

**INDIAN CHILD WELFARE ACT**  
**MINNESOTA INDIAN FAMILY PRESERVATION ACT**

**A CHECKLIST FOR JUDGES**

**This outline covers the legal requirements of the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act. It does not attempt to include all of the provisions that routinely apply to every juvenile or family proceeding. References in the outline are identified more fully at the end.**

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**INDIAN CHILD WELFARE ACT  
MINNESOTA INDIAN FAMILY PRESERVATION ACT**

**A Checklist For Judges**

A. TYPES OF CASES GOVERNED BY ICWA AND MIFPA:

1. Application of both laws is mandatory whenever an "Indian child" is involved [25 U.S.C. §1903(4); Minn. Stat. §257.351 subd. 6]
- \_\_\_\_\_ a. unmarried and under 18, and
- \_\_\_\_\_ b. either:
- \_\_\_\_\_ (i) a member of an Indian tribe; or
- \_\_\_\_\_ (ii) eligible for membership in an Indian tribe (NOTE: the federal definition of Indian child requires that a child who is eligible for membership also have a biological parent who is a member of a tribe)

<p>Court orders may be invalidated in cases involving an Indian child where there was non-compliance with the major provisions of the ICWA. [25 U.S.C. §1914]. Therefore, when in doubt, it is better to consider the child an Indian child until it is established with reasonable certainty that the child is not eligible for membership in a tribe.</p>
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2. Types of cases governed by both Indian Child Welfare Act [25 U.S.C. §1903(1)] and Minnesota Indian Family Preservation Act [Minn. Stat. §257.351 subd.3 & subd. 17]:
- \_\_\_\_\_ a. CHIPS
- \_\_\_\_\_ b. Termination of parental rights
- \_\_\_\_\_ c. Voluntary placements
- \_\_\_\_\_ d. Adoption
- \_\_\_\_\_ e. Status offenses
- \_\_\_\_\_ f. Delinquency cases where placement is required not because of the delinquent act but because of the parent's unfitness or child's needs
- \_\_\_\_\_ g. Guardianship
- \_\_\_\_\_ h. Third party custody cases

\_\_\_\_\_ i. Custody claims in OFP or other proceedings by a father who has not acknowledged paternity, who has not adopted the child under tribal law or custom, and who does not qualify as an "Indian custodian"

3. Types of cases governed only by the Minnesota Indian Family Preservation Act:

\_\_\_\_\_ a. Petty misdemeanor level delinquency cases, regardless of reason for placement [Minn. Stat. §257.352 subd.2]

B. ITEMS TO CHECK AT INITIAL HEARING:

1. Initial inquiry about Indian status [Minn. Stat. §257.351 subd. 6; 25 U.S.C. §1903(4) & §1912]:

The ICWA refers to "membership" in a tribe. [25 USC §1903 (3)(4)&(5)]. "Enrollment" is a common means of establishing membership in a tribe, but it is not the only means. A person may be a member of a tribe without being enrolled. Membership criteria may be established by tribal ordinance and may be unique to that tribe. The BIA may be able to establish whether a person is enrolled, but may not otherwise be able to establish a person's membership in a tribe. [DHS SSM XIII-3522]

\_\_\_\_\_ a. Both parents, child, and agency representatives are asked if child is American Indian or has American Indian ancestors [Minn. Stat. §257.354 subd. 2]

\_\_\_\_\_ b. All available information is reviewed for any indication of Indian heritage [DHS SSM XIII-3522; 44 Fed. Reg. 67586]

\_\_\_\_\_ c. All tribes are identified [Minn. Stat. §257.351 subd. 7 & §257.354; 25 U.S.C. §1903(5)]:

\_\_\_\_\_ (i). where child is/may be member

\_\_\_\_\_ (ii). where child is/may be eligible for membership

\_\_\_\_\_ (iii). where child has significant contacts,if child is eligible for membership in more than one tribe [44 Fed. Reg. 67587 and DHS SSM XIII-3523]

2. Jurisdiction:

If the child lives or resides on a reservation with jurisdiction over child custody matters, or if the child is already a ward of a tribal court, state courts lack jurisdiction and the case must be dismissed. [25 USC §1911(a); Minn. Stat. § 260.111 subd. 5]. When the child has been taken into custody in an emergency, the case may be transferred to tribal court in lieu of dismissal. [25 U.S.C. §1922]

