

Indian Child Welfare Act Of 1978 P.L. 95-608

PURPOSE:

25 U.S.C. §§1901, 1902

- Protect the best interests of Indian children and promote the stability and security of Indian tribes and families.
- Establish a policy that, where possible, Indian children remain in the Indian community.
- Require state courts to consider the tribal heritage of Indian children and political sovereignty of the tribe and its members in applicable child custody proceedings.

References:

- Title 25, United States Code, Chapter 21.
- Bureau of Indian Affairs (BIA) Final Rule, 25 Code of Federal Regulations Part 23 (June 14, 2016)
- *Interest of L.D.R.T.*, 391 N.W.2d 594, (N.D. 1986)
- *Interest of M.S.*, 2001 ND 68, 624 N.W.2d 678)
- *Interest of A.B.*, 2003 ND 98, 663 N.W.2d 625)
- *Interest of A.B.*, 2005 ND 216, 707 N.W.2d 75
- *Adoption of C.D.*, 2008 ND 128, 751 N.W.2d 236
- *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)
- *Adoptive Couple v. Baby Girl*, 570 U.S. ____ (2013)

DEFINITIONS

Active Efforts: Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. (25 U.S.C §1912(d)) and (25 C.F.R. § 23.2)

Child Custody Proceeding: Includes any action, other than emergency proceedings, that may culminate in one of the following outcomes:

- (1) Foster-care Placement:** Any action removing an Indian child from his or her 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 the parental rights have not been terminated. (25 U.S.C §1903(1)(i)) and (25 C.F.R. § 23.2)
- (2) Termination of Parental Rights:** Any action resulting in termination of the parent-child relationship. (25 U.S.C. §1903(1)(ii))
- (3) Preadoptive Placement:** Temporary placement of an Indian child in a foster home or institution after termination of the parents' rights but prior to, or in lieu of, an adoptive placement. (25 U.S.C. §1903(1)(iii))
- (4) Adoptive Placement:** Permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. (25 U.S.C. §1903(1)(iv))

Continued Custody: Physical custody or legal custody or both, under any applicable Tribal Law or Tribal custom, or State law that a parent or Indian custodian already has or had at any point in the past. The biological mother of the child has had custody of a child. (25 C.F.R. § 23.2)

Custody: Physical custody or legal custody or both, under any applicable Tribal Law or Tribal custom, or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal Custom or State Law. (25 C.F.R. § 23.2)

Domicile:

For a parent or Indian Custodian: the place at which a person has been physically present and that the person regards as home; a person's true, fixed principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere. *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) and (25 C.F.R. § 23.2)

For an Indian Child: the domicile of the Indian child's parents or Indian child's custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent. *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) and (25 C.F.R. § 23.2)

Qualified Expert Witness (QEW): Testimony of a QEW is required in foster care placement and termination of parental rights proceedings.

(25 U.S.C §1912(e)-(f)) and (25 C.F.R. § 23.122)

- A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.
- A person may be designated by the Indian child's tribe as being qualified to testify to the prevailing and social and cultural standards of the Tribe.
- The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the child's Tribe in locating the persons qualified to serve as an expert witness.

Note: The social worker regularly assigned to the Indian child may not serve as a QEW.)

Indian Child: An unmarried person under age 18 who is either (1) a member or citizen of an Indian tribe, or (2) eligible for membership or citizenship in an Indian tribe and is the biological child of a member/citizen of an Indian tribe. (25 U.S.C. §1903(4)) and (25 C.F.R. § 23.2)

Indian Child's Tribe: (1) The Indian tribe in which an Indian child is a member or eligible for membership or, 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. (25 U.S.C. §1903(5)) or (2) in the case of an Indian child who is a member or eligible for membership in more than one tribe, the Indian Tribe described in 25 U.S.C. §1903(3).

Indian Custodian: Any Indian person who has legal custody of an Indian child under Tribal law or custom or under State law, or any Indian person to whom the temporary physical care, custody and control of an Indian child has been transferred by the child's parent. (25 U.S.C. §1903(6))

Parent: A biological parent of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.

