Chapter 20: "Child Custody Proceedings" Involving Indian Children

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In this chapter . . .

This chapter discusses the Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., as it applies to proceedings involving involuntary or voluntary foster care placement and termination of parental rights. Through ICWA, Congress has expressed a strong preference for keeping Indian children with their families and deferring to tribes on matters of child custody and placement. This preference is expressed in ICWA's notice, transfer, intervention, and heightened evidentiary requirements.

The ICWA also applies to delinquency, guardianship, and adoption proceedings. For discussion of these types of proceedings, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003); *Michigan Probate Benchbook* (ICLE, 2005), Chapter 6; and Warner, *Adoption Proceedings Benchbook* (MJI, 2003), Chapter 11.

20.1 General Requirements of the Indian Child Welfare Act

The Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., mandates that state courts adhere to certain minimum procedural requirements before removing Indian children from their homes. 25 USC 1902. Because ICWA is federal law, it preempts conflicting state law.

*These higher standards are noted in this chapter when relevant.

However, several of the procedural requirements of ICWA are less stringent than statutory and court rule requirements in Michigan. When applicable state law contains higher standards of protection of the rights of an Indian child's parent or Indian custodian, a court must apply those higher standards. See 25 USC 1921.*

Several procedures required under ICWA overlap with the procedures generally applicable to child protective proceedings. This chapter discusses procedures unique to ICWA. The following procedures are discussed elsewhere in this benchbook:

*See Sections 7.4–7.5.

- Both respondent and child have the right to court-appointed counsel in child protective proceedings in Michigan. See 25 USC 1912(b).*

*See Section 22.1–22.2.

- All parties to a child protective proceeding have the right to examine all reports and documents filed with the court. 25 USC 1912(c).*

*See Section 8.2.

- Children accepted for foster care or preadoptive placement must be placed in the least restrictive setting that most approximates a family and in which the child's special needs, if any, may be met. The child must also be placed within reasonable proximity to his or her home, again taking into account any special needs of the child. 25 USC 1915(b).*

The requirements of the Adoption & Safe Families Act and its implementing regulations apply to cases under ICWA. Those requirements are discussed throughout this Benchbook.

20.2 Purpose of the Indian Child Welfare Act

The purpose of ICWA is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards for the removal of Indian children from their families and their placement in foster or adoptive homes that reflect the unique values of Indian culture, and to provide assistance to Indian tribes in the operation of child and family service programs. 25 USC 1902.

The ICWA does not violate the Equal Protection rights of non-Indians. *In re Miller,* 182 Mich App 70, 74–76 (1990).

20.3 Determining Whether a Child Is an "Indian Child"

The ICWA applies to "child custody proceedings" involving an "Indian child." "Child custody proceedings" include actions involving foster care, guardianship, preadoptive placements, and termination of parental rights. 25 USC 1903(1)(*i*)–(*iii*). MCR 3.980(A) provides that if an "Indian child," as defined in ICWA, is the subject of a child custody proceeding, the procedures in ICWA and MCR 3.980 must be used.

"Indian child" defined. "Indian child" is defined in 25 USC 1903(4) as "any unmarried person who is under age [18] 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[.]" The tribe's determination of its membership is conclusive. *Santa Clara Pueblo v Martinez,* 436 US 49, 72 (1978).

Tribes set their own eligibility requirements, and there is no specific degree of Indian ancestry that qualifies a child for tribal membership. In *In re Elliott,* 218 Mich App 196, 201–06 (1996), the Court of Appeals held that a Michigan court may not make an independent determination as to whether the child is being removed from an "existing Indian family" in deciding whether ICWA applies. The trial court ruled that the issue of the child's membership or eligibility for membership in an Indian tribe need not be addressed since Native American culture was not a "consistent component" of the child's or mother's life. *Id.* at 200. The Court of Appeals reversed, holding that a judicially created "existing Indian family" exception to ICWA violated the plain terms of the federal statute and failed to adequately protect the interests of the Indian tribes in involuntary custody proceedings. *Id.* at 204–06.