- \_\_\_\_\_ a. Inquiry is made to determine if child is ward of tribal court [25 U.S.C. §1911; Minn. Stat. §257.354]
- \_\_\_\_\_ b. Inquiry is made to determine if child resides or is domiciled on a reservation with jurisdiction over child custody matters [25 U.S.C. §1911; Minn. Stat. §257.354]
- \_\_\_\_\_ c. Jurisdiction shall be declined if the petitioner improperly removed the child from the parent or custodian, or improperly retained the child after a visit or other temporary relinquishment of custody [25 U.S.C. §1920]

3. Indian custodians, if any, are identified [25 USC §1903(6)]

"Indian custodian" means any Indian person who has legal custody 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. An Indian person who has adopted an Indian child under state law, or tribal law or custom is considered a parent for purposes of the ICWA. [25 U.S.C. §1903(6)&(9)]

4. Parents and Indian custodians were given proper notice of proceedings:

- \_\_\_\_\_ a. Notice was received by parents and custodians at least 10 days before hearing [25 USC §1912(a)]
- \_\_\_\_\_ b. Notice was sent registered mail, return receipt requested [25 USC §1912(a)]
- \_\_\_\_\_ c. Notice contained the following [44 Fed.Reg. 67588; DHS SSM XIII-3561]:
  - \_\_\_\_\_ (i). child's name, birthdate, and birthplace
  - \_\_\_\_\_ (ii). child's tribal affiliation

\_\_\_\_\_ (iii). names of child's parents or Indian custodians, including birthdate, birthplace, and mother's maiden name

\_\_\_\_\_ (iv). copy of the petition or complaint

\_\_\_\_\_ (v). name of petitioner

\_\_\_\_\_ (vi). name and address of petitioner's attorney

\_\_\_\_\_ (vii). statement of right of parents, Indian custodians, and tribe to intervene in the proceedings

\_\_\_\_\_ (viii). statement of right of parents and Indian custodians to have counsel appointed if they are unable to afford counsel

\_\_\_\_\_ (ix). statement of right of parents, Indian custodians, and tribe to have an additional 20 days to prepare, if they request it

\_\_\_\_\_ (x). location, mailing address and phone number of the court

\_\_\_\_\_ (xi). statement of right of parents, Indian custodians, and tribe to petition for transfer of proceedings to tribal court, and their right to refuse to permit transfer

\_\_\_\_\_ (xii). statement of the potential legal consequences of an adjudication on future custodial and parental rights

\_\_\_\_\_ (xiii). statement that tribal officials should keep confidential the information contained in the notice and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the ICWA

\_\_\_\_\_ d. If identity or location of a parent or Indian custodian is unknown, notice is sent to the Secretary of the Interior who has been given at least 15 days to locate the parent or custodian  
[25 USC §1912(a)]

\_\_\_\_\_ e. If there is any reason to believe a parent on Indian custodian is not likely to understand the content of the notice because of lack of adequate comprehension of written English, copy must be sent to BIA agency nearest the person with request to have notice personally explained in the language best understood by the parent or custodian [44 Fed. Reg. 67583]

5. Child's tribe(s) given proper notice:

\_\_\_\_\_ a. If the child may be eligible for membership in more than one tribe, notice must be sent to each tribe [44 Fed. Reg. 67586-7 and DHS SSM XIII-3523]

\_\_\_\_\_ b. Notice was received by tribe(s) at least 10 days before hearing [25 USC §1912(a)]

\_\_\_\_\_ c. Notice was sent registered mail, return receipt requested [25 USC §1912(a)]

\_\_\_\_\_ d. Notice contained the following [44 Fed.Reg. 67588; DHS SSM XIII-3561]:

\_\_\_\_\_ (i). child's name, birthdate, and birthplace

\_\_\_\_\_ (ii). child's tribal affiliation

\_\_\_\_\_ (iii). if the child may be eligible for membership in more than one tribe, the name of each tribe identified, together with a statement inviting each tribe's views as to which tribe shall be designated the tribe with which the child has the more significant contacts [DHS SSM XIII-3523]

\_\_\_\_\_ (iv). names of child's parents or Indian custodians, including birthdate, birthplace, and mother's maiden name

\_\_\_\_\_ (v). copy of the petition or complaint

\_\_\_\_\_ (vi). name of petitioner

\_\_\_\_\_ (vii). name and address of petitioner's attorney

\_\_\_\_\_ (viii). statement of right of parents, Indian custodians, and tribe to intervene in the proceedings