Note: Unwed biological fathers, where paternity has not been acknowledged or established, are excluded. (25 U.S.C. §1903(9))

Upon Demand: The parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies. (25 U.S.C §1903(1)(i)) and (25 C.F.R. § 23.2)

WHEN DOES ICWA APPLY? (25 U.S.C. §1911)

- Indian child custody proceedings in state courts: e.g. adoptions, foster care placements, or other types of court ordered placements with persons other than the child's natural parent or Indian custodian.
 - Placements based upon an act that, if committed by an adult, would be a crime and placements based on an award of custody to one parent in marriage dissolution proceedings are excluded. (25 U.S.C. §1903(1))
 - ICWA applies to proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for out-of-home placement of the child in foster care, preadoptive placement, or termination of parental rights. (25 C.F.R. § 23.102(a)(i)).
 - ICWA supersedes state law, but any applicable state or other federal law that provides a higher standard of protection to the rights of the parent or Indian custodian shall prevail. (25 U.S.C. §1921)

Note: ICWA does not apply to (1) Tribal court proceedings, (2) a proceeding regarding a criminal act that is not a status offense, (3) an award in a divorce proceeding, or (4) a voluntary placement that either parent, both parents, or the Indian custodian has, of free will, without a threat of removal by a State agency chosen for the Indian and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand. (25 C.F.R. § 23.102(b)(1)-(4)) This would include what is often referred to as voluntary foster care placements, but does not include voluntary adoptions.

DOES NORTH DAKOTA RECOGNIZE THE “EXISTING INDIAN FAMILY” DOCTRINE? (*Interest of A.B.*, 2003 ND 98, 663 N.W.2d 625)

- No. The judicial adoption of an exception to ICWA would thwart a tribe's interest in its Indian children and ignore the plain language of ICWA, which does not require an Indian child to be part of an existing Indian family or the family to be involved with the tribe.
 - Existing Indian Family Exception – “courts have addressed tensions between the best interests of Indian children, families, and tribes by refusing to apply ICWA to situations in which an Indian child is not being removed from an existing Indian family with a significant connection to the Indian community.” (*Interest of A.B.*, 2003 ND 98, ¶133, 663 N.W.2d 625-36)

HOW SHOULD THE STATE COURT DETERMINE IF THERE IS REASON TO KNOW THE CHILD IS AN INDIAN CHILD? (25 C.F.R. § 23.107)

- 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.
- 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:
 - Confirm by way of a report, declaration, or testimony included in the record that the agency or other party with 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 in fact a member (or a biological parent is a member and the child is eligible for membership); and
 - Treat the child as an Indian child, unless and until it is determined on the record that this child does not meet the definition of an “Indian child”.

A COURT, UPON CONDUCTING THE REQUIRED INQUIRY, HAS REASON TO KNOW THE CHILD IS AN INDIAN CHILD IF:

(25 C.F.R. § 23.107 (c) (1-6))

- Any participant involved in the proceeding, Indian Tribe, Indian Organization or agency:
 - Informs the court that the child is an Indian child;
 - Has discovered information indicating the child is an Indian Child;
- The child who is the subject of the proceedings gives the court reason to know he or she is an Indian child;
- The court is informed that the domicile or residence of the child, the child’s parent, or the child’s or the child’s Indian custodian is on a reservation;
- The court is informed that the child is or has been a ward of Tribal court;
- The court is informed that either parent of the child possesses an identification card indicating membership in an Indian Tribe.

HOW SHOULD THE STATE COURT DETERMINE AN INDIAN CHILD’S TRIBE WHEN THE CHILD MAY BE ELIGIBLE FOR MEMBERSHIP IN MORE THAN ONE TRIBE? (25 C.F.R. § 23.109)

- If the child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child’s Tribe.
- 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.
- If an Indian child meets the definition of an “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 an opportunity for the Tribes to determine which should be designated as the Indian child’s tribe.

NOTICE

WHO IS ENTITLED TO NOTICE? (25 U.S.C. §1912(a))

- When the court knows or has reason to know that an Indian child is involved, the parent or Indian custodian and the Indian child's tribe are entitled to notice of (1) each such proceeding (including but not limited to temporary custody hearing, any removal or foster care placement, any adoptive placement, or any termination of parental or custodial rights), and (2) their right of intervention.
 - No hearing shall be held until at least **10 days after receipt** of the notice by the parent or Indian custodian and the tribe or by the Secretary.
 - Upon request, the parent, Indian custodian or tribe shall be granted up to 20 additional days to prepare for any hearing.
 - If the identity or location of the parent or Indian custodian and the tribe is unknown, notice must be provided to the Secretary of the Interior.

