWA are meaningless*.

Matter of Welfare of M.S.S., 86 Wn. App. 127, 134, 936 P.2d 36, 40 (1997). BIA Guidelines at 31 (describing prompt notice as "vitally important").

Because legal notice plays such a significant role in the statutory scheme, ICWA contains detailed procedures for providing notice. 25 C.F.R. § 23.111; 25 C.F.R. § 23.11. Federal regulations require a published list of designated agents for service at all federally recognized Tribes so that Tribes can select the proper person or office to receive and consider notices. 25 C.F.R. § 23.12.[7] ICWA's notice requirements ensure Tribes can plan for and receive notice in an orderly way.[8]

The lower court incorrectly relied on the state's "good faith investigation" to find there was no "reason to know," and therefore legal notice was not required. The state's investigation is not a substitute for

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[7] The BIA Regulations contain several provisions that detail how and to whom child welfare agencies are required to provide legal notice to Tribes. *See* 25 C.F.R. § 23.111 (listing information required in the notice); 25 C.F.R. § 23.11 (identifying the Regional Director to receive notice and specifying the method of service).

[8] During the notice and comment period on the 2016 BIA regulations, Tribes specifically noted the need for consistency in how notices are received. "Several Tribal commenters recounted their experiences in having notices sent to various addresses other than the designated Tribal agent address listed in the Federal Register." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38803 (June 14, 2016).

notice to the Tribe's designated agent because, as here, the state may be wrong and the Tribe has the right to make the determination about whether a child is a member of their Tribe.

The lower court relied on a provision in WICWA that requires the state to make "a good faith effort to determine whether the child is an Indian child." RCW 13.348.050. However, the same provision specifically states that, "preliminary contacts … *do not constitute legal notice* as required by RCW 13.38.070." *Id.* (emphasis added). A good faith investigation can generate "reason to know" but, because only the Tribe can determine membership, a good faith investigation does not empower states to determine which children are Indian Children absent notice to the Tribe.

The lower court's ruling has significant implications for the entire statutory scheme. The lower court incorrectly relies on state court investigations, rather than legal notice to Tribes, to make critical determinations about membership. And by narrowly interpreting what it means to have a "reason to know," the decision further denies Tribes the opportunity to learn about cases involving their members. Without notice, the rest of ICWA's protections for families and Tribes are meaningless. The implications for ICWA as a whole presents an issue of significant public interest.

D. REVIEW SHOULD BE GRANTED BECAUSE THE LOWER COURT DECISION CONFLICTS WITH THE *T.L.G.* CASE AND DECISIONS OF OTHER STATES

Review should be granted because the decision below conflicts with another decision of the Court of Appeals as well as decisions of other states that have addressed this issue.

The lower court's decision is inconsistent with *In re Dependency of T.L.G.*, which reversed a termination of parental rights and remanded finding that, "[b]ecause the children were *possibly* Indian children, the court was required to notify the tribe or the BIA of the proceedings." 126 Wn. App. 181, 185, 108 P.3d 156, 158 (2005) (emphasis added). In support of its holding, the case cites the notice provisions of ICWA. *In re Dependency of T.L.G.*, at 192 (holding that "the mother's assertion of Cherokee heritage gave the court 'reason to know,' and triggered the notice requirements of 25 U.S.C. § 1912(a)…"). But the lower court misconstrued *T.L.G.* as only requiring that the state informally "reach out" to the relevant Tribes. *Matter of Dependency of Z.J.G.*, 448 P.3d at 185.

In fact, the court in *T.L.G.* rejected the very argument endorsed by the lower court in this case. There, the state argued that the children were not Indian children, and the notice requirements of ICWA were never triggered, because the mother testified she is neither enrolled in a Tribe nor a member of a Tribe. *In re Dependency of T.L.G.*, 126 Wn. App. at 190.

But the court disagreed and held that, nevertheless, there was a "reason to know." *Id.* This Court should accept review to resolve the conflict between the decisions.

The lower court's decision is also in conflict with the courts of other states. The Supreme Court of Montana recently held that ICWA should be construed to apply whenever a child "*may be*" an Indian Child. *Matter of S.R.*, 394 Mont. 362, 374, 436 P.3d 696, 703 (2019) (holding that pursuant to 25 U.S.C. § 1912 a "reason to know" is an "awareness of a reasonable basis upon which to believe that a child *may be* an Indian child.").

Likewise, a California Court of Appeal recently rejected the argument that there is "reason to know" only when the evidence shows the child is definitively an "Indian Child," upholding the law that leaves such determinations exclusively to the Tribe. *In re A.W.*, 38 Cal. App. 5th 655, 665, 251 Cal. Rptr. 3d 50, 59 (Cal. Ct. App. 2019); *see also Matter of A.P.*, 818 S.E.2d 396, 400 (N.C. Ct. App. 2018), *writ denied, review denied,* 827 S.E.2d 99 (N.C. 2019); *Matter of J.W.E.*, 419 P.3d 374, 378-380 (Okla. Civ. App. 2018); *Geouge v. Traylor*, 68 Va. App. 343, 365, 808 S.E.2d 541, 551 (2017).

Review is warranted to address the inconsistency between the lower court's decision and the *T.L.G.* case. Further, review would allow

Washington to reach an interpretation of this federal law that is consistent with the majority of other states that have addressed the issue.

VII. CONCLUSION

The lower court's ruling permits dependency courts to exclude families, and Indian Children, from the protections of the Indian Child welfare laws and will deprive Tribes of legal notice of cases that involve their members. Yet in order to further the purposes of those laws, the opposite is required: courts must err on the side of providing Tribes with notice and must apply the protections of ICWA and WICWA until the Tribe makes its determination.

The facts of this case exemplify the dangers in the lower court's approach. Here, the social worker incorrectly determined that the children were not "members" of any Tribe and the court failed to apply ICWA at a time when it could have prevented the removal of the children. The appellate court decision, if allowed to stand, would condone similar errors in future cases.

DATED this 19th day of December, 2019.

Respectfully submitted,

KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Dependency of Z.J.G. and M.E.J.G., minor children, WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES, Respondent, v. SCOTT JAMES GREER, Appellant.	No. 78790-0-I consolidated with No. 78791-8-I PUBLISHED OPINION FILED: September 3, 2019

VERELLEN, J. — Consistent with the standards of the federal Indian Child Welfare Act of 1978 (ICWA)[1] and the Washington State Indian Child Welfare Act (WICWA),[2] at the commencement of a 72-hour shelter care hearing, the court is obligated to inquire whether the child is or may be an Indian child. But if the Department of Social and Health Services[3] (Department) engages in a good faith investigation into the child's Indian status, the parties elicit the relevant evidence at

[1] 25 U.S.C. §§ 1901-19.

[2] Ch. 13.38 RCW.

[3] Now known as the Department of Children, Youth, & Families.

the hearing, and the court considers that evidence before ruling on shelter care, then the court substantially complies with the inquiry requirement.

The application of ICWA and WICWA turns on the definition of an "Indian child." The court has "reason to know" a child is or "may be" an Indian child when the court receives evidence that the child is a tribal member or the child is eligible for tribal membership and a biological parent is a tribal member.[4] If there is a reason to know, ICWA and WICWA require the court to treat the child as an Indian child pending a conclusive membership determination by the tribe.[5] But a parent's assertion of Indian heritage, absent other evidence, is not enough to establish a reason to know a child is an Indian child. Either a child or a parent must have a political relationship to a tribe through membership.

Here, at the time of the shelter care hearing, good faith investigation had not yet revealed evidence a parent or a child was a tribal member. As a result, the court did not err in concluding there was no reason to know the children were Indian children. Of course, the Department was obligated to continue its investigation.

Even if there is reason to know a child is an Indian child, ICWA's and WICWA's heightened requirements of a 10-day notice to the tribe and active efforts to provide services have no application to an imminent harm 72-hour shelter care hearing because it is an emergency proceeding.

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[4] 25 U.S.C. § 1912(a); RCW 13.38.070(1).

[5] 25 U.S.C. § 1912(a); RCW 13.38.070(1).

Therefore, we affirm.

FACTS

On June 27, 2018, Z.G., age 21 months, and M.G., age 2 months, were placed in law enforcement protective custody by the Kent Police Department due to concerns of neglect and unsanitary living conditions.[6] Officers noted "[n]o food in the home, a fridge that won't open, items in disarray, rats coming in and out of the [recreational vehicle]."[7]

On June 29, 2018, the Department filed dependency petitions for Z.G. and M.G.[8] The dependency petitions recite:

> Based upon the following, the petitioner knows or has reason to know the child is an Indian child as defined in RCW 13.38.040 and 25 U.S.C. § 1903(4), and the Federal and Washington State Indian Child Welfare Acts do apply to this proceeding:
>
> Mother has Tlingit-Haida heritage and is eligible for membership with Klawock Cooperative Association. She is also identified as having Cherokee heritage on her paternal side. Father states he may have native heritage with Confederated Tribes of the Umatilla in Oregon.
>
> The petitioner has made the following preliminary efforts to provide notice of this proceeding to all tribes to which the petitioner knows or has reason to know the child may be a member or eligible for membership if the biological parent is also a member:

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[6] Clerk's Papers (CP) at 4.

[7] Id.

[8] CP at 1. The record on appeal contains only Z.G.'s dependency petition, shelter care order, and dependency order. But at oral argument, the State represented that the petition and orders pertaining to M.G. are identical regarding his Indian status.

> Inquiry to tribes has been initiated. Worker has called Central Council Tlingit Haida regarding this family and petition. Further inquiry and notification to tribes ongoing.[9]

The shelter care hearing took place on July 2 and 3, 2018. The father, the mother, and the social worker who signed the dependency petitions testified at the hearing. During direct examination, the State asked the social worker whether the children "qualify" under WICWA.[10] The social worker responded, "To my knowledge, not at this time."[11] The State asked, "And what investigation have you done?" The social worker responded,

> I called the Tlingit and Haida Indian tribes of Alaska, and they gave me information that the maternal grandmother is an enrolled member, but the mother is not enrolled, and the children are not enrolled. And to my knowledge, the father is not enrolled in a federally recognized tribe either.[12]

During cross-examination, father's counsel asked the social worker whether "it's possible that the children are eligible for tribal membership?" The social worker replied, "Yes, it is."[13]

The father testified he had "native heritage with the confederated tribes of the Umatilla in Oregon."[14] The father also indicated that it was his "understanding

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[9] CP at 2 (emphasis added).

[10] Report of Proceedings (RP) (July 2, 2018) at 11.

[11] Id.

[12] Id. at 11-12.

[13] Id. at 23.