A parent's enrollment in an Indian tribe is not a prerequisite to application of ICWA. *In re IEM*, 233 Mich App 438, 445 (1999), and *In re NEGP*, 245 Mich App 126, 133, (2001), declining to follow *In re Shawboose,* 175 Mich App 637, 639–40 (1989) (ICWA was inapplicable because respondent was not enrolled as a member of any tribe).

"Indian tribe" defined. An "Indian tribe" means "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary [of the Interior] because of their status as Indians[.]" 25 USC 1903(8). The court determines whether a tribe is an "Indian tribe." *In re NEGP,* 245 Mich App 126, 133-34 (2001).

In *In re Fried*, 266 Mich App 535, 540 (2005), the respondent claimed that the trial court erred in failing to apply ICWA to the proceedings because the child was eligible for membership in the "Lost Cherokee Nation." The Court of Appeals held that "because the tribe to which respondent belongs is not a tribe recognized as eligible for services provided to Indians by the Secretary of the Interior, it is not an 'Indian tribe' within the meaning of the ICWA. 25 USC 1903(8), (11)." *Fried, supra.*

*See Sections 5.1–5.2 for discussion of establishing paternity.

"Parent" defined. A "parent" is "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[.]" 25 USC 1903(9). Therefore, ICWA does not apply to an unwed father when paternity has not been acknowledged or established.*

Department of Human Services's (DHS) responsibility. The DHS *Services Manual* contains detailed procedures to be followed by Child Protective Services and Foster Care workers in identifying and determining an Indian child's heritage. The *Services Manual* also contains procedures regarding other ICWA requirements. Items CFF 742 and 744 are attached as an appendix to this chapter.

Petitioner's responsibility. A petitioner must include in the petition a child's membership or eligibility for membership in an American Indian tribe or band. If this information is not known, the petitioner must state in the petition that it is unknown. MCR 3.961(B)(5) and MCL 712A.11(4). If the child is a member or eligible for membership in more than one tribe, the child's tribe should be identified as the one with which he or she has the more significant contacts. 25 USC 1903(5).

Court's responsibility. At the preliminary hearing or the first hearing on the record if there is no preliminary hearing, the court must inquire regarding the applicability of ICWA. MCR 3.965(B)(9) states as follows:

> "The court must inquire if the child or either parent is a member of any American Indian tribe or band. If the child is a member, or if a parent is a tribal member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe, notify the tribe or band, and follow the procedures set forth in MCR 3.980."

The requirement that a court inquire regarding tribal membership supersedes a portion of 25 USC 1912(a), which states that a court must know or have reason to know that an Indian child is involved in the proceeding before the notice requirements are applicable. See 25 USC 1921 (when applicable state law contains higher standards than ICWA, a court must apply those higher standards) and *In re Elliott,* 218 Mich App 196, 208–09 (1996). However, the requirement in MCR 3.965(B)(9) that a court

determine the tribe's identity and notify the tribe or band is superseded by another portion of 25 USC 1912(a) that requires "the party seeking . . . foster care placement or termination of parental rights" to fulfill those requirements. See also MCR 3.980(A)(2), which requires a court "to ensure that the petitioner has given notice" as required by ICWA.

Under any of the following circumstances, a court or DHS has "reason to believe" that a child is an Indian child:

- Any party to the case, Indian tribe, Indian organization, or public or private agency informs the court that the child is an Indian child.
- Any public or state-licensed agency involved in child protection services or family support has discovered information that suggests that the child is an Indian child.
- The child who is the subject of the proceedings gives the court reason to believe he or she is an Indian child.
- The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.
- An officer of the court involved in the proceedings has knowledge that the child may be an Indian child.
- Any other circumstances that would lead the court to believe that the child is an Indian child.

Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, B.1(c) (1979).*

*The Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, is attached as an appendix to this chapter. It provides valuable guidance in applying ICWA.

20.4 Notice of Proceedings to Parent and Tribe or Secretary of Interior

Once the court or DHS knows or has reason to know that an Indian child is involved in an involuntary proceeding, the notice requirements of ICWA apply. 25 USC 1912(a).

> **Note:** The ICWA mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary proceedings. However, ICWA still applies to voluntary child custody proceedings involving an Indian child, which include consent to termination of parental rights or voluntary foster care placement. See Section 20.13, below for information on voluntary proceedings.

25 USC 1912(a) states as follows:

> "(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."

MCR 3.980(A)(2) states:

> "If the child does not reside on a reservation,* the court shall ensure that the petitioner has given notice of the proceedings to the child's tribe and the child's parents or Indian custodian and, if the tribe is unknown, to the Secretary of the Interior."

*If an Indian child resides on a reservation, the case must be transferred to the appropriate tribal court. See Section 20.5(A), below.

Notice of the proceedings must indicate the parties' rights to intervene and must be sent to all of the following:

- the child's parents,
- the child's Indian custodian, if any, and
- any tribes that may be the Indian child's tribe.

25 CFR 23.11(a) and Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, B.5(b) (1979). Although 25 USC 1912(a) requires that notice be sent to a parent *or* Indian custodian, state law requires notice to a noncustodial parent. See Section 5.1.

An "Indian custodian" is defined in 25 USC 1903(6) as "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[.]"

If the identity or location of the child's parent or Indian custodian and the tribe cannot be determined, then notice must be given to the following:

- the Secretary of the Interior, and
- the Area Director of the Bureau of Indian Affairs. (Notices for the Area Director for Michigan must be sent to: Minneapolis Area Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241. 25 CFR 23.11(c)(2).)

25 CFR 23.11(a) and Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, B.5(b) (1979).

A required notice must include the following information:

- The name of the Indian child and the child's date and place of birth.
- Name of the Indian tribe or tribes in which the child is enrolled or may be eligible for enrollment.
- All names known and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents, and great grandparents or Indian custodians, including maiden, married, and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers; and/or other identifying information.
- A copy of the petition, complaint, or other document by which the proceeding was initiated.
- The name of the petitioner and the name and address of the petitioner's attorney.
- A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.
- A statement that if the parents or Indian custodians are unable to afford counsel, and where a state court determines indigency, counsel will be appointed to represent them.
- A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, 20 days (or such additional time as may be permitted under state law) to prepare for the proceedings.
- The location, mailing address, and telephone number of the court and all parties notified of the pending action.

- A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court, absent an objection by either parent and provided that the tribal court does not decline jurisdiction.
- The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.
- A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, all parties notified must keep confidential the information contained in the notice concerning the particular proceeding. The notices must not be revealed to anyone who does not need the information in order to exercise the tribes' rights under the ICWA.

25 CFR 23.11(a)–(e) and Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, B.5(b) (1979).

If notice to the Secretary of the Interior is required, after receiving the notice, the Secretary must make "reasonable documented efforts to locate and notify the child's tribe and the child's Indian parents or Indian custodians." 25 CFR 23.11(f). The Secretary has 15 days after receiving the notice to notify the child's tribe and parents or Indian custodian. If within the 15-day period the Secretary is unable to locate the parents or Indian custodian, the Secretary must notify the court prior to the initiation of the proceedings regarding the amount of additional time, if any, necessary to complete the search. 25 CFR 23.11(f).

Case law. The following cases discuss notice requirements under ICWA.