\_\_\_\_\_ (ix). statement of right of parents and Indian custodians to have counsel appointed if they are unable to afford counsel

\_\_\_\_\_ (x). statement of right of parents, Indian custodians, and tribe to have an additional 20 days to prepare, if they request it

\_\_\_\_\_ (xi). location, mailing address and phone number of the court

\_\_\_\_\_ (xii). statement of right of parents, Indian custodians, and tribe to petition for transfer of proceedings to tribal court, and their right to refuse to permit transfer

\_\_\_\_\_ (xiii). statement of the potential legal consequences of an adjudication on future custodial and parental rights

\_\_\_\_\_ (xiv). statement that tribal officials should keep confidential the information contained in the notice and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the ICWA

\_\_\_\_\_ e. If identity or location of the child's tribe is unknown, notice is sent to the Secretary of the Interior who has been given at least 15 days to locate the tribe [25 USC §1912(a)]

6. If parents or Indian custodians appear in court without an attorney, they are advised of [44 Fed. Reg. 67588]:

\_\_\_\_\_ a. Right to appointed counsel

\_\_\_\_\_ b. Right to request transfer of proceedings to tribal court, or to object to such transfer

\_\_\_\_\_ c. Right to request additional time to prepare for hearing, and

\_\_\_\_\_ d. Right to intervene in the proceedings if they are not already parties

7. Attorneys appointed for:

\_\_\_\_\_ a. Both parents [25 USC §1912(b)]

\_\_\_\_\_ b. Indian custodian(s) [25 USC §1912(b)]

\_\_\_\_\_ (i) B.I.A. notified for payment of costs [25 U.S.C. 21 §1912(b)]

\_\_\_\_\_ c. Child [25 USC §1912(b)]

- 8. If guardian ad litem is appointed, g.a.l. is American Indian and preferably a member of child's tribe; if that is not possible, g.a.l. can demonstrate knowledge and appreciation of child's tribal heritage. [Minn. Stat. §260.155 subd.4]
- 9. Tribe, parents and Indian custodians are given full access to court file and to social services file [25 U.S.C. §1912(c); Minn. Stat. §257.352 subd. 2 & §257.353 subd. 2; Minn. Stat. §13.04]

### C. TRANSFER OF CASES TO TRIBAL COURT:

#### 1. Mandatory transfer:

\_\_\_\_\_ a. Child is ward of tribal court (NOTE: in non-emergency situations the case must be dismissed, not transferred) [25 U.S.C. §1922]

\_\_\_\_\_ b. Child resides or is domiciled on reservation with jurisdiction over child custody matters (NOTE: in non-emergency situations the case must be dismissed, not transferred) [25 U.S.C. §1922]

\_\_\_\_\_ c. Either parent, Indian custodian or the tribe request transfer, unless

\_\_\_\_\_ (i). a parent objects to transfer [25 USC §1911(b)];

\_\_\_\_\_ (ii). the tribe does not have a tribal court, or declines to take the case [25 USC §1911(b) and 44 Fed. Reg. 67590-1]; or

\_\_\_\_\_ (iii). any party opposing transfer proves there is "good cause" not to transfer the case [25 U.S.C. §1911(b); 44 Fed. Reg. 67591 and DHS SSM XIII-3573]

#### 2. Discretionary transfer: the court may evaluate the following factors in determining whether or not a party opposing transfer has proven there is "good cause" to deny transfer [44 Fed. Reg. 67590-91 and DHS SSM XIII-3573]:

\_\_\_\_\_ a. Proceedings are at a late stage and the petitioner did not file for transfer promptly after receiving notice of the proceedings

\_\_\_\_\_ b. The child is over 12 and objects

- \_\_\_\_\_ c. Necessary evidence could not be presented in tribal court without undue hardship to the parties or the witnesses
- \_\_\_\_\_ d. The child is over 5, the parents are not available, and the child has had little or no contact with the tribe or members of the tribe for a significant period of time
- \_\_\_\_\_ e. Socio-economic conditions or the perceived adequacy of tribal or BIA social services may not be considered in a good cause determination

"...we emphasize that it is essential to the purposes of the ICWA to allow appropriate tribal authorities to determine these matters according to tribal law, customs and mores best known to them. ... transfer of jurisdiction over Indian child custody matters to tribal authorities is mandated by the ICWA whenever possible." Matter of Welfare of B.W., 454 N.W.2d 437 (Minn. App. 1990)]