[14] RP (July 3, 2018) at 67.

that [Z.G. and M.G.] are eligible for tribal membership."[15] The mother testified she and the children were "eligible for American Indian tribal membership" with the Tlingit and Haida tribes.[16] She also testified that she was not an enrolled member of a federally recognized tribe.[17]

In the written shelter care order, the court determined:

> Based upon the following, there is not a reason to know the child is an Indian child . . . . [M]other and father are not enrolled members in a federally recognized tribe. Maternal grandmother is enrolled member, Department continuing to investigate. Mother believes she's eligible for tribal membership.[18]

The court placed Z.G. and M.G. in licensed foster care.[19]

On July 30, 2018, the court granted the Tlingit-Haida tribe's motion to intervene. On September 18, 2018, the court entered a dependency order as to the father's parental rights.[20] Consistent with the tribe's intervention, the court determined there was "reason to know" Z.G. and M.G. were Indian children and applied ICWA and WICWA.[21]

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[15] Id.

[16] Id. at 88.

[17] Id.

[18] CP at 10.

[19] CP at 12 ("It is currently contrary to the welfare of the child to remain in or return home. The child is in need of shelter care because there is reasonable cause to believe . . . [t]he release of the child would present a serious threat of substantial harm to the child.").

[20] It appears an amended agreed dependency order was entered on March 27, 2019. This order is not contained in the record on appeal.

[21] CP at 59.

On January 9, 2019, a commissioner of this court granted the father's motion for discretionary review of the shelter care order. Although the father's appeal is technically moot, the commissioner determined the issues were of continuing and substantial public importance.[22]

ANALYSIS

A law enforcement officer may take a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and if the child might be injured if it was necessary to first obtain a court order.[23] Within 72 hours of removal either by a law enforcement officer or court order, the court must conduct a shelter care hearing.[24] The father's appeal concerns the application of ICWA and WICWA at the 72-hour shelter care hearing.

Congress enacted ICWA in 1978 to address the "'alarmingly high percentage of Indian families [that] are broken up by [ ] removal'" by setting minimum procedural and substantive standards.[25] Shortly after, the Bureau of Indian Affairs (BIA), an agency within the United States Department of the Interior, issued related regulations.[26] The BIA also published guidelines "for State courts to

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[22] Given the lack of argument concerning mootness, the State appears to concede review of the merits is appropriate.

[23] RCW 26.44.050.

[24] RCW 13.34.065(1)(a).

[25] BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 5 (Dec. 2016) (BIA GUIDELINES) (quoting 25 U.S.C. § 1901(4)), https://www.indianaffairs.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf [https://perma.cc/3AJ-PBCA].

[26] Id.

use in interpreting many of ICWA's requirements in Indian child custody proceedings."[27]

In 2015, the Department of the Interior engaged in a notice-and-comment process to promulgate formal ICWA requirements after "recognizing the need for [binding] regulations."[28] In 2016, the BIA issued those binding regulations and updated the guidelines "to promote the consistent application of ICWA across the United States."[29]

In 2011, our legislature enacted WICWA with the express intent to clarify "existing laws" and to promote "practices designed to prevent out-of-home placement of Indian children that is inconsistent with the rights of the parents, the health, safety, or welfare of the children, or the interests of their tribe."[30]

ICWA applies "[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved."[31] Similarly, WICWA applies to "any involuntary child custody proceeding seeking the foster care placement of . . . a child in which the petitioning party or the court knows, or has reason to know, that the child is or may be an Indian child as defined in this chapter."[32] At various times, the parties appear to suggest there is a tension

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[27] Id.

[28] Id.

[29] Id. at 6.

[30] RCW 13.38.030.

[31] 25 U.S.C.A. § 1912(a) (emphasis added).

[32] RCW 13.38.070(1) (emphasis added).

between the best interests of the child and the interests of the tribe, but the federal guidelines recognize "ICWA was specifically designed by Congress to protect the best interests of Indian children."[33] The federal guidelines further explain:

> One of the most important ways that ICWA protects the best interests of Indian children is by ensuring that, if possible, children remain with their parents and that, if they are separated, that support for reunification is provided. This is entirely consistent with the "best interests" standard applied in state courts . . . .
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> . . . Congress found that the unfettered subjective application of the "best interests" standard often failed to consider [t]ribal cultural practices or recognize the long-term advantages to children of remaining with their families and [t]ribes.[34]

The federal guidelines acknowledge the best interests of the child and the interests of the tribe are usually aligned, rather than in conflict. Application of ICWA and WICWA does not sacrifice an Indian child's safety or well-being to satisfy the interests of the tribe. "ICWA and the regulations provide objective standards that are designed to promote the welfare and short- and long-term interests of Indian children" and "provide flexibility for courts to appropriately consider the particular circumstances of the individual children and to protect those children."[35]

I. Threshold Inquiry at Shelter Care Hearing

The father contends the juvenile court failed to conduct an adequate inquiry at the shelter care hearing concerning the applicability of ICWA and WICWA.

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[33] BIA GUIDELINES, supra, at 89.

[34] Id.

[35] Id.

With regard to the court's duty at the shelter care hearing, RCW 13.34.065(4) of the Juvenile Court Act provides, "The paramount consideration for the court shall be the health, welfare, and safety of the child" and sets minimum inquiries the court must conduct, including "[w]hether the child is or may be an Indian child."[36]

WICWA requires the court to determine the applicability of WICWA "as soon as practicable."[37] Federal regulations require the court to conduct the threshold inquiry "in an emergency or voluntary or involuntary child-custody proceeding."[38] Regardless of whether a shelter care hearing is an involuntary or emergency proceeding, the court must inquire into the child's Indian status and ask each participant "whether the participant knows or has reason to know that the child is an Indian child."[39] This "inquiry is made at the commencement of the proceeding and all responses should be on the record."[40]

Here, at the shelter care hearing, the State asked the social worker whether the children "qualified" under WICWA. The social worker summarized his telephone call with the Tlingit and Haida tribes, who confirmed only the maternal grandmother is an enrolled member. The social worker's investigation did not

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[36] RCW 13.34.065(4)(h).

[37] RCW 13.38.070(2)

[38] 25 C.F.R. § 23.107(a).

[39] Id.

[40] Id.

reveal either of the parents or children were members of a tribe. The social worker acknowledged it is possible the children are eligible for tribal membership.

The father testified he had "native heritage with the confederated tribes of the Umatilla in Oregon."[41] The father also indicated that it was his "understanding that [Z.G. and M.G.] are eligible for tribal membership."[42]

The mother testified she and the children were "eligible for American Indian tribal membership" with the Tlingit and Haida Tribes.[43] She also testified that she was not an enrolled member of a federally recognized tribe.[44] In the written shelter care order, the court found, "[T]there is not a reason to know the child is an Indian child."[45]

The father argues the court did not comply with 25 C.F.R. § 23.107(a) because it did not conduct the threshold reason-to-know inquiry itself. The State argues that although the court did not conduct the inquiry, the hearing substantially complied with the federal regulation because the parties elicited the relevant information concerning Z.G.'s and M.G.'s Indian status.

The father also contends the court did not comply with the federal regulation because it did not conduct the inquiry at the commencement of the

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[41] RP (July 3, 2018) at 67.

[42] Id.

[43] Id. at 88.

[44] Id. at 90.

[45] CP at 10.

shelter care hearing.[46] In response, the State argues the hearing substantially complied with the federal regulation because the court addressed Z.G.'s and M.G.'s Indian status before ruling on shelter care.

Our courts have applied the doctrine of substantial compliance to ICWA and WICWA requirements. In In re the Welfare of M.S.S., Division Two of this court applied the doctrine of substantial compliance to ICWA's notice requirement.[47] In M.S.S., the father appealed the court's termination of his parental rights, arguing the court lacked jurisdiction because the Department failed to strictly comply with the notice provisions of ICWA.

In M.S.S., the termination hearing occurred on June 30, 1995. Before the hearing, on June 22, 1995, the father's attorney informed the social worker that the Cook Inlet Indian tribe had identified the children's maternal grandmother as an enrolled member.[48] The next day, the social worker sent an inquiry to the Cook Inlet tribe by overnight mail.[49] On June 26, 1995, the Cook Inlet tribe informed the social worker that the tribe did not want to intervene or otherwise be involved in

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[46] See also RCW 13.34.065(4)(h) ("At the shelter care hearing . . . the court shall inquire into . . . [w]hether the child is or may be an Indian child as defined in RCW 13.38.040, whether the provisions of the federal Indian child welfare act or chapter 13.38 RCW apply, and whether there is compliance with the federal Indian child welfare act and chapter 13.38 RCW, including notice to the child's tribe.").

[47] 86 Wn. App. 127, 936 P.2d 36 (1997). M.S.S. was decided in 1997, before our legislature enacted WICWA.

[48] Id. at 131.

[49] Id.

the proceedings.[50] The social worker did not comply with the ICWA notice requirements because he did not send the inquiry by registered mail with return receipt requested, and the tribe did not receive notice at least 10 days before the termination hearing.

In analyzing whether the notice substantially complied with ICWA, Division Two focused on the purpose behind the notice requirement:

> Notice is a key component of the congressional goal to protect and preserve Native American families. It ensures that the tribe will be afforded the opportunity to assert its rights under the act. Without such notice, the rights guaranteed by the ICWA are meaningless.[51]

The court reasoned that "technical compliance with the act is not required if there has been substantial compliance with the notice provisions of the ICWA."[52] The court determined the tribe had actual notice, "and because we find no prejudice to either the tribe or the children by the failure to send the notice by registered mail, we hold that the overnight mailing substantially complied with the mailing requirements of the act."[53] But the court ultimately decided to remand because the social worker mailed the information only seven days before the termination hearing.[54]

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[50] Id. at 132.

[51] Id. at 134.

[52] Id. at 134-35.

[53] Id. at 135.

[54] Id.

Here, the court received and considered evidence regarding the children's status. The father argues the court made no attempt at compliance because the court did not conduct the inquiry "outside the constraints of the adversarial process."[55] The father contends the court's determination that ICWA and WICWA did not apply was "limited only to the evidence that the parties chose to present."[56] But he fails to point to any evidence he was unable to present. The father elicited testimony from all the participants and presented argument to the court concerning the applicability of ICWA and WICWA.

Similarly, although the inquiry did not occur at the commencement of the hearing, the court addressed ICWA and WICWA before issuing its ruling on shelter care. The federal guidelines emphasize the importance of determining "at the outset of a State court child custody proceeding whether ICWA applies" because "[d]oing so promotes stability for Indian children and families and conserves resources by reducing the need for delays, duplication, appeals, and attendant disruptions."[57]

> If this inquiry is not timely, a child-custody proceeding may not comply with ICWA and thus may deny ICWA protections to Indian children and their families or, at the very least, cause inefficiencies. The failure to timely determine if ICWA applies also can generate unnecessary delays, as the court and the parties may need to redo certain processes or findings under the correct standard. This is

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[55] Appellant's Reply Br. at 4.

[56] Id.

[57] BIA GUIDELINES, supra, at 9 (emphasis added).