- *In re IEM,* 233 Mich App 438, 444–47 (1999)

At a preliminary hearing, the referee received inconclusive answers from the respondent-mother to his questions concerning her tribal membership. The referee then ordered the FIA to investigate the matter. On appeal, the respondent argued that the FIA failed to satisfy the notice requirements of ICWA and state law, and the Court of Appeals agreed. Respondent's answers, though inconclusive, were sufficient to require the court to ensure that the FIA provided proper notice. The FIA merely sent a request for a determination of the child's Indian heritage to the Michigan Indian Child Welfare Agency (MICWA) and called one local tribe. The Court of Appeals noted the importance of the notice requirement in making a definitive determination of tribal membership. Only after the petitioner has complied with the notice requirements and a tribe fails to respond or intervene does the burden shift to the respondent to show that ICWA applies.

- *In re TM (After Remand)*, 245 Mich App 181, 187–91 (2001)

The petitioner filed an amended petition identifying a woman other than respondent as TM's mother. Respondent-mother appeared on the day set for trial and indicated that she was TM's mother. The court delayed the trial but did not inquire as to respondent-mother's or TM's Native American heritage. At trial, "[r]espondent testified that she was of Native American heritage, but was not affiliated with or a member of any tribe. She thought that she was from a Cherokee tribe, probably from Mississippi, and believed that she was more than one-quarter Native American Indian." *Id.* at 184–85. After initially concluding that ICWA did not apply, the trial court, at a subsequent hearing, instructed the petitioner to notify the Cherokee tribe. After respondent-mother's parental rights were terminated, an appeal was filed, and the Court of Appeals remanded the case to the trial court to expand the record as to what efforts were made to notify the appropriate tribe.

On appeal after remand, respondent-mother contended that the petitioner failed to send notice by registered mail, return receipt requested, to all tribes in which she may be able to claim membership. The Court of Appeals first stated that respondent-mother's testimony at trial was sufficient to trigger the notice requirements of 25 USC 1912(a). Although the record did not show that notice was sent to any tribe or the appropriate Bureau of Indian Affairs office by registered mail, it did show that all three federally recognized Cherokee tribes and the appropriate Bureau of Indian Affairs office received actual notice of the proceeding, and that no tribe elected to intervene in the proceeding. Thus, the order terminating respondent-mother's parental rights was not set aside for failure to comply with ICWA. The Court of Appeals concluded that "because actual notice to the Cherokee tribes and the [Bureau of Indian Affairs] was demonstrated in this case, petitioner's substantial compliance with the notice requirements was sufficient to satisfy the ICWA." *TM, supra* at 191.

- *In re NEGP*, 245 Mich App 126, 129–32 (2001)

During the second day of a termination of parental rights hearing, respondent-father's attorney told the trial court that respondent-father was possibly affiliated with the Anishinabee tribe. The trial court directed the petitioner to notify the tribe but continued taking proofs. Petitioner submitted a request to the Secretary of Interior for a search of the child's possible Native American ancestry. The Secretary of Interior responded that no information was available regarding the request. The Court of Appeals held that the trial court erred by failing to conclusively determine whether the child was an Indian child before the close of proofs. There was no record evidence that the petitioner sent the tribe the required notice, and the trial court did not comply with 25 USC 1912(a) when it continued with the termination hearing. The Court of Appeals distinguished *IEM, supra*, where notice to the Secretary of the Interior alone was held to satisfy 25 USC 1912(a) because the child's Native American heritage was unspecified in that case. Here, a tribe was identified; therefore, notice must be sent to that

tribe. The Court of Appeals remanded the case to the trial court for further proceedings.

20.5 Transfer of Case to Tribal Court

A. Mandatory Transfer

If an Indian child resides on a reservation or is under tribal court jurisdiction at the time of referral to state court, the matter must be transferred to the tribal court having jurisdiction. 25 USC 1911(a) and MCR 3.980(A)(1). Indian tribes have exclusive jurisdiction over child custody proceedings involving an Indian child who resides or is domiciled within the reservation of the tribe. 25 USC 1911(a).