#### D. EMERGENCY HOLDS AND EX PARTE CUSTODY:

- 1. Placement is necessary to prevent imminent physical damage or harm [25 USC §1922]
  - \_\_\_\_\_ a. An expert with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community testifies or otherwise presents evidence of the imminent harm [*But see, dicta in Matter of J.A.S., F.A.B., and C.J.S. Jr.*, 488 N.W.2d 332 (Minn. App. 1992)]
- 2. Tribe has been notified by phone or FAX of emergency hold hearing
- 3. Residence and domicile of child are determined
  - \_\_\_\_\_ a. If child currently resides or is domiciled on a reservation with child custody jurisdiction, case must be transferred to tribal court or dismissed [25 USC §1922]
  - \_\_\_\_\_ b. If child previously resided or was domiciled on a reservation the court shall contact the tribal court to determine if the child is a ward of the tribal court [44 Fed. Reg. 67588; DHS SSM XIII-3572]; if the child is a ward of the tribal court, the case must be transferred to tribal court or dismissed [25 USC §1922]

The emergency hold provision of the ICWA is a narrow exception to a tribe's exclusive jurisdiction over resident member children and non-resident member children who are the subject of a tribal court order. A child detained in an emergency must be returned to the parents or Indian custodians as soon as the emergency abates. or the state court must promptly transfer the case to tribal court.

4. Petitions that seek a court order for immediate custody of the child pursuant to Minn. Stat. §260.135 subd.5 or ex parte custody by a non-parent, must be accompanied by affidavit that contains the following information [44 Fed. Reg. 67589]:

- \_\_\_\_\_ a. Name, age and last known address of child
- \_\_\_\_\_ b. Name and address of the child's parents and Indian custodians, if any; if unknown, then a detailed explanation of what efforts have been made to locate them
- \_\_\_\_\_ c. Facts necessary to determine residence and domicile, and whether either is believed to be on a reservation; name of reservation shall be stated
- \_\_\_\_\_ d. Tribal affiliation of child and parents and/or Indian custodian
- \_\_\_\_\_ e. Specific and detailed account of the circumstances that led the agency to seek immediate custody
- \_\_\_\_\_ f. If the child is believed to reside or be domiciled on a reservation where the tribe has exclusive jurisdiction over child custody matters, a statement of the efforts that have been made and are being made to transfer the case to the tribe
- \_\_\_\_\_ g. Statement of specific actions taken to assist the parents or Indian custodian so the child may safely be left in their custody

5. Petitions seeking continued custody after a peace officer has taken the child into custody pursuant to Minn. Stat. §260.165 must include all of the information in #4, and in addition must also include:

- \_\_\_\_\_ a. What vigorous action the agency has taken and active efforts it has made to assist the parents or Indian custodians so that the child may safely and promptly be returned to their custody [DHS SSM XIII-3550]
- \_\_\_\_\_ b. The specific, emergency conditions that continue to exist which threaten imminent physical damage or harm to the child [DHS SSM XIII-3550]

6. Findings and order to be made at emergency custody hearing:

- \_\_\_\_\_ a. That emergency placement is necessary to prevent imminent physical damage or harm
  - \_\_\_\_\_ (i). an expert with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community testified or otherwise presented evidence of the imminent harm [*But see, dicta* in J.A.S., 488 N.W.2d 332 (Minn. App. 1992)]
- \_\_\_\_\_ b. Residence and domicile of child
- \_\_\_\_\_ c. Whether child is ward of tribal court
- \_\_\_\_\_ d. Whether active efforts were made to prevent the placement [Minn. Stat. §1912(d); Minn. Stat. §260.172 subd. 1]
- \_\_\_\_\_ e. Whether vigorous action was taken by the agency after placement so that the child could be promptly and safely returned home [Minn. Stat. §260.172 subd. 1; DHS SSM XIII-3550]
- \_\_\_\_\_ f. Whether services are available that could prevent further detention [Minn. Stat. §260.172 subd.1]
- \_\_\_\_\_ g. If child is to remain in placement, whether child is in least restrictive placement, and in highest preference placement [25 U.S.C. §1915(b)]
  - \_\_\_\_\_ (i) member of child's extended family [NOTE: under state law extended family also includes important friends with whom the child resided or had significant contact. Minn. Stat. §260.181 subd. 3]
  - \_\_\_\_\_ (ii) foster home licensed, approved, or specified by child's tribe
  - \_\_\_\_\_ (iii) Indian foster home licensed or approved by an authorized non-Indian licensing authority
  - \_\_\_\_\_ (iv) 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
- \_\_\_\_\_ h. If child is in non-Indian home, date and time of hearing in 30 days to review placement to determine if there are preferred homes available [Minn. Stat. §257.071 subd.1a]