> inefficient for courts and parties, and can create delays and instability in placements for the Indian child.[58]

Here, consistent with RCW 13.34.065 of the Juvenile Court Act, the shelter care hearing occurred at the beginning of the dependency. There was no increased risk of delay across the course of the entire dependency proceeding just because the court did not conduct the inquiry precisely at the start of the shelter care hearing. The purpose of the initial inquiry at shelter care was accomplished here. The court received the available information about the children's Indian child status before making a shelter care decision.

We conclude the shelter care hearing in this case substantially complied with 25 C.F.R. § 23.107(a) and RCW 13.34.065(4)(h).

II. "Reason to Know" an Indian Child is Involved

The father argues the court erred at the shelter care hearing when it determined ICWA and WICWA did not apply.

Whether ICWA and WICWA apply is a question of law we review de novo.[59] ICWA applies "[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved."[60] Similarly, WICWA applies to "any involuntary child custody proceeding seeking the foster care placement of . . . a child in which the petitioning party or the court knows, or has

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[58] Id. at 11.

[59] In re Adoption of T.A.W., 186 Wn.2d 828, 840, 383 P.3d 492 (2016).

[60] 25 U.S.C. § 1912(a) (emphasis added).

reason to know, that the child is or may be an Indian child as defined in this chapter."[61]

Generally, with regard to harmonizing ICWA and WICWA, our Supreme Court has determined the two "should be read as coextensive barring specific differences in their statutory language. In this way, . . . the acts will be interpreted as analogous and conterminous unless one provides greater protection, in which case the more protective act will supplant the less protective act."[62] Although WICWA and ICWA are not identical, WICWA's express intent was to clarify rather than expand ICWA.[63]

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[61] RCW 13.38.070(1) (emphasis added).

[62] T.A.W., 186 Wn.2d at 844 (citing 25 U.S.C. § 1921 ("In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.")); 25 C.F.R. § 23.106 ("(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA. (b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard."); BIA GUIDELINES, supra, at 7 ("ICWA establishes the minimum procedural and substantive standards that must be met, regardless of State law. The regulations provide a binding, consistent, nationwide interpretation of ICWA's minimum standards. ICWA displaces State laws and procedures that are less protective. Many States have their own laws applying to child welfare proceedings involving Indian children that establish protections beyond the minimum Federal standards. In those instances, the more protective State law applies." (footnote omitted)).

[63] RCW 13.38.030 ("It is the intent of the legislature that this chapter is a step in clarifying existing laws and codifying existing policies and practices."); see T.A.W., 186 Wn.2d at 844 n.9 ("This is presumably in reference, at least partially, to ICWA, given ICWA's and WICWA's governance of the same subject matter.").

Under both ICWA and WICWA, an "Indian child" is defined as an "unmarried and unemancipated Indian person who is under eighteen years of age and is either: (a) A member of an Indian tribe; or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[64] Both acts provide that only the tribe can make the ultimate determination as to whether an individual is a member of the tribe.

The federal regulations provide, "The determination by a [t]ribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the [t]ribe."[65] Similarly, WICWA provides, "A written determination by an Indian tribe that a child is a member of or eligible for membership in that tribe, or testimony by the tribe attesting to such status shall be conclusive that the child is an Indian child."[66]

To safeguard against the situation where a state court lacks a tribe's conclusive determination whether a child is an Indian child, the state court must

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[64] RCW 13.38.040(7) (emphasis added); see also 25 U.S.C. § 1903(4) ("'Indian child' means 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.").

[65] 25 C.F.R. § 23.108(b).

[66] RCW 13.38.070(3)(a); see also RCW 13.38.070(3)(b) ("A written determination by an Indian tribe that a child is not a member of or eligible for membership in that tribe, or testimony by the tribe attesting to such status shall be conclusive that the child is not a member or eligible for membership in that tribe.").

analyze whether there is reason to know a child is an Indian child. This safeguard honors the tribe's authority to conclusively determine tribal membership.[67]

The father argues our legislature's inclusion of "may be" "casts an even wider net" than the mere reason-to-know standard from ICWA.[68] We disagree. The language of WICWA mirrors 25 C.F.R. § 23.107(b), which provides:

> If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:
>
> (1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the [t]ribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and
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> (2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.[69]

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[67] See Conference of W. Att'ys Gen., AMERICAN INDIAN LAW DESKBOOK § 13:8, at 940-41 (2019 ed.) (DESKBOOK) ("[S]tate law-based evidentiary rules must be considered in establishing the tribal determination itself. Notice requirements in ICWA are designed to facilitate the opportunity for potentially affected tribes to make those determinations where foster care placement or parental rights termination proceedings are involved. A different factual standard—'reason to know'—controls whether such notice is statutorily compelled.").

[68] Appellant's Br. at 13.

[69] (Emphasis added.); see DESKBOOK, supra, at 959-60 ("The arguable breadth of some of the 'reason to know' criteria, as well as the requirement to treat the child as an Indian child until proved otherwise, is tempered by the definition of 'Indian child,' which requires tribal membership or eligibility for membership together with actual membership of a biological parent, and not mere Indian ancestry.").

Our legislature's inclusion of "may be" in WICWA and the above federal regulation address the situation where there is evidence that satisfies the definition of "Indian child" but that evidence has not been confirmed or rejected by the tribe. As here, where no one asserts the child is a tribal member, ICWA and WICWA apply only if the child is eligible for tribal membership and one of the child's biological parents is a tribal member. A parent's belief that the child is eligible for tribal membership without evidence that one of the parents is a tribal member is insufficient to establish ICWA and WICWA apply to the child.

It is also important to note that the statutory definition of "Indian child" turns on membership rather than enrollment. "'Member' and 'membership' means a determination by an Indian tribe that a person is a member or eligible for membership in that Indian tribe."[70] Depending on the practices of the specific tribe, enrollment and membership may be but are not necessarily synonymous.

> [M]any tribes require a person to register or enroll in order to be considered a member of the tribe, but some do not and automatically include a person as a member if the person is descended from a tribal member who was listed on the tribal rolls as of a specific date. Accordingly, the absence of enrollment alone may not necessarily be determinative of whether a person is a member of a tribe.[71]

Here, at the shelter care hearing, the State asked the social worker, "And what investigation have you done?"; the social worker responded,

> I called the Tlingit and Haida Indian tribes of Alaska, and they gave me information that the maternal grandmother is an enrolled

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[70] RCW 13.38.040(12).

[71] In re Termination of Parental Rights to Arianna R.G., 259 Wis. 2d 563, 575-76, 657 N.W.2d 363 (2003).

> member, but the mother is not enrolled, and the children are not enrolled. And to my knowledge, the father is not enrolled in a federally-recognized tribe either.[72]

The social worker and the father testified it was possible the children were eligible for tribal membership.[73] The mother testified she and the children were "eligible for American Indian tribal membership" with the Tlingit and Haida Tribes.[74] But she also testified that she was not an enrolled member of a federally recognized tribe.[75]

In the written shelter care order, the court found, "[T]here is not a reason to know the child is an Indian child."[76] "Mother and father are not enrolled members in a federally recognized tribe. Maternal grandmother is enrolled member, Department continuing to investigate. Mother believes she's eligible for tribal membership."[77]

The father relies on In re Dependency of T.L.G. to argue the parents' assertion of Indian heritage is enough to establish a reason to know.[78] In T.L.G., before the Department filed dependency petitions for the two children, the mother

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[72] RP (July 2, 2018) at 11-12.

[73] Id. at 23; RP (July 3, 2018) at 67.

[74] RP (July 3, 2018) at 88.

[75] Id. at 90.

[76] CP at 10.

[77] Id.

[78] 126 Wn. App. 181, 108 P.3d 156 (2005).

disclosed possible Indian heritage.[79] The mother was adopted as an infant but had been told her biological father was "full-blooded Cherokee."[80] In the dependency petitions and the agreed dependency orders, the Department asserted the children were not Indian children.[81] The mother did not challenge these assertions.[82]

When the children's potential Indian status came up at a permanency planning hearing, the court ordered the Department to investigate.[83] The caseworker told the mother the Department needed her adoption records to investigate, but the mother was unable to get the records.[84] Ultimately, neither the Department nor the court provided notice to the children's potential tribes. At the termination trial, the court concluded ICWA did not apply because the mother was not an enrolled member of a tribe and she did not assist the Department's investigation.[85] The mother appealed.

On appeal, this court discussed the importance of the notice requirements under ICWA: "One reason notice is a key component of ICWA is to ensure that tribes will have the opportunity to assert their rights independent of the parents or

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[79] Id. at 186.

[80] Id.

[81] Id. at 189.

[82] Id.

[83] Id.

[84] Id. at 190.

[85] Id.

state agency."[86] This court emphasized, "[N]o formal notice was given to the tribe or the [BIA], even after the court ordered [the Department] to investigate the children's Indian heritage."[87] In the context of the Department's failure to investigate, this court stated:

> [T]ribal enrollment is not the only means of establishing Indian heritage. Nor is [the mother's] belief that she is not a tribal member dispositive. Tribes control the rules of their membership, and whether [the mother] is a member is a question only the tribe can definitively answer.[88]

This court determined the trial court "erred in failing to ensure notice of the termination proceedings was given to the tribe or the [BIA]."[89]

T.L.G. correctly identifies that only the tribe can definitively answer whether an individual is a member of that tribe. But T.L.G. does not stand for the broad proposition that assertion of Indian heritage alone establishes a reason to know. Rather, T.L.G. exemplifies the importance of the Department promptly investigating and contacting potential tribes when a parent asserts Indian heritage. When the Department fails to reach out to potential tribes, as in T.L.G., those tribes are unable to make a conclusive determination concerning membership.

T.L.G. is factually distinguishable from this case. In T.L.G., the mother asserted Indian heritage at the commencement of the dependency proceeding, but

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[86] Id. at 191.

[87] Id. at 192.

[88] Id. at 191 (emphasis added).

[89] Id. at 192.

the Department failed to investigate at any point before the termination trial. And the mother appealed the termination order. Here, both parents asserted Indian heritage prior to the shelter care hearing, and the Department started to investigate before the hearing. And here, we are concerned with the preliminary shelter care order.

The applicability of T.L.G. is further limited because this court issued its opinion before the BIA updated the federal regulations and guidelines. A review of the updated regulations and guidelines counsels against reading T.L.G. as undercutting the precise definitions of an Indian child from ICWA and WICWA.