In *Mississippi Band of Choctaw Indians v Holyfield,* 490 US 30 (1989), the United States Supreme Court addressed the issue of an Indian child's domicile. On December 29, 1985, twin babies were born out of wedlock to parents who were both enrolled members of the Mississippi Band of Choctaw Indians. The mother and father resided and were domiciled on the Choctaw Indian reservation. The mother traveled 200 miles from the reservation, gave birth to both children, and then signed a consent to adoption. The father of the children also traveled 200 miles from the reservation and signed a consent to adoption. 490 US at 39–40. Adoptive parents then filed a petition for adoption in a court 200 miles from the reservation, and on January 28, 1986, the court entered a final order of adoption. Two months after the final order, the Mississippi Band of Choctaw Indian Tribe (Tribe) filed a motion to vacate the adoption decree on the ground that pursuant to the ICWA exclusive jurisdiction was vested in the tribal court. The trial court denied the motion and indicated that the children had never been on, resided in, or been domiciled on the Indian reservation, and, therefore, exclusive jurisdiction did not rest with the Tribe. The Supreme Court of Mississippi affirmed the trial court's ruling. 490 US at 40-41. The United States Supreme Court overturned the Supreme Court of Mississippi and held that the children were domiciled on the reservation. The Court stated the following:

> "For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there. One acquires a 'domicile of origin' at birth, and that domicile continues until a new one (a 'domicile of choice') is acquired. Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents. In the case of an illegitimate child, that has traditionally meant the domicile of its mother. . . . It is undisputed in this case that the domicile of the mother (as well as the father) has been, at all relevant times, on the Choctaw Reservation.

> Thus, it is clear that at their birth the twin babies were also domiciled on the reservation, even though they themselves had never been there." [Internal citations omitted.] 490 US at 48-49.

The Supreme Court remanded the case and directed that the custody of the children should be determined by the Choctaw tribal court. 490 US at 50.

If the child is a ward of a tribal court, the tribal court retains exclusive jurisdiction over the child notwithstanding the residence or domicile of the child. 25 USC 1911(a).

If the case is transferred, the state court shall provide the tribal court with all available information on the case. Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, C.4(b) (1979).

B. Non-Mandatory Transfer

If the tribe exercises its right to appear in the proceeding and requests that the proceeding be transferred to tribal court, the court must transfer the case to the tribal court unless either parent objects, the court finds good cause not to transfer the case to tribal court jurisdiction, or the tribal court declines jurisdiction. 25 USC 1911(b).

MCR 3.980(A)(3) states:

> "If the tribe exercises its right to appear in the proceeding and requests that the proceeding be transferred to tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case."

Determining "good cause." "Good cause" exists if the Indian child's tribe does not have a tribal court, as defined by ICWA, to accept the transfer. Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, C.3 (1979). "Good cause" also may exist if one of the following circumstances is found:

> "(*i*) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
>
> "(*ii*) The Indian child is over twelve years of age and objects to the transfer.

> "(*iii*) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
>
> "(*iv*) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe." *Id*.

The socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination of "good cause." *Id*.

The burden of establishing "good cause" is on the party opposing the motion. *Id*.

Declination of transfer. As indicated above, a tribal court may decline the transfer of jurisdiction. 25 USC 1911(b). The Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, C.4(b)–(c) (1979) provides the following guidelines for declination of a transfer:

> "(b) Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.
>
> "(c) Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties."

If the tribal court does not respond to the notice of a transfer petition within the time period provided on the notice, the tribal court is assumed to have accepted the transfer. Affirmative action is required on the part of the tribal court if it wishes to decline jurisdiction. Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584, C.4 Commentary (1979).

20.6 Additional Time Required to Prepare for Proceedings

If notice is given to the Secretary of the Interior because the child's tribe or band is unknown, the Secretary must be given 15 days after receipt of notice to notify the child's parent or Indian custodian and tribe. No foster care placement or termination of parental rights proceedings may be held until at least ten days after receipt of notice by the child's parent or Indian custodian and tribe. In addition, upon request, the parent or Indian custodian or tribe must be given up to 20 additional days to prepare for the proceedings. 25 USC 1912(a).* If proceedings have already begun and the court becomes aware of the child's possible Native American ancestry, the proceedings must stop until proper notice is given to the tribe. *In re NEGP*, 245 Mich App 126, 130 (2001).