Note: For proceedings in North Dakota, copies of the notices must be sent to the appropriate Regional Director (25 C.F.R. § 23.11):

Acting Regional Director
Bureau of Indian Affairs
115 4th Ave. S.E.
Aberdeen, S.D. 57401

WHO MUST SEND NOTICE? (25 U.S.C. §1912(a))

- The party seeking the foster care placement of or termination of parental right to, the Indian child.

WHAT IS THE REQUIREMENT FOR NOTICE? (25 C.F.R. § 23.11)

- All notices must be sent by registered or certified mail, return receipt requested.

Note: Notice may also be sent via personal service or electronically, but cannot replace the requirement for notice to be sent by registered or certified mail. (25 C.F.R. § 23.111 (c)) The regulations do not require notice in voluntary child custody proceedings.

EMERGENCY PROCEEDINGS (25 C.F.R. §23.113)

DOES ICWA APPLY IN AN EMERGENCY? (25 U.S.C. §1922)

- ICWA does not prevent (1) emergency removal of an Indian child who is a resident of or domiciled on a reservation but temporarily located off the reservation from his or her parent or Indian custodian, or (2) emergency placement of such child in a foster home or institution when necessary to “prevent imminent physical damage or harm to the child.”
- 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
- The state court must:
 - Make a finding on the record that the removal or placement is necessary to prevent imminent physical damage or harm to the child;
 - Promptly hold a hearing and determine whether the emergency removal or placement continues to be necessary;
 - Immediately terminate the emergency proceeding once the court or agency possesses sufficient evidence to determine the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child;
- **An emergency proceeding *should not be continued for more than 30 days*** unless the court makes the following determinations:
 - Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
 - The court has been unable to transfer the proceeding to the jurisdiction of the appropriate tribe; and
 - It has not been possible to initiate a “child-custody proceeding” as identified in 25 C.F.R. §23.2.

DOES NORTH DAKOTA RECOGNIZE THE EXISTING INDIAN FAMILY DOCTRINE? (*Interest of A.B.*, 2003 ND 98, 663 N.W.2d 625)

- No. The judicial adoption of an exception to ICWA would thwart a tribe's interest in its Indian children and ignore the plain language of ICWA, which does not require an Indian child to be part of an existing Indian family or the family to be involved with the tribe.

WHICH COURT HAS JURISDICTION? (25 U.S.C. §1911(a))

- The tribal court has exclusive jurisdiction in any child custody proceeding involving an Indian child who resides or is domiciled on the reservation of such tribe or is already a ward of a tribal court.

PETITIONS TO TRANSFER TO TRIBAL COURT

HOW ARE PETITIONS FOR TRANSFER OF PROCEEDINGS MADE? (25 C.F.R. § 23.115)

- Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination of parental rights proceeding to the jurisdiction of the child's tribe.
- The right to request a transfer is available at any stage in each foster care or termination of parental rights proceeding.

WHAT ARE THE CRITERIA FOR RULING ON TRANSFER PETITIONS?

Upon the receipt of a transfer petition, the State court must transfer the custody proceeding unless the court determines that the transfer is not appropriate because one or more of the following criteria are being met:

- (1) Either parent objects to the transfer;
- (2) The tribal court declines jurisdiction; or
- (3) The court determines good cause exists for denying the transfer. (25 U.S.C. §1911(b))

WHAT FACTORS SHOULD NOT BE CONSIDERED IN A "GOOD CAUSE" DETERMINATION (25 C.F.R. § 23.118 (c) (1-5))

- Whether the proceeding is at an advanced stage if the Indian child's parent, custodian or Tribe did not receive notice of the child-custody proceeding;
- Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- Whether transfer could affect the placement of the child;
- The Indian child's cultural connections with the Tribe or its reservation; or
- Socioeconomic conditions of any negative perception of Tribal or BIA social services or judicial systems.