The federal regulations answer the question of how a State court should determine if there is a reason to know a child is an Indian child:

> A court, upon conducting the inquiry required . . . , has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:
>
> (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian [t]ribe, Indian organization, or agency informs the court that the child is an Indian child;
>
> (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian [t]ribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
>
> (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
>
> (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
>
> (5) The court is informed that the child is or has been a ward of a [t]ribal court; or

> (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian [t]ribe.[90]

The BIA's comments accompanying the regulation provide:

> The rule reflects the statutory definition of "Indian child," which is based on the child's political ties to a federally recognized Indian [t]ribe, either by virtue of the child's own citizenship in the [t]ribe, or through a biological parent's citizenship and the child's eligibility for citizenship. ICWA does not apply simply based on a child or parent's Indian ancestry. Instead, there must be a political relationship to the [t]ribe.
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> Most [t]ribes require that individuals apply for citizenship and demonstrate how they meet that [t]ribe's membership criteria. Congress recognized that there may not have been an opportunity for an infant or minor child to become a citizen of a [t]ribe prior to the child-custody proceeding, and found that Congress had the power to act for those children's protection given the political tie to the [t]ribe through parental citizenship and the child's own eligibility.[91]

An assertion of Indian heritage triggers the Department's duty to investigate.[92] But an assertion of Indian heritage, absent other evidence, does not

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[90] 25 C.F.R. § 23.107(c).

[91] BIA GUIDELINES, supra, at 10 (emphasis added).

[92] See RCW 13.38.050 ("Any party seeking the foster care placement of, termination of parental rights over, or the adoption of a child must make a good faith effort to determine whether the child is an Indian child. This shall be done by consultation with the child's parent or parents, any person who has custody of the child or with whom the child resides, and any other person that reasonably can be expected to have information regarding the child's possible membership or eligibility for membership in an Indian tribe to determine if the child is an Indian child, and by contacting any Indian tribe in which the child may be a member or may be eligible for membership. Preliminary contacts for the purpose of making a good faith effort to determine a child's possible Indian status, do not constitute legal notice as required by RCW 13.38.070.") (emphasis added).

establish a reason to know that a child is an Indian child. With regard to the Department's duty to investigate, the federal guidelines provide:

> When in doubt, it is better to conduct further investigation into a child's status early in the case; this establishes which laws will apply to the case and minimizes the potential for delays or disrupted placements in the future. States or courts may choose to require additional investigation into whether there is a reason to know the child is an Indian child.[93]

Here, in the dependency petition, the Department indicated the mother had asserted Tlingit-Haida and Cherokee heritage and the father had asserted heritage with the Confederated Tribes of the Umatilla.[94] Before the shelter care hearing, the Department called the Klawock Cooperative Association to investigate the mother's Tlingit-Haida heritage.[95] The Department also indicated, "Further inquiry and notification to tribes ongoing."[96]

At the shelter care hearing, the social worker testified that he called the Tlingit and Haida Indian tribes of Alaska, and they clarified the maternal grandmother was an enrolled member, but neither the mother nor the children were enrolled.[97] The social worker also testified, "[T]o my knowledge, the father is not enrolled in a federally-recognized tribe either."[98] It is unclear whether the

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[93] BIA GUIDELINES, supra, at 11.

[94] CP at 2.

[95] Id.

[96] Id.

[97] RP (July 2, 2018) at 11.

[98] Id. at 11-12.

Department investigated the mother's Cherokee heritage or the father's Umatilla heritage prior to the shelter care hearing. In the shelter care order, the court found the Department was continuing to investigate.[99]

After the shelter care hearing, the Department sent inquiry letters to the Confederated Tribes of the Umatilla, the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee Indians in Oklahoma, and the Central Council Tlingit and Haida Indian Tribes of Alaska.

Consistent with RCW 13.38.050, the Department must conduct a good faith investigation into all indicated tribes, but the father cites no authority that the Department must initiate contact with all potential tribes before the 72-hour shelter care hearing. The Department's Indian child welfare policy and procedures similarly recognize it typically takes more than 72 hours to undertake and complete a detailed investigation:

> 3. When a child may have Indian ancestry and be affiliated with a federally recognized tribe, [Children's Administration] caseworkers will:
>
> . . . .
>
> b. Send a Native American Inquiry Referral (NAIR) to the Native American Inquiry Unit[.]
>
> . . . .
>
> 4. Upon receipt of the referral, the NAIR unit will send to the identified tribe(s):

[99] CP at 10.

a. First inquiry letter within 30 days from Indian ancestry identification.[100]

And here, the father does not challenge the court's finding in the shelter care order that the Department "made a good faith effort to determine whether the child is an Indian child."[101]

Ultimately, the court did not err when it determined at the shelter care hearing that there was no reason to know ICWA and WICWA applied to Z.G. and M.G. Specifically, the information before the court at the shelter care hearing as a result of the Department's good faith investigation did not establish a reason to know Z.G. and M.G. were Indian children. Because there was no reason to know, the normal serious threat of substantial harm standard applied at the shelter care hearing.[102]

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[100] Dep't of Children, Youth & Families, Indian Child Welfare Policies and Procedures: Inquiry Verification of Child's Indian Status (Sept. 12, 2016), https://www.dcyf.wa.gov/indian-child-welfare-policies-and-procedures/3-inquiry-and-verification-childs-indian-status [https://perma.cc/9732-Z86J].

[101] CP at 10.

[102] See RCW 13.34.065(5)(a) ("The court shall release a child alleged to be dependent to the care, custody, and control of the child's parent, guardian, or legal custodian unless the court finds there is reasonable cause to believe that: (i) After consideration of the specific services that have been provided, reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home; and . . . (B) The release of such child would present a serious threat of substantial harm to such child." (emphasis added)).

III. Was the 72-hour Shelter Care Hearing an "Emergency Proceeding" for Purposes of ICWA and WICWA?

The briefing touches on the heightened standards that would apply if there was reason to know Z.G. and M.G. are Indian children. For example, before the court orders foster care placement or termination of parental rights, ICWA and WICWA require a 10-day notice to the parents and the tribe.[103] ICWA and WICWA also require proof that "active efforts have been made to provide remedial services . . . designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[104]

And ICWA and WICWA apply to child custody proceedings. A child custody proceeding includes foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.[105] A foster care placement is "any action removing an Indian child from his or her parent . . . for temporary placement in a foster home . . . where the parent . . . cannot have the child returned upon demand, but where parental rights have not been terminated."[106]

But the federal regulations expressly exclude an emergency proceeding from the definition of "child-custody proceeding."[107] And the regulations define an emergency proceeding to include "any court action that involves an emergency

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[103] 25 U.S.C. § 1912(a); RCW 13.38.070(1).

[104] 25 U.S.C. § 1912(d); RCW 13.38.130(1).

[105] 25 U.S.C. § 1903(1); RCW 13.38.040(3).

[106] 25 U.S.C. § 1903(1); RCW 13.38.040(3).

[107] 25 C.F.R. § 23.2 ("other than an emergency proceeding").

removal or emergency placement of an Indian child."[108] Furthermore, the guidelines acknowledge that states use different terminology for emergency hearings, including "shelter hearing":

> While States use different terminology (e.g., preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may be necessary to prevent imminent physical damage or harm to the child.[109]

The federal regulations also provide a table listing which provisions of ICWA apply to various types of proceedings.[110] 25 C.F.R. § 23.104 expressly provides that the 10-day notice requirement to the parents and tribe and the requirement to show active efforts do not apply to an emergency placement.[111]

Although WICWA does not define "emergency proceeding," WICWA does recognize the importance of emergency placements regarding an Indian child:

> Notwithstanding any other provision of federal or state law, nothing shall be construed to prevent the department or law enforcement from the emergency removal of an Indian child who is a resident of or is domiciled on an Indian reservation, but is temporarily located off the reservation, from his or her parent or Indian custodian or the emergency placement of such child in a foster home, under applicable state law, to prevent imminent physical damage or harm to the child.[112]

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[108] Id.

[109] BIA GUIDELINES, supra, at 23 (emphasis added).

[110] 25 C.F.R. § 23.104.

[111] See also RCW 13.38.140(3), distinguishing the formal 10-day notice required for dependency and termination hearings from the pragmatic notice to the tribe before removal of an Indian child "[w]hen the nature of the emergency allows."

[112] RCW 13.38.140(1); see also 25 U.S.C. § 1922.

It would be inconsistent with the above provisions to require a 10-day notice or active efforts at an imminent harm 72-hour shelter care hearing.[113]

Z.G. and M.G. were placed in law enforcement protective custody by the Kent Police Department due to concerns of neglect and unsanitary living conditions.[114] Under RCW 26.44.050,

> [a] law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050.

"A child taken into custody pursuant to RCW 13.34.050 or 26.44.050 shall be immediately placed in shelter care."[115] A shelter care hearing must occur within 72 hours to address continued shelter care.[116] "The primary purpose of the shelter care hearing is to determine whether the child can be immediately and safely returned home while the adjudication of the dependency is pending."[117]

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[113] Additionally, we note that under ICWA and WICWA, the removal standard for a nonemergency foster care placement is "that the continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e); RCW 13.38.130(2). But in the context of an emergency placement, the removal standard and the procedural protections are altered (e.g., no active efforts, no 10-day notice).

[114] CP at 4.

[115] RCW 13.34.060(1).

[116] Id. ("No child may be held longer than seventy-two hours, excluding Saturdays, Sundays, and holidays, after such child is taken into custody unless a court order has been entered for continued shelter care.").

[117] RCW 13.34.065(1)(a).

Here, this typical 72-hour shelter care hearing following a law enforcement removal qualified as an emergency proceeding.[118]

Even assuming there was a reason to know Z.G. and M.G. were Indian children, heightened protections such as a 10-day notice and active efforts requirements would not have applied to Z.G. and M.G.'s 72-hour shelter care hearing.[119]

CONCLUSION

ICWA and WICWA require a court conducting a 72-hour shelter care hearing to inquire whether the child is or may be an Indian child. A court substantially complies with that requirement if prior to the hearing the Department has begun a good faith investigation into the child's Indian status, the parties elicit the relevant evidence during the hearing, and the court considers that evidence before ruling on shelter care.

The reason-to-know standard turns on evidence that the child is a tribal member, or the child is eligible for tribal membership and a biological parent is a

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[118] We note that the form shelter care order does not include a box or specific space to find or explain the nature of the imminent risk of physical harm contemplated by RCW 13.38.140, 25 U.S.C. § 1922, and 25 C.F.R. § 23.113.

[119] See DESKBOOK, supra, at 915 ("[P]reliminary protective hearings held in many dependency or child-in-need-of-care proceedings may be 'emergency proceedings' under ICWA and therefore are not subject to many of ICWA's procedural requirements, such as the provision that no hearing can take place until at least ten days after the parents, Indian custodian, or tribe has received notice."); see Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,819 (June 14, 2016) (sec. IV(H)(4) cmt.) (emergency hearings are "known in various States as 72-hour hearings, detention hearings, shelter care hearings, and other terms").

tribal member. If there is a reason to know a child is or may be an Indian child, then ICWA and WICWA require the court to treat the child as an Indian child pending a conclusive membership determination by a tribe. A parent's mere assertion of Indian heritage absent other evidence is not enough to establish a reason to know a child is or may be an Indian child. Because the Department's good faith investigation before the shelter care hearing did not reveal evidence that a parent or a child was a tribal member, the court did not err in concluding that there was no reason to know the children were Indian children based on the evidence available at the time of the shelter care hearing. Of course, the Department has an obligation to continue its investigation before proceeding to a dependency or termination hearing.