*A court may grant an adjournment or continuance for good cause. See Section 5.12.

20.7 Custodian's and Tribe's Rights to Intervene in Proceedings

The child's Indian custodian and the tribe may intervene at any point in the proceedings. 25 USC 1911(c).

20.8 Emergency Removal of Indian Child From Home

An Indian child who resides or is domiciled on a reservation but is temporarily located off the reservation may be taken into temporary protective custody if he or she is subject to imminent physical damage or harm. 25 USC 1922 states:

> "Nothing in this title [25 USCS §§ 1911-1923] 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 title [25 USCS §§ 1911-1923], 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."

*See Chapter 3.

The applicable court rule, MCR 3.980, mirrors the requirements of the federal statute and sets forth the standard for emergency removal of an Indian child who does not reside or is not domiciled on a reservation. MCR 3.980(B) states:

> **"(B) Emergency Removal.**
>
> "(1) An Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, must not be removed from a parent or Indian custodian unless the removal is to prevent imminent physical harm to the child.
>
> "(2) An Indian child not residing or domiciled on a reservation may be temporarily removed if reasonable efforts have been made to prevent removal of the child, and continued placement with the parent or Indian custodian would be contrary to the welfare of the child."*

*These standards are applied to non-Indian children. See Sections 8.1(B) and 8.10.

20.9 Requirements for Involuntary Foster Care Placements

The ICWA contains heightened evidentiary requirements for placing Indian children in foster care. 25 USC 1912(e) states:

> "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."

*See Section 20.12 for the requisite qualifications of expert witnesses.

The applicable court rule, MCR 3.980, mirrors these requirements and adds time requirements for hearings to review an emergency removal or determine a foster care placement. MCR 3.980(C) states, in part:

> **"(C) Removal Hearing.**
>
> "(1) *After Emergency Removal.* If an Indian child is removed under subrule (B)(1) or (2), a removal hearing must be completed within 28 days of removal from the parent or Indian custodian.
>
> "(2) *Non-Emergency Removal.* Except in cases of emergency removal under subrules (B)(1) or (2), a

> removal hearing must be completed before an Indian child may be removed from the parent or Indian custodian.
>
> "(3) *Evidence.* An Indian child must not be removed from a parent or Indian custodian, or, for an Indian child removed under subrules (B)(1) or (2), remain removed from a parent or Indian custodian pending further proceedings, without clear and convincing evidence, including the testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe, that services designed to prevent the break up of the Indian family have been furnished to the family and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical injury to the child.
>
> "(4) A removal hearing may be combined with any other hearing."

Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, D.3(c) (1979), states the following regarding the required showing of "serious emotional or physical injury":

> "Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result."

"Active efforts" requirement. A provision of ICWA requires the petitioner to 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. 25 USC 1912(d). See *In re Kreft,* 148 Mich App 682, 693–95 (1986) (requirements met by provision of parenting assistance, infant nutrition information, and housing assistance).

20.10 Preferred Placements of Indian Children

The ICWA establishes placement preferences that a court may be required to follow. 25 USC 1915(b)–(e) states as follows:

> "(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."

"Extended family" is defined by law or custom of the child's tribe or, if there is no applicable law or custom, as a person 18 years of age or older who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or step-parent. 25 USC 1903(2).

MCR 3.980(C)(5) establishes a substantially similar order of preference:

> "(5) The Indian child, if removed from home, must be placed, in descending order of preference, with:
>
> > (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 family licensed or approved by a non-Indian licensing authority,
> >
> > (d) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.
>
> "The court may order another placement for good cause shown."