- \_\_\_\_\_ i. If child remains in placement, date and time of adjudicatory hearing within 60 days, if requested by any party [Minn. Stat. §260.172 subd.4], and, unless there are extraordinary circumstances, within 90 days in all other cases [44 Fed. Reg. 67589]

E. FINDINGS TO BE MADE AT ADJUDICATORY HEARING:

1. Whether or not child is an Indian child [Minn. Stat. §257.354 subd. 2]

"The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive." [B.I.A. Guidelines for State Courts, 44 Fed. Reg. 67586; Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)]. However, if a tribe's determination that a child is ineligible for membership is based upon incorrect or incomplete information provided by the petitioner, the tribe's initial determination of ineligibility may not protect the subsequent court order from invalidation for failure to apply the ICWA. [25 U.S.C. §1914].

2. Identification of child's tribe [Minn. Stat. §257.354 subd.2], and if the child is eligible for membership in more than one tribe, the tribe with which the child has the most significant connections [44 Fed. Reg. 67587; DHS SSM XIII-3523]

3. Whether or not active efforts were made to prevent placement [25 U.S.C. §1912(e) & (f); DHS SSM XIII-3583]:

\_\_\_\_\_ a. Remedial services and rehabilitative programs designed to prevent breakup of the Indian family -- including resources of the extended family, the tribe, Indian social service agencies, and individual Indian care givers -- have been provided to both parents, Indian custodians, and child [Matter of Welfare of M.S.S., 465 N.W.2d 412 (Minn. App. 1991); 44 Fed. Reg.67592]

\_\_\_\_\_ b. If the agency and parents are unable to work together constructively, the agency has solicited help from a community agency with expertise in working with Indian families [DHS SSM XIII-3583]

4. Whether or not the active efforts have proved unsuccessful [25 U.S.C. §1912(e) & (f)]

5. Whether or not any of the witnesses are "qualified expert witnesses" for purposes of the ICWA [25 U.S.C. §1912(e) & (f); DHS SSM XIII-3586; Matter of Welfare of B.W., 454 N.W.2d 437 (Minn. App. 1990)]

\_\_\_\_\_ a. a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices; or

\_\_\_\_\_ b. a lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe; or

\_\_\_\_\_ c. a professional person having substantial education and experience in the area of his or her specialty along with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community

6. Whether, in the opinion of the qualified expert witnesses, continued custody of the child 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) & (f)]

7. Whether or not the evidence shows the causal relationship between the conditions that exist and the damage that is likely to result [DHS SSM XIII-3585]

8. Whether the petitioning party met their burden of proof regarding danger to the child and active efforts [Matter of Welfare of M.S.S., 465 N.W.2d 412 (Minn. App. 1991)]:

\_\_\_\_\_ a. beyond a reasonable doubt for termination of parental rights cases [25 U.S.C. §1912(f)]

\_\_\_\_\_ b. clear and convincing evidence in all other cases [25 U.S.C. §1912(e)]

"Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming 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." [B.I.A. Guidelines for State Courts, 44 Fed. Reg. 67593]

9. What the position of the tribe is with respect to the outcome of the case [25 U.S.C. §1911(c)]

10. In termination of parental rights cases, whether or not an extended family member is available for placement that would alleviate the need for termination [Matter of Welfare of M.S.S., 465 N.W. 2d 412 (Minn. App. 1991)]

#### F. OUT-OF-HOME PLACEMENTS:

***Every time an Indian child is removed from his/her parents or Indian custodians, and every time a child is moved from one placement to another, the provisions of the ICWA must be followed. [25 U.S.C. §1916(b)]. In every placement, including shelter placements, diligent efforts must be made to***

***place the child in a first preference home. Only if that is not possible can a child be placed in a home in the next preference category. Standards of the American Indian community are to be applied in accepting or rejecting a particular placement. [25 U.S.C. §1915(d).] Once a tribe has intervened agencies must defer to tribal judgment as to the suitability of a particular home. [Minn. Stat. 257.072 subd. 7(1)(b)]***