Even if there is reason to know a child is an Indian child, the heightened protections of a 10-day notice and active efforts have no application to an imminent harm shelter care hearing because it is an emergency placement.

Therefore, we affirm.

WE CONCUR:

FILED
11/19/2019
Court of Appeals
Division I
State of Washington

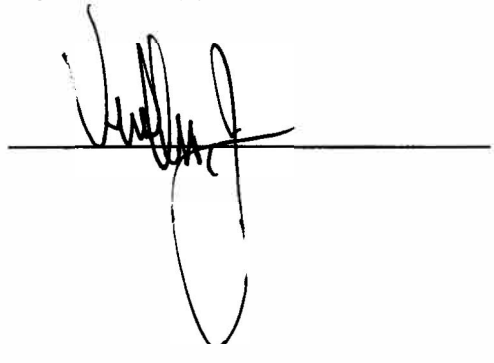
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Dependency of Z.J.G. and M.E.J.G., minor children,	)	No. 78790-0-I consolidated with No. 78791-8-I
WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES,	)	
Respondent,	)	
v.	)	
SCOTT JAMES GREER,	)	ORDER DENYING MOTION FOR RECONSIDERATION
Appellant.	)	

Appellant filed a motion for reconsideration of the opinion filed September 3, 2019. The court granted permission to the Northwest Justice Project and the Central Council of the Tlingit and Haida Indian Tribes of Alaska to file an amicus curiae brief in support of the father's motion for reconsideration and provided an opportunity for the Department to respond, which it did. Following consideration of the motion for reconsideration along with the additional materials, the panel has determined the motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE PANEL:



25 U.S.C.A. Ch. 21, Refs & Annos
Currentness

25 U.S.C.A. Ch. 21, Refs & Annos, 25 USCA Ch. 21, Refs & Annos
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by Brackeen v. Bernhardt, 5th Cir.(Tex.), Aug. 09, 2019

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)

25 U.S.C.A. § 1901

§ 1901. Congressional findings

Currentness

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes [1] " and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

CREDIT(S)

(Pub.L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069.)

Notes of Decisions (7)

Footnotes

1 So in original. Probably should be capitalized.

25 U.S.C.A. § 1901, 25 USCA § 1901

Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by Brackeen v. Bernhardt, 5th Cir.(Tex.), Aug. 09, 2019

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)

25 U.S.C.A. § 1902

§ 1902. Congressional declaration of policy

Currentness

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of 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 service programs.

CREDIT(S)

(Pub.L. 95-608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

Notes of Decisions (14)

25 U.S.C.A. § 1902, 25 USCA § 1902
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)

25 U.S.C.A. § 1903

§ 1903. Definitions

Currentness

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

(i) "foster care placement" which shall mean 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;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means 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;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

CREDIT(S)

(Pub.L. 95-608, § 4, Nov. 8, 1978, 92 Stat. 3069.)

Notes of Decisions (51)

25 U.S.C.A. § 1903, 25 USCA § 1903
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by Brackeen v. Bernhardt, 5th Cir.(Tex.), Aug. 09, 2019

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1911

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

Currentness

(a) Exclusive jurisdiction

An 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, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The 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.

CREDIT(S)

(Pub.L. 95-608, Title I, § 101, Nov. 8, 1978, 92 Stat. 3071.)

Notes of Decisions (101)

25 U.S.C.A. § 1911, 25 USCA § 1911
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

25 U.S.C.A. § 1912

§ 1912. Pending court proceedings

Currentness

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court 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.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

CREDIT(S)

(Pub.L. 95-608, Title I, § 102, Nov. 8, 1978, 92 Stat. 3071.)

Notes of Decisions (120)

25 U.S.C.A. § 1912, 25 USCA § 1912
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

25 U.S.C.A. § 1913

§ 1913. Parental rights; voluntary termination

Currentness

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

CREDIT(S)

(Pub.L. 95-608, Title I, § 103, Nov. 8, 1978, 92 Stat. 3072.)

Notes of Decisions (14)

25 U.S.C.A. § 1913, 25 USCA § 1913
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

25 U.S.C.A. § 1914

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Currentness

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

CREDIT(S)

(Pub.L. 95-608, Title I, § 104, Nov. 8, 1978, 92 Stat. 3072.)

Notes of Decisions (13)

25 U.S.C.A. § 1914, 25 USCA § 1914
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

25 U.S.C.A. § 1915

§ 1915. Placement of Indian children

Currentness

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, 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.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement 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. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement 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.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

CREDIT(S)

(Pub.L. 95-608, Title I, § 105, Nov. 8, 1978, 92 Stat. 3073.)

Notes of Decisions (28)

25 U.S.C.A. § 1915, 25 USCA § 1915
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

25 U.S.C.A. § 1916

§ 1916. Return of custody

Currentness

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

CREDIT(S)

(Pub.L. 95-608, Title I, § 106, Nov. 8, 1978, 92 Stat. 3073.)

Notes of Decisions (2)

25 U.S.C.A. § 1916, 25 USCA § 1916
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

 KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by Brackeen v. Bernhardt, 5th Cir.(Tex.), Aug. 09, 2019

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1917

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Currentness

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

CREDIT(S)

(Pub.L. 95-608, Title I, § 107, Nov. 8, 1978, 92 Stat. 3073.)

25 U.S.C.A. § 1917, 25 USCA § 1917
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

25 U.S.C.A. § 1918

§ 1918. Reassumption of jurisdiction over child custody proceedings

Currentness

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

CREDIT(S)

(Pub.L. 95-608, Title I, § 108, Nov. 8, 1978, 92 Stat. 3074.)

Notes of Decisions (5)

25 U.S.C.A. § 1918, 25 USCA § 1918
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by Brackeen v. Bernhardt, 5th Cir.(Tex.), Aug. 09, 2019

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1919

§ 1919. Agreements between States and Indian tribes

Currentness

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

CREDIT(S)

(Pub.L. 95-608, Title I, § 109, Nov. 8, 1978, 92 Stat. 3074.)

Notes of Decisions (2)

25 U.S.C.A. § 1919, 25 USCA § 1919
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

25 U.S.C.A. § 1920

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Currentness

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

CREDIT(S)

(Pub.L. 95-608, Title I, § 110, Nov. 8, 1978, 92 Stat. 3075.)

Notes of Decisions (7)

25 U.S.C.A. § 1920, 25 USCA § 1920
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by Brackeen v. Bernhardt, 5th Cir.(Tex.), Aug. 09, 2019

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1921

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

Currentness

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

CREDIT(S)

(Pub.L. 95-608, Title I, § 111, Nov. 8, 1978, 92 Stat. 3075.)

Notes of Decisions (1)

25 U.S.C.A. § 1921, 25 USCA § 1921
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1922

§ 1922. Emergency removal or placement of child; termination; appropriate action

Currentness

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

CREDIT(S)

(Pub.L. 95-608, Title I, § 112, Nov. 8, 1978, 92 Stat. 3075.)

Notes of Decisions (12)

25 U.S.C.A. § 1922, 25 USCA § 1922
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by Brackeen v. Bernhardt, 5th Cir.(Tex.), Aug. 09, 2019

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter I. Child Custody Proceedings

25 U.S.C.A. § 1923

§ 1923. Effective date

Currentness

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

CREDIT(S)

(Pub.L. 95-608, Title I, § 113, Nov. 8, 1978, 92 Stat. 3075.)

Notes of Decisions (6)

25 U.S.C.A. § 1923, 25 USCA § 1923
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter II. Indian Child and Family Programs

25 U.S.C.A. § 1931

§ 1931. Grants for on or near reservation programs and child welfare codes

Currentness

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to--

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under Titles IV-B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under Titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

CREDIT(S)

(Pub.L. 95-608, Title II, § 201, Nov. 8, 1978, 92 Stat. 3075.)

25 U.S.C.A. § 1931, 25 USCA § 1931
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter II. Indian Child and Family Programs

25 U.S.C.A. § 1932

§ 1932. Grants for off-reservation programs for additional services

Currentness

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to--

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

CREDIT(S)

(Pub.L. 95-608, Title II, § 202, Nov. 8, 1978, 92 Stat. 3076.)

25 U.S.C.A. § 1932, 25 USCA § 1932
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter II. Indian Child and Family Programs

25 U.S.C.A. § 1933

§ 1933. Funds for on and off reservation programs

Currentness

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

CREDIT(S)

(Pub.L. 95-608, Title II, § 203, Nov. 8, 1978, 92 Stat. 3076; Pub.L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

25 U.S.C.A. § 1933, 25 USCA § 1933
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter II. Indian Child and Family Programs

25 U.S.C.A. § 1934

§ 1934. “Indian” defined for certain purposes

Currentness

For the purposes of sections 1932 and 1933 of this title, the term “Indian” shall include persons defined in section 1603(c) of this title.

CREDIT(S)

(Pub.L. 95-608, Title II, § 204, Nov. 8, 1978, 92 Stat. 3077.)

25 U.S.C.A. § 1934, 25 USCA § 1934
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

25 U.S.C.A. § 1951

§ 1951. Information availability to and disclosure by Secretary

Currentness

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show--

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

CREDIT(S)

(Pub.L. 95-608, Title III, § 301, Nov. 8, 1978, 92 Stat. 3077.)

25 U.S.C.A. § 1951, 25 USCA § 1951
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by Brackeen v. Bernhardt, 5th Cir.(Tex.), Aug. 09, 2019

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter III. Recordkeeping, Information Availability, and Timetables

25 U.S.C.A. § 1952

§ 1952. Rules and regulations

Currentness

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

CREDIT(S)

(Pub.L. 95-608, Title III, § 302, Nov. 8, 1978, 92 Stat. 3077.)

Notes of Decisions (1)

25 U.S.C.A. § 1952, 25 USCA § 1952
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter IV. Miscellaneous Provisions

25 U.S.C.A. § 1961

§ 1961. Locally convenient day schools

Currentness

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

CREDIT(S)

(Pub.L. 95-608, Title IV, § 401, Nov. 8, 1978, 92 Stat. 3078; Pub.L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

Notes of Decisions (1)

25 U.S.C.A. § 1961, 25 USCA § 1961
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter IV. Miscellaneous Provisions

25 U.S.C.A. § 1962

§ 1962. Copies to the States

Currentness

Within sixty days after November 8, 1978, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter.

CREDIT(S)

(Pub.L. 95-608, Title IV, § 402, Nov. 8, 1978, 92 Stat. 3078.)

25 U.S.C.A. § 1962, 25 USCA § 1962
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 21. Indian Child Welfare (Refs & Annos)
Subchapter IV. Miscellaneous Provisions

25 U.S.C.A. § 1963

§ 1963. Severability

Currentness

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

CREDIT(S)

(Pub.L. 95-608, Title IV, § 403, Nov. 8, 1978, 92 Stat. 3078.)