Note: The best interest of the child is not an element of a good cause determination. (*Interest of A.B.*, 2003 ND 98, 663 N.W.2d 625)

IS THERE A RIGHT TO INTERVENE UNDER ICWA? (25 U.S.C. §1911(c))

- Yes. The Indian custodian and the Indian child's tribe have a right to intervene at any time in a state court proceeding for foster care placement or termination of parental rights.

Note: An order granting a tribe leave to intervene is not final and is not appealable as a right. A grant of intervention merely allows the action to proceed and does not finally determine the rights or claims of any party. (*Interest of A.B.*, 2005 ND 216, 707 N.W.2d 75)

IS THERE A RIGHT TO APPOINTED COUNSEL? (25 U.S.C. §1912(b))

- Yes. Once the court determines indigency, the parent or Indian custodian has the right to appointed counsel.
 - Parents have the right to examine all reports or other documents filed with the court in foster care placement and termination of parental rights proceedings. Upon the finding that such appointment is in the best interest of the child, the court may appoint counsel for the child. (25 U.S.C. §1912(c))

ACTIVE EFFORTS

HOW DOES THE STATE COURT ENSURE THAT ACTIVE EFFORTS HAVE BEEN MADE? (25 C.F.R. § 23.120)

- Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been made unsuccessful.
- Active efforts must be documented in detail in the court record.

WHAT IS THE BURDEN OF PROOF FOR ACTIVE EFFORTS? (25 U.S.C. §1912(d); *Interest of M.S.*, 2001 ND 68, 624 N.W.2d 678)

- The party seeking foster care placement or termination of parental rights must demonstrate by clear and convincing evidence that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and those efforts were unsuccessful.
 - **Note:** Active efforts are not required to prevent the breakup of an Indian family when a parent abandons a child before birth and never had physical or legal custody of the child. (*Adoptive Couple v. Baby Girl*, 570 U.S. ___)

EXAMPLES OF ACTIVE EFFORTS: (25 C.F.R. § 23.2)

- Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
- Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the child's family and in family team meetings, permanency planning, and resolution of placement issues;
- Conducting a diligent search for the Indian child's extended family members, and contacting and consulting with the child's extended family members to provide family structure and support for the child and parents;
- Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of services by the child's Tribe;
- Taking steps to keep siblings together whenever possible;
- Supporting regular visits with parents or custodians in the most natural setting as possible as well as trial home visits during any period of removal;
- Identifying community resources including;
- Monitoring progress and participation in services;
- Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum series do not exist or are not available;
- Providing post-reunification services and monitoring.

BURDEN OF PROOF

WHAT IS THE BURDEN OF PROOF FOR FOSTER CARE PLACEMENT? (25 U.S.C. §1912(e))

- Clear and convincing evidence.

WHAT IS THE BURDEN OF PROOF FOR TERMINATION OF PARENTAL RIGHTS? (25 U.S.C. §1912(f); *Interest of M.S.*, 2001 ND 68, 624 N.W.2d 678)

- A dual burden of proof is created by state and federal law.
 - State law elements must be proven by clear and convincing evidence.
 - Federal law elements must be proven by evidence beyond a reasonable doubt.

HOW IS EACH BURDEN OF PROOF SATISFIED? (25 U.S.C. §1912(e)-(f), N.D.C.C. § 27-20-44)

- State satisfaction of burden of proof for termination of parental rights:
 - The parent has abandoned the child; or
 - The child is subjected to aggravated circumstances as defined by N.D.C.C. § 27-20-02(3); or
 - The child is a deprived child and the court finds (1) the conditions and causes of deprivation are likely to continue or will not be remedied and due to the continued deprivation the child is suffering or will probably suffer serious physical, mental, moral or emotional harm; or (2) the child has been in foster care, in the care, custody, and control of the department, or a county social service board, or the division of juvenile services, if adjudicated unruly, for at least 450 days out of the previous 660 nights; or
 - The parent has given written consent acknowledged before the court.
- Federal satisfaction of burden of proof for foster care placement and termination of parental rights:
 - By evidence, including the testimony of qualified expert witnesses, that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding. (25 C.F.R. § 23.121 (c))

Note: The heightened standard of proof for termination of parental rights does not apply when a parent never had legal or physical custody. (*Adoptive Couple v. Baby Girl*, 570 U.S. ___)

QUALIFIED EXPERT WITNESS (QEW)

WHO MAY SERVE AS A QUALIFIED EXPERT WITNESS? (25 C.F.R. § 23.122)

- A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.
- A person may be designated by the Indian child's tribe as being qualified to testify to the prevailing and social and cultural standards of the Tribe.
- The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the child's Tribe in locating the persons qualified to serve as an expert witness.
- The social worker regularly assigned to the Indian child may not serve as a Qualified Expert Witness.