- 1. The tribe has been contacted to see if they have their own order of preference [25 U.S.C. §1915(c)]
- 2. The tribe has been sent written notification prior to initial placement and prior to any change in placement [25 U.S.C. §1912; 25 U.S.C. §1916(b)]
  - \_\_\_\_\_ a. Copies of notices are filed with court [44 Fed. Reg. 67588]
- 3. Child is placed with a member of his/her extended family [25 U.S.C. §1915(b)]
  - \_\_\_\_\_ a. Relatives have been informed of right to apply for foster care payments [Miller v. Youakim, 440 U.S. 125, 99 S.Ct. 957, 59 L.Ed.2d 194 (1979)]
- 4. If child is not with extended family, a diligent search is on-going [Minn. Stat. §257.352 subd.4; Minn. Stat. §257.353 subd. 5; Minn. Stat. §257.072 subd. 1; 44 Fed. Reg. 67595; DHS SSM XIII-3611]
  - \_\_\_\_\_ a. Child's mother has been asked for names of extended family
  - \_\_\_\_\_ b. Child's father has been asked for names of extended family
  - \_\_\_\_\_ c. Child has been asked for names of extended family members
  - \_\_\_\_\_ d. Tribe has been asked to help with search for extended family
  - \_\_\_\_\_ e. American Indian advocate on case has been asked to help with search for extended family
  - \_\_\_\_\_ f. All possible extended family members have been contacted about possible placement and have been informed (i) that relatives are first preference for placement, and (ii) of what financial or other services may be available to the child and the family; contacts are repeated every 30 days [Minn. Stat. §257.071]

**Agencies may disclose private or confidential information to extended family members for purposes of locating a suitable placement. If a parent makes an explicit request to the contrary the matter should be brought to court's attention. [Minn. Stat. §257.072 subd. 7]**

- \_\_\_\_\_ g. Special training is offered to extended family if necessary for placement [Minn. Stat. §257.072 subd. 4(4) & 7(3); Minn. Rule 9545.0230 subp. 2C]

- 5. Until extended family is located child is placed in American Indian shelter or foster home licensed, approved, or specified by child's tribe [25 U.S.C. §1915; Minn. Stat. §257.072 subd. 7]
- 6. If no extended family members are available and the tribe has not specified a foster home, the child is placed in an Indian home licensed by an authorized non-tribal agency [25 U.S.C. §1915(b)]
- 7. If no extended family members, tribal homes, or other Indian homes are available, child is placed in an institution for children approved by a tribe or operated by an Indian organization, with a program suitable to the child's needs [25 U.S.C. §1915(b)]
- 8. If child is not yet in an American Indian home, a diligent search for an American Indian home is on-going [44 Fed. Reg. 67595; DHS SSM XIII-3611]
  - \_\_\_\_\_ a. Information about available homes is requested from tribe
  - \_\_\_\_\_ b. All American Indian foster care licensing agencies have been contacted
  - \_\_\_\_\_ c. Other private licensing agencies have been contacted
- 9. If child is not with extended family member, petitioner has met burden of showing there is "good cause" not to follow the preferences [25 U.S.C. §1915(b); 44 Fed. Reg. 67594; Matter of Custody of S.E.G., 521 N.W.2d 357 (Minn. 1994)]
  - \_\_\_\_\_ a. If appropriate, request of biological parents or child (if of sufficient age), shall be considered
  - \_\_\_\_\_ b. Extraordinary physical or emotional needs of the child -- such as the need for highly specialized treatment services that are unavailable in the community where extended family reside -- as established by testimony of a qualified expert witness [See section E-5 above]
  - \_\_\_\_\_ c. Suitable families are unavailable despite a diligent search

G. VOLUNTARY PLACEMENTS AND CUSTODY AGREEMENTS:

- 1. Tribe has been properly notified:
  - \_\_\_\_\_ a. If parent or Indian custodian will not be able to have child returned upon demand: full notice given per section B-5 above [25 U.S.C. §1903(1)(i) & §1912]