"Good cause" for ordering a different placement. Pursuant to the Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, F.3(a) (1979), a determination of "good cause" not to follow the order of preference set out in 25 USC 1915(b)(*i*)–(*iv*) must be based on one or more of the following considerations:

> "(*i*) The request of the biological parents or the child when the child is of sufficient age.

> "(*ii*) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
>
> "(*iii*) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria."

The burden of establishing "good cause" not to follow the order of preference provided above is on the party requesting the deviation. Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, F.3(b) (1979).

20.11 Required Procedures to Involuntarily Terminate Parental Rights

The ICWA contains heightened evidentiary requirements to terminate parental rights to an Indian child. 25 USC 1912(f) states as follows:

> "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."

Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, D.3 (1979) states:

> "Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result."

In addition to meeting the requirements of the ICWA, the petitioner must establish a statutory ground for termination pursuant to state law. Therefore,

in order to involuntarily terminate the parental rights to an Indian child, the court must find the following:

- evidence beyond a reasonable doubt that the child would suffer serious emotional or physical damage if returned to the custody of the parent, and
- clear and convincing evidence that a statutory basis for the termination of parental rights has been proven. *In re Elliott,* 218 Mich App 196, 209–10 (1996). See Sections 18.18–18.31 for statutory grounds for termination of parental rights.

"Proceedings for termination of parental rights involving an Indian child, as defined by 25 USC 1901 et seq., are governed by MCR 3.980 in addition to this rule." MCR 3.977(A)(1). MCR 3.980(D) states as follows:

> "(D) *Termination of Parental Rights.* In addition to the required findings under MCR 3.977, the parental rights of a parent of an Indian child must not be terminated unless there is also evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.

"Active efforts" requirement. A provision of ICWA requires the petitioner to 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. 25 USC 1912(d). See *In re Kreft,* 148 Mich App 682, 693–95 (1986) (requirements met by provision of parenting assistance, infant nutrition information, and housing assistance).

In *In re SD,* 236 Mich App 240 (1999), the trial court terminated the parental rights of the respondent-father to his three children based on his imprisonment for the sexual assault of two of his children. Respondent-father is a Caucasian, and the children's mother is a member of the Sault Ste. Marie Tribe of Chippewa Indians. At the time of the termination hearing, respondent-father and the children's mother had separated and filed for divorce, and the children resided with their mother. *Id.* at 241–42. On appeal, respondent-father argued that the FIA was required by 25 USC 1912(d) to make active efforts to reunite the family before his parental rights could be terminated. No reunification services were provided. The Court of Appeals held that a court may terminate parental rights without finding that active efforts were made to prevent the breakup of an "Indian family" if termination would not actually result in the breakup of an "Indian family." *SD, supra* at 244. The Court of Appeals concluded that there was no disruption of an "Indian family" in this case because respondent-father and

the children's mother had separated and filed for divorce before respondent-father's rights were terminated, respondent-father was imprisoned, and the children lived with their mother, the only parent with Indian heritage and the parent through whom the children had ties to the tribe. *Id.* at 244–45.

20.12 Expert Witness Testimony

Number of expert witnesses required. Two provisions of ICWA, 25 USC 1912(e) and (f), require testimony from "qualified expert witnesses" before a court may order foster care placement or termination of parental rights. MCR 3.980(C)(3) requires the testimony of "at least one expert witness" before a court may order foster care placement of an Indian child, but MCR 3.980(D) requires the testimony of "qualified expert witnesses" before a court may order termination of parental rights. Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings,* 44 Federal Register 67584, D.3 (1979), provides that in either case, testimony by "one or more" expert witnesses is required. The Court of Appeals has concluded that only one qualified expert witness need testify. *In re Elliott,* 218 Mich App 196, 207 (1996), and *In re Kreft,* 148 Mich App 682, 690 (1986).

Qualifications. For purposes of ICWA, "qualified expert witness" means:

- a member of the tribe recognized by the tribal community as knowledgeable in tribal customs related to family organizations and child-rearing practices;
- a lay expert with substantial experience with delivery of services to Indian families and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the tribe; or
- a professional with substantial education and experience in his or her field.