WHEN IS THE QUALIFIED EXPERT WITNESS (QEW) REQUIRED TO TESTIFY? (25 U.S.C §1912(e-f))

- Testimony of a QEW is required in foster care placement and termination of parental rights proceedings.

PLACEMENT PREFERENCE

IS THERE AN ORDER OF PREFERENCE FOR FOSTER CARE OR PREADOPTIVE PLACEMENT OF AN INDIAN CHILD? (25 U.S.C. §1915(b)), (25 C.F.R. § 23.131)

- Yes. In any foster care, or pre-adoptive placement of an Indian child, absent good cause, preference shall be given to placement with:
 - (1) A member of the Indian child's extended family,
 - (2) A foster home licensed, approved or specified by the Indian child's Tribe,
 - (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority, or
 - (4) An institution for children approved by the Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

Note: The child must be placed (1) in the least restrictive placement that most approximates a family, taking into consideration sibling attachment and in which his or her special needs, if any, may be met, and (2) within reasonable proximity to his or her home, extended family, or siblings.

IS THERE AN ORDER OF PREFERENCE FOR ADOPTIVE PLACEMENT OF AN INDIAN CHILD? (25 U.S.C. §1915(a))

- Yes. In any adoptive placement of an Indian child, absent good cause, preference shall be given to placement of the child with:
 - (1) A member of the Indian child's extended family,
 - (2) Other members of the Indian child's tribe, or
 - (3) Other Indian families.

WHEN ARE THE ADOPTIVE PLACEMENT PREFERENCES TRIGGERED? (*Adoptive Couple v. Baby Girl*, 570 U.S. ___)

Adoption placement preferences are triggered when a party within the adoption preferences (relative, tribal member, or other Indian person) seeks to adopt the Indian child. When no party within the preferences formally seeks to adopt the Indian child, the preferences do not apply.

ARE THERE REQUIRED FINDINGS TO EFFECT A FOSTER CARE PLACEMENT OR TERMINATION OF PARENTAL RIGHTS? (25 U.S.C. §1912(d))

- Yes, a finding that active efforts to provide remedial and rehabilitative programs to prevent the breakup of the Indian family were unsuccessful.

Note: Active efforts are not required to prevent the breakup of an Indian family when a parent abandons a child before birth and never had physical or legal custody of the child. (*Adoptive Couple v. Baby Girl*, 570 U.S. ___)

WHAT IS “GOOD CAUSE” NOT TO FOLLOW THE ORDER OF PREFERENCE FOR A FOSTER CARE, PREADOPTIVE OR ADOPTIVE PLACEMENT? (25 C.F.R. § 23.132)

- Good cause not to follow the order of preference exists upon:
 - The request of one or both of the parents;
 - The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
 - The presence of a sibling attachment that can be maintained only through a particular placement;
 - The extraordinary physical, mental, or emotional needs of the Indian child that may be unavailable in the community where families who meet the preferences live;
 - The unavailability of suitable placement after determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located.

Note: A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement. A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

DOES THE ORDER OF PREFERENCE FOR A FOSTER CARE, PREADOPTIVE OR ADOPTIVE PLACEMENT ALWAYS GOVERN? (25 U.S.C. §1915(c))

- No. The Indian child’s tribe may establish by resolution a different order of preference, which shall be followed so long as the child is placed in the least restrictive placement appropriate to the child’s particular needs.
 - Where appropriate, the preference of the child or parent shall be considered, as shall the desire of a consenting parent for anonymity.