25 U.S.C.A. § 1963, 25 USCA § 1963
Current through P.L. 116-73. Some statute sections may be more current, see credits for details.

End of Document

25 C.F.R. § 23.101

§ 23.101 What is the purpose of this subpart?

Effective: December 12, 2016
Currentness

The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

End of Document

25 C.F.R. § 23.102

§ 23.102 What terms do I need to know?

Effective: December 12, 2016
Currentness

The following terms and their definitions apply to this subpart. All other terms have the meanings assigned in § 23.2.

Agency means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements.

Indian organization means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a Tribe, or a majority of whose members are Indians.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter D. Human Services
Part 23. Indian Child Welfare Act (Refs & Annos)
Subpart I. Indian Child Welfare Act Proceedings (Refs & Annos)
General Provisions

25 C.F.R. § 23.103

§ 23.103 When does ICWA apply?

Effective: December 12, 2016
Currentness

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of "Indian child," then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter D. Human Services
Part 23. Indian Child Welfare Act (Refs & Annos)
Subpart I. Indian Child Welfare Act Proceedings (Refs & Annos)
General Provisions

25 C.F.R. § 23.104

§ 23.104 What provisions of this subpart apply to each type of child-custody proceeding?

Effective: December 12, 2016
Currentness

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in § 23.103(a):

Section	Type of proceeding
23.101-23.106 (General Provisions).....	Emergency, Involuntary, Voluntary.
Pretrial Requirements:	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?).....	Emergency, Involuntary, Voluntary.
23.108 (Who makes the determination as to whether a child is a member whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?).....	Emergency, Involuntary, Voluntary.
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?).....	Emergency, Involuntary, Voluntary.
23.110 (When must a State court dismiss an action?).....	Involuntary, Voluntary.
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?).....	Involuntary (foster-care placement and termination of parental rights).
23.112 (What time limits and extensions apply?).....	Involuntary (foster-care placement and termination of parental rights).
23.113 (What are the standards for emergency proceedings involving an Indian child?).....	Emergency.
23.114 (What are the requirements for determining improper removal?).....	Involuntary.
Petitions to Transfer to Tribal Court:	
23.115 (How are petitions for transfer of a proceeding made?).	Involuntary, Voluntary (foster-care placement and termination of parental rights).

23.116 (What happens after a petition for transfer is made?).....	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.117 (What are the criteria for ruling on transfer petitions?)..	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.118 (How is a determination of "good cause" to deny transfer made?).....	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.119 (What happens after a petition for transfer is granted?).	Involuntary, Voluntary (foster-care placement and termination of parental rights).
Adjudication of Involuntary Proceedings:	
23.120 (How does the State court ensure that active efforts have been made?).....	Involuntary (foster-care placement and termination of parental rights).
23.121 (What are the applicable standards of evidence?).....	Involuntary (foster-care placement and termination of parental rights).
23.122 (Who may serve as a qualified expert witness?).....	Involuntary (foster-care placement and termination of parental rights).
23.123 Reserved.....	N/A.
Voluntary Proceedings:	
23.124 (What actions must a State court undertake in voluntary proceedings?).....	Voluntary.
23.125 (How is consent obtained?).....	Voluntary.
23.126 (What information must a consent document contain?).	Voluntary.
23.127 (How is withdrawal of consent to a foster-care placement achieved?).....	Voluntary.
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?).....	Voluntary.
Dispositions:	
23.129 (When do the placement preferences apply?).....	Involuntary, Voluntary.
23.130 (What placement preferences apply in adoptive placements?).....	Involuntary, Voluntary.
23.131 (What placement preferences apply in foster-care or preadoptive placements?).....	Involuntary, Voluntary.
23.132 (How is a determination of "good cause" to depart from the placement preferences made?).....	Involuntary, Voluntary.
Access:	
23.133 (Should courts allow participation by alternative methods?).....	Emergency, Involuntary.

23.134 (Who has access to reports and records during a proceeding?).....	Emergency, Involuntary.
23.135 Reserved.....	N/A.
Post-Trial Rights & Responsibilities:	
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?).....	Involuntary (if consent given under threat of removal), voluntary.
23.137 (Who can petition to invalidate an action for certain ICWA violations?).....	Emergency (to extent it involved a specified violation), involuntary, voluntary.
23.138 (What are the rights to information about adoptees' Tribal affiliations?).....	Emergency, Involuntary, Voluntary.
23.139 (Must notice be given of a change in an adopted Indian child's status?).....	Involuntary, Voluntary.
Recordkeeping:	
23.140 (What information must States furnish to the Bureau of Indian Affairs?).....	Involuntary, Voluntary.
23.141 (What records must the State maintain?).....	Involuntary, Voluntary.
23.142 (How does the Paperwork Reduction Act affect this subpart?).....	Emergency, Involuntary, Voluntary.
Effective Date:	
23.143 (How does this subpart apply to pending proceedings?)	Emergency, Involuntary, Voluntary.
Severability:	
23.144 (What happens if some portion of part is held to be invalid by a court of competent jurisdiction?).....	Emergency, Involuntary, Voluntary.

Note: For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

End of Document

25 C.F.R. § 23.105

§ 23.105 How do I contact a Tribe under the regulations in this subpart?

Effective: December 12, 2016
Currentness

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its Web site at www.bia.gov.

(b) For a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to be directed to the appropriate office or individual.

(c) If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, DC (see www.bia.gov).

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

End of Document

25 C.F.R. § 23.106

§ 23.106 How does this subpart interact with State and Federal laws?

Effective: December 12, 2016
Currentness

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

25 C.F.R. § 23.107

§ 23.107 How should a State court determine if there is reason to know the child is an Indian child?

Effective: December 12, 2016
Currentness

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by Brackeen v. Bernhardt, 5th Cir.(Tex.), Aug. 09, 2019

Code of Federal Regulations
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Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter D. Human Services
Part 23. Indian Child Welfare Act (Refs & Annos)
Subpart I. Indian Child Welfare Act Proceedings (Refs & Annos)
Pretrial Requirements

25 C.F.R. § 23.108

§ 23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?

Effective: December 12, 2016
Currentness

(a) The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.

(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

(c) The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an “Indian child.” An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

End of Document

25 C.F.R. § 23.109

§ 23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

Effective: December 12, 2016
Currentness

(a) If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe.

(b) If the Indian child meets the definition of "Indian child" through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of "Indian child" through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

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Pretrial Requirements

25 C.F.R. § 23.110

§ 23.110 When must a State court dismiss an action?

Effective: December 12, 2016
Currentness

Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and § 23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:

(a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

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Pretrial Requirements

25 C.F.R. § 23.111

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

Effective: December 12, 2016
Currentness

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental-rights proceeding is an Indian child, the court must ensure that:

(1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and

(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to:

(1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (see § 23.105 for information on how to contact a Tribe);

(2) The child's parents; and

(3) If applicable, the child's Indian custodian.

(c) Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

(d) Notice must be in clear and understandable language and include the following:

(1) The child's name, birthdate, and birthplace;

(2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;

(3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;

(4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);

(5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;

(6) Statements setting out:

(i) The name of the petitioner and the name and address of petitioner's attorney;

(ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.

(iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.

(iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.

(v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.

(vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and § 23.115.

(vii) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.

(viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.

(ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

(e) If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in § 23.112, and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

End of Document

25 C.F.R. § 23.112

§ 23.112 What time limits and extensions apply?

Effective: December 12, 2016
Currentness

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and § 23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows:

(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the child-custody proceeding as provided in 25 U.S.C. 1912(a) and § 23.111; and

(4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and § 23.111 may also be available under State law or pursuant to extensions granted by the court.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

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Pretrial Requirements

25 C.F.R. § 23.113

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

Effective: December 12, 2016
Currentness

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;

(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or

(3) Restoring the child to the parent or Indian custodian.

(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child;

(2) The name and address of the child's parents and Indian custodians, if any;

(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;

(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov);

(5) The residence and the domicile of the Indian child;

(6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;

(7) The Tribal affiliation of the child and of the parents or Indian custodians;

(8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;

(9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and

(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;

(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and

(3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

End of Document

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25 C.F.R. § 23.114

§ 23.114 What are the requirements for determining improper removal?

Effective: December 12, 2016
Currentness

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

Current through December 13, 2019; 84 FR 68320.

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Chapter Listing

Chapter 13.38 RCW

INDIAN CHILD WELFARE ACT

Sections

RCW 13.38.010

Short title.

This chapter shall be known and cited as the "Washington state Indian child welfare act."

[2011 c 309 § 1.]

RCW 13.38.020

Application.

This chapter shall apply in all child custody proceedings as that term is defined in this chapter. Whenever there is a conflict between chapter **13.32A**, 13.34, 13.36, *26.10, or **26.33** RCW, the provisions of this chapter shall apply.

[**2011 c 309 § 2.**]

NOTES:

***Reviser's note:** Chapter **26.10** RCW was repealed in its entirety by 2019 c 437 § 801, effective January 1, 2021.

RCW 13.38.030

Findings and intent.

The legislature finds that the state is committed to protecting the essential tribal relations and best interests of Indian children by promoting practices designed to prevent out-of-home placement of Indian children that is inconsistent with the rights of the parents, the health, safety, or welfare of the children, or the interests of their tribe. Whenever out-of-home placement of an Indian child is necessary in a proceeding subject to the terms of the federal Indian child welfare act and in this chapter, the best interests of the Indian child may be served by placing the Indian child in accordance with the placement priorities expressed in this chapter. The legislature further finds that where placement away from the parent or Indian custodian is necessary for the child's safety, the state is committed to a placement that reflects and honors the unique values of the child's tribal culture and is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, social, and spiritual relationship with the child's tribe and tribal community.

It is the intent of the legislature that this chapter is a step in clarifying existing laws and codifying existing policies and practices. This chapter shall not be construed to reject or eliminate current policies and practices that are not included in its provisions.

The legislature further intends that nothing in this chapter is intended to interfere with policies and procedures that are derived from agreements entered into between the department and a tribe or tribes, as authorized by section 109 of the federal Indian child welfare act. The legislature finds that this chapter specifies the minimum requirements that must be applied in a child custody proceeding and does not prevent the department from providing a higher standard of protection to the right of any Indian child, parent, Indian custodian, or Indian child's tribe.

It is also the legislature's intent that the department's policy manual on Indian child welfare, the tribal-state agreement, and relevant local agreements between individual federally recognized tribes and the department should serve as persuasive guides in the interpretation and implementation of the federal Indian child welfare act, this chapter, and other relevant state laws.

[2011 c 309 § 3.]