Elliott, supra at 206-08, and *Kreft*, *supra* at 689-93. If cultural bias is not implicated in the case, the expert witness need not have special knowledge of Indian culture, but the witness must have more specialized knowledge than the normal social worker. *Elliott, supra* at 207.

20.13 Requirements for Voluntary Foster Care Placement or Consent to Termination of Parental Rights

To obtain a valid consent from the child's parent or custodian to voluntary foster care placement* or voluntary termination of parental rights, the following procedures must be followed:

*These requirements apply to guardianships. See Sections 4.12 and 13.9(D).

- the consent must be executed in writing during a recorded proceeding before a judge of a court of competent jurisdiction;
- the presiding judge must certify that the terms and consequences of the consent were fully explained in detail and were fully understood by the child's parent or custodian;
- the judge must certify either that the parent or custodian understood the explanation in English or that it was translated into a language that the parent or custodian understood; and
- a valid consent may not be given prior to the birth of the Indian child, or within 10 days after the birth of the Indian child.

25 USC 1913(a).

The parent or custodian may withdraw his or her consent to a foster care placement at any time, and may withdraw his or her consent to termination of parental rights or adoption "at any time prior to the entry of a final decree of termination or adoption, as the case may be . . . ." The child must then be returned to the parent or custodian. 25 USC 1913(b) and (c).

In *In re Kiogima,* 189 Mich App 6, 10–13 (1991), the Court of Appeals held that where a parent voluntarily releases his or her parental rights for purposes of adoption, the release may be withdrawn only prior to entry of the order terminating parental rights, not prior to entry of an adoption decree. The Court distinguished between a release of parental rights, whereby the release is given to a child placing agency or the DHS, and a consent to adoption, whereby consent for adoption by a specific relative is given by the parent. Only in the case of a consent to adoption may the consent be withdrawn prior to entry of the adoption decree.

Note: 25 USC 1915(c) requires the court to "give weight" to a consenting parent's desire for anonymity. The Bureau of Indian Affairs, *Guidelines for State Courts*, *supra* at B.1, Commentary (1979), provides the following:

> "Under the [ICWA] confidential[ity] is given a much higher priority in voluntary proceedings than in involuntary proceedings. The [ICWA] mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 USC [§1912 with 25 USC §1913.] For voluntary placements, however, the [ICWA] specifically directs state courts to respect parental requests for confidentiality. 25 USC [§1915(c)]. The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary

placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status."

20.14 Invalidation of State Court Action for Violation of the Indian Child Welfare Act

An Indian child subject to foster care placement or termination proceedings under state law, a parent or custodian from whom the child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate the placement or termination proceedings upon a showing that the court's action violated 25 USC 1911, 1912, or 1913. 25 USC 1914. A parent has standing to challenge an order independent of the participation of the tribe, even though the statute provides for a challenge by the child, parent or custodian, *and* the tribe. *In re Kreft,* 148 Mich App 682, 687–89 (1986).

In *In re Morgan,* 140 Mich App 594, 601–04 (1985), the Court of Appeals invalidated the trial court's order terminating parental rights, where the trial court used the "clear and convincing evidence" standard rather than the "beyond a reasonable doubt" standard, failed to hear expert witness testimony, and failed to establish that remedial or rehabilitative efforts had failed. However, in *In re IEM,* 233 Mich App 438, 449–50 (1999), the Court of Appeals found that termination of parental rights was proper under state law but that the FIA failed to satisfy the notice requirements of ICWA. In such circumstances, remand to the trial court for further proceedings was the proper remedy.

See also 25 USC 1920 (where custody of child has been improperly obtained or maintained, the court must decline jurisdiction and return child to parent or custodian unless such return would subject the child to a substantial and immediate danger or threat of such danger).