DOES THE ORDER OF PREFERENCE FOR A FOSTER CARE, PREADOPTIVE OR ADOPTIVE PLACEMENT APPLY TO A CHANGE IN FOSTER CARE, PREADOPTIVE OR ADOPTIVE PLACEMENT? (25 U.S.C. §1916(b))

- Yes, whenever an Indian child is removed from a foster home or institution for the purpose of a further foster care, preadoptive or adoptive placement unless the child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

VOLUNTARY PROCEEDINGS

MAY A PARENT OR INDIAN CUSTODIAN VOLUNTARILY CONSENT TO A FOSTER CARE PLACEMENT OR TERMINATION OF HIS OR HER PARENTAL RIGHTS? (25 U.S.C. §1913(a))

- Yes.

WHAT ACTIONS MUST A STATE COURT UNDERTAKE IN VOLUNTARY PROCEEDINGS? (25 C.F.R. § 23.124)

- The state court must require the participants to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child.
- If there is reason to believe the child is an Indian child, the state court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status.
- The state court must ensure that the placement for the Indian child complies with ICWA.

WHAT IS REQUIRED FOR THE CONSENT OF A PARENT OR INDIAN CUSTODIAN TO BE VALID? (25 U.S.C. §1913(a))

- The child must be at least 10 days old;
- The consent must be in writing and signed before a judge;
- The judge must certify that the terms and consequence of the consent were fully explained in detail and fully understood by the parent or Indian custodian; and
- The judge must certify either that the parent or Indian custodian understood the explanation in English or that it was interpreted into a language understood by the parent or Indian custodian.

CAN A PARENT OR INDIAN CUSTODIAN WITHDRAW CONSENT TO A FOSTER CARE PLACEMENT? (25 U.S.C. §1913(b))

- Yes, at anytime, and, in such event, the child shall be returned to the parent or Indian custodian.

CAN A PARENT WITHDRAW CONSENT TO TERMINATION OF PARENTAL RIGHTS OR ADOPTION? (25 U.S.C. §1913(c))

- Yes, at anytime, and for any reason prior to the entry of a final decree of termination or adoption.
 - A parent cannot withdraw consent for termination of parental rights once the final order of termination has been entered, even if a final order for adoption has not been entered for the child. (*Interest of L.D.R.T.*, 391 N.W.2d 594, 599 (N.D. 1986))

CAN A PARENT WITHDRAW CONSENT TO ADOPTION AFTER ENTRY OF A FINAL DECREE OF ADOPTION? (25 U.S.C. §1913(d))

- Yes, if within 2 years, the parent petitions the court to vacate the decree and proves that his or her consent was obtained through fraud or duress.

DOES THE INDIAN CHILD HAVE RIGHTS TO INFORMATION AFTER ADOPTION? (25 U.S.C. §1917)

- Yes. Upon application by an adopted Indian child who has reached age 18, the court that entered the final decree of adoption must (1) inform the child of the tribal affiliation, if any, of the child’s biological parents, and (2) provide any other information necessary to protect the rights that the child may have as a result of the child’s tribal relationship

WHAT NOTICE IS REQUIRED OF A FINAL DECREE OF ADOPTION? (25 U.S.C. §1951), (25 C.F.R. § 23.140)

- Within 30 days of entering the final decree, the Court must mail to the BIA, an envelope marked “Confidential”, a copy of the final decree and the following information:
 1. Indian child’s name and tribal affiliation and name of the Indian child after adoption;
 2. Names and addresses of the child’s biological parents;
 3. Names and addresses of the child’s adoptive parents,
 4. Identity of the agency having files or information relating to the adoptive placement;
 5. Any affidavit signed by the biological parent or parents asking that their identity remain confidential; an
 6. Any information relating to Tribal membership or eligibility for tribal membership of the adopted child.

The mailing address for the BIA is:

Bureau of Indian Affairs, Chief,
Division of Human Services
1849 C Street NW.
Mail Stop 4516 MIB,
Washington, DC 20240

DOES THE ADOPTION AND SAFE FAMILIES ACT (ASFA) SUPERCEDE ICWA? (45 C.F.R. §1355.20(a))

- No. ASFA and its regulations confirm that Indian children must meet the same requirements as other dependent children.
 - Active efforts may be a higher standard than reasonable efforts, and ICWA contains no exceptions to the requirement of active efforts.
 - That a child is Indian is not by itself a compelling reason not to file a petition for termination of parental rights.