- \_\_\_\_\_ b. if child will be returned upon demand: notice by agency was sent within 7 working days after (i) placement, or (ii) a determination that the agency will be working with the child for more than 30 days and child could be placed, whichever occurs first [Minn. Stat. §257.352 subd. 2; Minn. Stat. §257.353 subd. 2]
2. Parent has received proper notice per section B-4 above if child will not be returned upon demand [25 U.S.C. §1903(1)(i) & §1912]
3. Consent to placement [25 U.S.C. §1913]:
- \_\_\_\_\_ a. Must not be given prior to, or within ten days after birth
- \_\_\_\_\_ b. Must be in writing
- \_\_\_\_\_ c. Must be recorded before a judge
4. Content of consent document [44 Fed. Reg. 67593]:
- \_\_\_\_\_ a. Child's name and birthdate
- \_\_\_\_\_ b. Name of child's tribe and any tribal membership number or other identification of membership
- \_\_\_\_\_ c. Name and address of consenting parent or Indian custodian
- \_\_\_\_\_ d. Name and address of person or entity through whom placement was arranged
- \_\_\_\_\_ e. Name and address of prospective foster parents, if known
5. Findings to be made [25 U.S.C. §1913]:
- \_\_\_\_\_ a. Terms and consequences of consent were fully explained to the parent or Indian custodian
- \_\_\_\_\_ b. Terms and consequences of consent were fully understood by the parent or Indian custodian
- \_\_\_\_\_ c. Parent or Indian custodian fully understands English, or the explanation of the terms and consequences was translated into their language
6. Withdrawal of consent:
- \_\_\_\_\_ a. To foster care placement may be done at any time and the child shall be returned [25 U.S.C. §1913(b)]

\_\_\_\_\_ b. To termination of parental rights or adoption may be done at any time prior to entry of the decree and the child shall be returned [25 U.S.C. §1913(c)]

\_\_\_\_\_ (i). notarized statement of intent to withdraw consent should be filed with the court; clerk of courts should notify party through whom placement was arranged; and that party shall arrange return of child [44 Fed. Reg. 67594]

\_\_\_\_\_ c. After adoption, petition to vacate may be brought on grounds that consent was obtained through fraud or duress [25 U.S.C. §1913(d)]

7. Placement preferences have been followed (See section F above) NOTE: Consenting parent's desire for anonymity shall be given weight in application of the preferences if consistent with best interests of child [25 U.S.C. §1915(c); Minn. Stat. §257.072 subd. 7(1)(a)]

"The parents request for anonymity takes precedence over efforts to comply with placement preferences only to the extent that is necessary to protect the parents' identity. The agency must justify to the State court the necessity for not following the placement preference requirements." [DHS SSM XIII-3614]

#### H. CASE PLANS AND OTHER DISPOSITIONAL ISSUES:

1. Recommendation and reports of tribe considered [Minn. Stat. §260.181 subd. 3]
2. Tribe participated in preparation of case plan [Minn. Stat. §260.191 subd. 1e]
3. Services in case plan, including assessments and evaluations, are culturally appropriate [Minn. Stat. §260.012(c) & §256F.03 subd. 8]
4. If indigent, parent was informed of right to court appointed attorney in preparation of case plan, even if original placement was voluntary [Minn. Stat. §257.071 subd. 1]

#### I. ADOPTIONS:

1. Jurisdiction:

\_\_\_\_\_ a. Inquiry is made to determine if child is ward of tribal court [25 U.S.C. §1911; Minn. Stat. §257.354]

- \_\_\_\_\_ b. Inquiry is made to determine if child resides or is domiciled on a reservation with jurisdiction over child custody matters [25 U.S.C. §1911; Minn. Stat. §257.354]

If parents are domiciled on a reservation the child is also domiciled there, even if born off the reservation, and even if the child never resided on the reservation. [Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d (1989)]

2. Tribe has been properly notified

- \_\_\_\_\_ a. Tribe received full notice of all proceedings for termination of parental rights [25 U.S.C. §1912; see section B-5 of this outline for content and timing of notice]

- \_\_\_\_\_ b. Tribe received notice of potential preadoptive or adoptive placement within 7 working days after (i) placement, or (ii) a determination that the agency will be working with the child for more than 30 days and child could be placed, whichever occurs soonest [Minn. Stat. §257.352 subd. 2; Minn. Stat. §257.353 subd. 2] NOTE: Minn. Stat. §257.353 allows private placement agencies to have up to 3 months to give notice if parent temporarily places a child pending a decision on adoption.