RCW 13.38.040

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Active efforts" means the following:

(a) In any foster care placement or termination of parental rights proceeding of an Indian child under chapter 13.34 RCW and this chapter where the department or a supervising agency as defined in *RCW 74.13.020 has a statutory or contractual duty to provide services to, or procure services for, the parent or parents or Indian custodian, or is providing services to a parent or parents or Indian custodian pursuant to a disposition order entered pursuant to RCW 13.34.130, the department or supervising agency shall make timely and diligent efforts to provide or procure such services, including engaging the parent or parents or Indian custodian in reasonably available and culturally appropriate preventive, remedial, or rehabilitative services. This shall include those services offered by tribes and Indian organizations whenever possible. At a minimum "active efforts" shall include:

(i) In any dependency proceeding under chapter 13.34 RCW seeking out-of-home placement of an Indian child in which the department or supervising agency provided voluntary services to the parent, parents, or Indian custodian prior to filing the dependency petition, a showing to the court that the department or supervising agency social workers actively worked with the parent, parents, or Indian custodian to engage them in remedial services and rehabilitation programs to prevent the breakup of the family beyond simply providing referrals to such services.

(ii) In any dependency proceeding under chapter 13.34 RCW, in which the petitioner is seeking the continued out-of-home placement of an Indian child, the department or supervising agency must show to the court that it has actively worked with the parent, parents, or Indian custodian in accordance with existing court orders and the individual service plan to engage them in remedial services and rehabilitative programs to prevent the breakup of the family beyond simply providing referrals to such services.

(iii) In any termination of parental rights proceeding regarding an Indian child under chapter 13.34 RCW in which the department or supervising agency provided services to the parent, parents, or Indian custodian, a showing to the court that the department or supervising agency social workers actively worked with the parent, parents, or Indian custodian to engage them in remedial services and rehabilitation programs ordered by the court or identified in the department or supervising agency's individual service and safety plan beyond simply providing referrals to such services.

(b) In any foster care placement or termination of parental rights proceeding in which the petitioner does not otherwise have a statutory or contractual duty to directly provide services to, or procure services for, the parent or Indian custodian, "active efforts" means a documented, concerted, and good faith effort to facilitate the parent's or Indian custodian's receipt of and engagement in services capable of meeting the criteria set out in (a) of this subsection.

(2) "Best interests of the Indian child" means the use of practices in accordance with the federal Indian child welfare act, this chapter, and other applicable law, that are designed to accomplish the following: (a) Protect the safety, well-being, development, and stability of the Indian child; (b) prevent the unnecessary out-of-home placement of the Indian child; (c) acknowledge the right of Indian tribes to maintain their existence and integrity which will promote the stability and security of their children and families; (d) recognize the value to the Indian child of establishing, developing, or maintaining a political, cultural, social, and spiritual relationship with the Indian child's tribe and tribal community; and (e) in a proceeding under this chapter where out-of-home placement is necessary, to prioritize placement of the Indian child in accordance with the placement preferences of this chapter.

(3) "Child custody proceeding" includes:

(a) "Foster care placement" which means any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home, institution, or with a relative, guardian, conservator, or suitable other person where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(b) "Termination of parental rights" which means any action resulting in the termination of the parent-child relationship;

(c) "Preadoptive placement" which means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights but before or in lieu of adoptive placement; and

(d) "Adoptive placement" which means the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

These terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a dissolution proceeding of custody to one of the parents.

(4) "Court of competent jurisdiction" means a federal court, or a state court that entered an order in a child custody proceeding involving an Indian child, as long as the state court had proper subject matter jurisdiction in accordance with this chapter and the laws of that state, or a tribal court that had or has exclusive or concurrent jurisdiction pursuant to 25 U.S.C. Sec. 1911.

(5) "Department" means the department of children, youth, and families and any of its divisions. "Department" also includes supervising agencies as defined in *RCW **74.13.020** with which the department entered into a contract to provide services, care, placement, case management, contract monitoring, or supervision to children subject to a petition filed under chapter **13.34** or **26.33** RCW.

(6) "Indian" means a person who is a member of an Indian tribe, or who is an Alaska native and a member of a regional corporation as defined in 43 U.S.C. Sec. 1606.

(7) "Indian child" means an unmarried and unemancipated Indian person who is under eighteen years of age and is either: (a) A member of an Indian tribe; or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

(8) "Indian child's family" or "extended family member" means an individual, defined by the law or custom of the child's tribe, as a relative of the child. If the child's tribe does not identify such individuals by law or custom, the term means an adult who is the Indian child's grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, first or second cousin, or stepparent, even following termination of the marriage.

(9) "Indian child's tribe" means a tribe in which an Indian child is a member or eligible for membership.

(10) "Indian custodian" means an Indian person who under tribal law, tribal custom, or state law has legal or temporary physical custody of an Indian child, or to whom the parent has transferred temporary care, physical custody, and control of an Indian child.

(11) "Indian tribe" or "tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary of the interior because of their status as Indians, including any Alaska native village as defined in 43 U.S.C. Sec. 1602(c).

(12) "Member" and "membership" means a determination by an Indian tribe that a person is a member or eligible for membership in that Indian tribe.

(13) "Parent" means a biological parent or parents of an Indian child or a person who has lawfully adopted an Indian child, including adoptions made under tribal law or custom. "Parent" does not include a person whose parentage has not been acknowledged or established under chapter **26.26A** RCW or the applicable laws of other states.

(14) "Secretary of the interior" means the secretary of the United States department of the interior.

(15) "Tribal court" means a court or body vested by an Indian tribe with jurisdiction over child custody proceedings, including but not limited to a federal court of Indian offenses, a court established and operated under the code or custom of an Indian tribe, or an administrative body of an Indian tribe vested with authority over child custody proceedings.

(16) "Tribal customary adoption" means adoption or other process through the tribal custom, traditions, or laws of an Indian child's tribe by which the Indian child is permanently placed with a nonparent and through which the nonparent is vested with the rights, privileges, and obligations of a legal parent. Termination of the parent-child relationship between the Indian child and the biological parent is not required to effect or recognize a tribal customary adoption.

[**2019 c 46 § 5018; 2017 3rd sp.s. c 6 § 311; 2011 c 309 § 4.**]

NOTES:

***Reviser's note:** RCW **74.13.020** was amended by 2018 c 284 § 36, deleting the definition of "supervising agency."

Effective date—2017 3rd sp.s. c 6 §§ 102, 104-115, 201-227, 301-337, 401-419, 501-513, 801-803, and 805-822: See note following RCW **43.216.025**.

Conflict with federal requirements—2017 3rd sp.s. c 6: See RCW **43.216.908**.

RCW 13.38.050

Determination of Indian status.

Any party seeking the foster care placement of, termination of parental rights over, or the adoption of a child must make a good faith effort to determine whether the child is an Indian child. This shall be done by consultation with the child's parent or parents, any person who has custody of the child or with whom the child resides, and any other person that reasonably can be expected to have information regarding the child's possible membership or eligibility for membership in an Indian tribe to determine if the child is an Indian child, and by contacting any Indian tribe in which the child may be a member or may be eligible for membership. Preliminary contacts for the purpose of making a good faith effort to determine a child's possible Indian status , do not constitute legal notice as required by RCW **13.38.070**.

[**2011 c 309 § 5.**]

RCW 13.38.060

Jurisdiction.

(1) An Indian tribe shall have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of that tribe, unless the tribe has consented to the state's concurrent jurisdiction, the tribe has expressly declined to exercise its exclusive jurisdiction, or the state is exercising emergency jurisdiction in strict compliance with RCW **13.38.140**.

(2) If an Indian child is already a ward of a tribal court at the start of the child custody proceeding, the Indian tribe may retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

[**2011 c 309 § 6.**]

RCW 13.38.070

Notice—Procedures—Determination of Indian status.

(1) In any involuntary child custody proceeding seeking the foster care placement of, or the termination of parental rights to, a child in which the petitioning party or the court knows, or has reason to know, that the child is or may be an Indian child as defined in this chapter, the petitioning party shall notify the parent or Indian custodian and the Indian child's tribe or tribes, by certified mail, return receipt requested, and by use of a mandatory Indian child welfare act notice addressed to the tribal agent designated by the Indian child's tribe or tribes for receipt of Indian child welfare act notice, as published by the bureau of Indian affairs in the federal register. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the secretary of the interior by registered mail, return receipt requested, in accordance with the regulations of the bureau of Indian affairs. The secretary of the interior has fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or

Indian custodian and the tribe. The parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for the proceeding.

(2) The determination of the Indian status of a child shall be made as soon as practicable in order to serve the best interests of the Indian child and protect the interests of the child's tribe.

(3)(a) A written determination by an Indian tribe that a child is a member of or eligible for membership in that tribe, or testimony by the tribe attesting to such status shall be conclusive that the child is an Indian child;

(b) A written determination by an Indian tribe that a child is not a member of or eligible for membership in that tribe, or testimony by the tribe attesting to such status shall be conclusive that the child is not a member or eligible for membership in that tribe. Such determinations are presumptively those of the tribe where submitted in the form of a tribal resolution, or signed by or testified to by the person(s) authorized by the tribe's governing body to speak for the tribe, or by the tribe's agent designated to receive notice under the federal Indian child welfare act where such designation is published in the federal register;

(c) Where a tribe provides no response to notice under RCW **13.38.070**, such nonresponse shall not constitute evidence that the child is not a member or eligible for membership. Provided, however, that under such circumstances the party asserting application of the federal Indian child welfare act, or this chapter, will have the burden of proving by a preponderance of the evidence that the child is an Indian child.

(4)(a) Where a child has been determined not to be an Indian child, any party to the proceeding, or an Indian tribe that subsequently determines the child is a member, may, during the pendency of any child custody proceeding to which this chapter or the federal Indian child welfare act applies, move the court for redetermination of the child's Indian status based upon new evidence, redetermination by the child's tribe, or newly conferred federal recognition of the tribe.

(b) This subsection (4) does not affect the rights afforded under 25 U.S.C. Sec. 1914.

[**2017 c 269 § 1; 2011 c 309 § 7.**]

RCW 13.38.080

Transfer of jurisdiction.

(1) In any proceeding for the foster care placement of, or termination of parental rights to, an Indian child who is not domiciled or residing within the reservation of the Indian child's tribe, the court shall, in the absence of good cause to the contrary, transfer the proceeding to the jurisdiction of the Indian child's tribe, upon the motion of any of the following persons:

(a) Either of the child's parents;

(b) The child's Indian custodian;

(c) The child's tribe; or

(d) The child, if age twelve or older.

The transfer shall be subject to declination by the tribe. The tribe shall have seventy-five days to affirmatively respond to a motion or order transferring jurisdiction to the tribal court. A failure of the tribe to respond within the seventy-five day period shall be construed as a declination to accept transfer of the case.

(2) If the child's tribe has not formally intervened, the moving party shall serve a copy of the motion and all supporting documents on the tribal court to which the moving party seeks transfer.

(3) If either of the Indian child's parents objects to transfer of the proceeding to the Indian child's tribe, the court shall not transfer the proceeding.

(4) Following entry of an order transferring jurisdiction to the Indian child's tribe:

(a) Upon receipt of an order from a tribal court accepting jurisdiction, the state court shall dismiss the child custody proceeding without prejudice.

(b) Pending receipt of such tribal court order, the state court may conduct additional hearings and enter orders which strictly comply with the requirements of the federal Indian child welfare act and this chapter. The state court shall not enter a final order in any child custody proceeding, except an order dismissing the proceeding and returning the Indian child to the care of the parent or Indian custodian from whose care the child was removed, while awaiting receipt of a tribal court order accepting jurisdiction, or in the absence of a tribal court order or other formal written declination of jurisdiction.

(c) If the Indian child's tribe declines jurisdiction, the state court shall enter an order vacating the order transferring jurisdiction and proceed with adjudication of the child custody matter in strict compliance with the federal Indian child welfare act, this chapter, and any applicable tribal-state agreement.

[**2011 c 309 § 8.**]

RCW 13.38.090

Right to intervene.

The Indian child, the Indian child's tribe or tribes, and the Indian custodian have the right to intervene at any point in any child custody proceeding involving the Indian child.

[**2011 c 309 § 9.**]

RCW 13.38.100

Full faith and credit.

The state shall give full faith and credit to the public acts, records, judicial proceedings, and judgments of any Indian tribe applicable to Indian child custody proceedings.

[**2011 c 309 § 10.**]

RCW 13.38.110

Right to counsel.

In any child custody proceeding under this chapter in which the court determines the Indian child's parent or Indian custodian is indigent, the parent or Indian custodian shall have the right to court-appointed counsel. The court may, in its discretion, appoint counsel for the Indian child upon a finding that the appointment is in the best interests of the Indian child.

[**2011 c 309 § 11.**]

RCW 13.38.120

Right to examine reports, other documents.

Each party to a child custody proceeding involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to the proceeding may be based.

[**2011 c 309 § 12.**]

RCW 13.38.130

Involuntary foster care placement, termination of parental rights—Determination—Qualified expert witness.

(1) A party seeking to effect an involuntary foster care placement of or the involuntary termination of parental rights to an Indian child shall satisfy the court 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.

(2) No involuntary foster care placement may be ordered in a child custody proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. For purposes of this subsection, any harm that may result from interfering with the bond or attachment between the foster parent and the child shall not be the sole basis or primary reason for continuing the child in foster care.

(3) No involuntary termination of parental rights may be ordered in a child custody proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. For the purposes of this subsection, any harm that may result from interfering with the bond or attachment that may have formed between the child and a foster care provider shall not be the sole basis or primary reason for termination of parental rights over an Indian child.

(4)(a) For purposes of this section, "qualified expert witness" means a person who provides testimony in a proceeding under this chapter to assist a court in the determination of whether the continued custody of the child by, or return of the child to, the parent, parents, or Indian custodian, is likely to result in serious emotional or physical damage to the child. In any

proceeding in which the child's Indian tribe has intervened pursuant to RCW **13.38.090** or, if the department is the petitioner and the Indian child's tribe has entered into a local agreement with the department for the provision of child welfare services, the petitioner shall contact the tribe and ask the tribe to identify a tribal member or other person of the tribe's choice who is recognized by the tribe as knowledgeable regarding tribal customs as they pertain to family organization or child rearing practices. The petitioner shall notify the child's Indian tribe of the need to provide a "qualified expert witness" at least twenty days prior to any evidentiary hearing in which the testimony of the witness will be required. If the child's Indian tribe does not identify a "qualified expert witness" for the proceeding on a timely basis, the petitioner may proceed to identify such a witness pursuant to (b) of this subsection.

(b) In any proceeding in which the child's Indian tribe has not intervened or entered into a local agreement with the department for the provision of child welfare services, or a child's Indian tribe has not responded to a request to identify a "qualified expert witness" for the proceeding on a timely basis, the petitioner shall provide a "qualified expert witness" who meets one or more of the following requirements in descending order of preference:

(i) A member of the child's Indian tribe or other person of the tribe's choice who is recognized by the tribe as knowledgeable regarding tribal customs as they pertain to family organization or child rearing practices for this purpose;

(ii) Any person 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;

(iii) Any person having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and child rearing practices in Indian tribes with cultural similarities to the Indian child's tribe; or

(iv) A professional person having substantial education and experience in the area of his or her specialty.

(c) When the petitioner is the department or a supervising agency, the currently assigned department or agency caseworker or the caseworker's supervisor may not testify as a "qualified expert witness" for purposes of this section. Nothing in this section shall bar the assigned department or agency caseworker or the caseworker's supervisor from testifying as an expert witness for other purposes in a proceeding under this chapter. Nothing in this section shall bar other department or supervising agency employees with appropriate expert qualifications or experience from testifying as a "qualified expert witness" in a proceeding under this chapter. Nothing in this section shall bar the petitioner or any other party in a proceeding under this chapter from providing additional witnesses or expert testimony, subject to the approval of the court, on any issue before the court including the determination of whether the continued custody of the child by, or return of the child to, the parent, parents, or Indian custodian, is likely to result in serious emotional or physical damage to the child.

[**2011 c 309 § 13.**]

RCW 13.38.140

Emergency removal or placement of Indian child—Notice.

(1) Notwithstanding any other provision of federal or state law, nothing shall be construed to prevent the department or law enforcement from the emergency removal of an Indian child who is a resident of or is domiciled on an Indian reservation, but is temporarily located off the reservation, from his or her parent or Indian custodian or the emergency placement of such child in a foster home, under applicable state law, to prevent imminent physical damage or harm to the child.

(2) The department or law enforcement agency shall ensure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of the federal Indian child welfare act and this chapter to transfer the child to the jurisdiction of the appropriate Indian tribe or restore the child to the child's parent or Indian custodian, if appropriate.

(3) When the nature of the emergency allows, the department must notify the child's tribe before the removal has occurred. If prior notification is not possible, the department shall notify the child's tribe by the quickest means possible. The notice must contain the basis for the Indian child's removal, the time, date, and place of the initial hearing, and the tribe's right to intervene and participate in the proceeding. This notice shall not constitute the notice required under RCW **13.38.070** for purposes of subsequent dependency, termination of parental rights, or adoption proceedings.

[**2011 c 309 § 14.**]

RCW 13.38.150

Consent to foster care placement or termination of parental rights—Withdrawal.

(1) If an Indian child's parent or Indian custodian voluntarily consents to a foster care placement of the child or to termination of parental rights, the consent is not valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court must also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent for release of custody given prior to, or within ten days after, the birth of the Indian child shall not be valid.

(2) An Indian child's parent or Indian custodian may withdraw consent to a voluntary foster care placement at any time and, upon the withdrawal of consent, the child shall be returned to the parent or Indian custodian.

(3) In a voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of an order terminating parental rights or a final decree of adoption, and the child shall be returned to the parent.

(4) After the entry of a final decree of adoption of an Indian child, the parent may withdraw consent to the adoption upon the grounds that consent was obtained through fraud or duress. Upon a finding that such consent was obtained through fraud or duress the court

shall vacate the decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under this section unless otherwise allowed by state law.

[**2011 c 309 § 15.**]

RCW 13.38.160

Improper removal of Indian child.

If a petitioner in a child custody proceeding under this chapter has improperly removed the child from the custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over the petition and shall immediately return the child to the child's parent or Indian custodian unless returning the child to the parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

[**2011 c 309 § 16.**]

RCW 13.38.170

Removal of Indian child from adoptive or foster care placement.

(1) If a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, the biological parent or prior Indian custodian may petition to have the child returned to their custody and the court shall grant the request unless there is a showing by clear and convincing evidence that return of custody to the biological parent or prior Indian custodian is not in the best interests of the Indian child.

(2) If an Indian child is removed from a foster care placement or a preadoptive or adoptive home for the purpose of further foster care, preadoptive, or adoptive placement, the placement shall be in accordance with this chapter, except when an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

[**2011 c 309 § 17.**]

RCW 13.38.180

Placement preferences.

(1) When an emergency removal, foster care placement, or preadoptive placement of an Indian child is necessary, a good faith effort will be made to place the Indian child:

(a) In the least restrictive setting;

(b) Which most approximates a family situation;

(c) Which is in reasonable proximity to the Indian child's home; and

(d) In which the Indian child's special needs, if any, will be met.

(2) In any foster care or preadoptive placement, a preference shall be given, in absence of good cause to the contrary, to the child's placement with one of the following:

(a) A member of the child's extended family;

(b) A foster home licensed, approved, or specified by the child's tribe;

(c) An Indian foster home licensed or approved by an authorized non-Indian licensing authority;

(d) A child foster care agency approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs;

(e) A non-Indian child foster care agency approved by the child's tribe;

(f) A non-Indian family that is committed to:

(i) Promoting and allowing appropriate extended family visitation;

(ii) Establishing, maintaining, and strengthening the child's relationship with his or her tribe or tribes; and

(iii) Participating in the cultural and ceremonial events of the child's tribe.

(3) In the absence of good cause to the contrary, any adoptive or other permanent placement of an Indian child, preference shall be given to a placement with one of the following, in descending priority order:

(a) Extended family members;

(b) An Indian family of the same tribe as the child;

(c) An Indian family that is of a similar culture to the child's tribe;

(d) Another Indian family; or

(e) Any other family which can provide a suitable home for an Indian child, such suitability to be determined in consultation with the Indian child's tribe or, in proceedings under chapter **13.34** RCW where the Indian child is in the custody of the department or a supervising agency and the Indian child's tribe has not intervened or participated, the local Indian child welfare advisory committee.

(4) Notwithstanding the placement preferences listed in subsections (2) and (3) of this section, if a different order of placement preference is established by the child's tribe, the court or agency effecting the placement shall follow the order of preference established by the tribe so long as the placement is in the least restrictive setting appropriate to the particular needs of the child.

(5) Where appropriate, the preference of the Indian child or his or her parent shall be considered by the court. Where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(6) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family members of an Indian child reside, or with which the parent or extended family members maintain social and cultural ties.

(7) Nothing in this section shall prevent the department or the court from placing the child with a parent to effectuate a permanent plan regardless of the parent's relationship to the child's tribe.

[**2011 c 309 § 18.**]

RCW 13.38.190

Review of cases—Standards and procedures—Compliance.

(1) The department, in consultation with Indian tribes, shall establish standards and procedures for the department's review of cases subject to this chapter and methods for monitoring the department's compliance with provisions of the federal Indian child welfare act and this chapter. These standards and procedures and the monitoring methods shall also be integrated into the department's child welfare contracting and contract monitoring process.

(2) Nothing in this chapter shall affect, impair, or limit rights or remedies provided to any party under the federal Indian child welfare act, 25 U.S.C. Sec. 1914.

[2011 c 309 § 19.]

KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

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