3. If adoption requires termination of parental rights of a parent or Indian custodian, the provisions of sections B, C, E, and F of this outline must be followed

4. If adoption is voluntarily initiated by birth parents, section G of this outline must be followed

5. Adoptive placement preference:

- \_\_\_\_\_ a. The tribe has been contacted to see if they have their own order of preference 25 U.S.C. §1915(c)]

- \_\_\_\_\_ b. Child is placed for adoption with a member of his/her extended family [25 U.S.C. §1915(a)]

- \_\_\_\_\_ c. If child is not with extended family, a diligent search is on-going [Minn. Stat. §257.352 subd. 4; §257.353 subd. 5; §259.455; 44 Fed. Reg. 67594-5; DHS SSM XIII-3611 & 3533]

\_\_\_\_\_ (i). child's mother has been asked for names of extended family

\_\_\_\_\_ (ii). child's father has been asked for names of extended family

\_\_\_\_\_ (iii). child has been asked for names of extended family members

\_\_\_\_\_ (iv). tribe has been asked to help with search for extended family

- \_\_\_\_\_ (v). American Indian advocate on case has been asked to help with search for extended family
  
- \_\_\_\_\_ (vi). all possible extended family members have been contacted about possible placement and have been informed (i) that relatives are first preference for adoption, and (ii) of what financial or other services may be available to the child and the family [44 Fed. Reg/ 67594; Minn. Stat. §259.40, §259.44, & §259.471]
  
- \_\_\_\_\_ (vii). special training is offered to extended family members if necessary for adoptive placement [Minn. Stat. 257.072 subd. 4(4) & 7(3); Minn. Rule 9545.0230 subp. 2C]
  
- \_\_\_\_\_ d. If no extended family members are available after diligent search, child is placed for adoption with a member of child's tribe [25 U.S.C. §1915(a)]
  - \_\_\_\_\_ (i) tribe has been notified that their members will be given preference in adoption and asked to locate potential adoptive families [44 Fed. Reg. 67594]
  
- \_\_\_\_\_ e. If no extended family member or tribal member is available, child is placed for adoption in other Indian home [25 U.S.C. §1915(a)]
  - \_\_\_\_\_ (i) local and national Indian organizations and placement agencies are contacted [DHS SSM XIII-3611]
  
- \_\_\_\_\_ f. If adoption is sought by someone who is not extended family member, petitioner has met their burden of showing there is "good cause" not to follow the preferences [25 U.S.C. §1915(b); 44 Fed. Reg. 67594; Matter of Custody of S.E.G., 521 N.W.2d 357 (Minn. 1994)]
  - \_\_\_\_\_ (i). request of biological parents or child (if of sufficient age), shall be considered if appropriate
  
  - \_\_\_\_\_ (ii). extraordinary physical or emotional needs of the child -- such as the need for highly specialized treatment services that are unavailable in the community where extended family reside - - as established by testimony of a qualified expert witness [See section E-5 above]
  
  - \_\_\_\_\_ (iii). suitable families are unavailable despite a diligent search

The fact that a foster family has provided a loving home to the child, and that separation from the foster parents will be initially painful to the child, is not good cause to defeat the preference for extended family under the ICWA. [In Re the Adoption of M.T.S., 489 N.W.2d 285 (Minn. App. 1992)]

- 6. Copy of adoption decree to be sent to BIA, along with [25 U.S.C. §1951(a)]:
  - \_\_\_\_\_ a. Name and tribal affiliation of child
  - \_\_\_\_\_ b. Names and addresses of biological parents
  - \_\_\_\_\_ c. Names and addresses of adoptive parents
  - \_\_\_\_\_ d. Identity of any agency having files or information relating to the adoptive placement
  - \_\_\_\_\_ e. Affidavit of biological parent(s) who request confidentiality
  
- 7. If adoption is set aside or adoptive parents voluntarily terminate parental rights, biological parent or prior Indian custodian shall be informed and shall be granted custody if he or she petitions for custody unless party opposing return of child meets standard under sections B and E of this outline [25 U.S.C. §1916; 44 Fed. Reg. 67595]
  
- 8. Any adult who was adopted as a child shall be informed of tribal affiliation of biological parents and any other information necessary to protect that person's rights flowing from tribal membership [25 U.S.C. §1917; 44 Fed. Reg. 67595; Minn. Stat. §259.29 subd. 2]

J. INVALIDATION PROCEEDINGS [25 U.S.C. §1914]:

"Had the mandate of the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'" [Mississippi Band of Choctaw Indians v. Holyfield, 109 S.Ct. 1597, 1611, 490 U.S. 30, 104 L.Ed.2d 29 (1989) quoting Supreme Court of Utah]

- 1. Invalidation petition can be brought by:
  - \_\_\_\_\_ a. Indian child
  - \_\_\_\_\_ b. Parent
  - \_\_\_\_\_ c. Indian custodian
  - \_\_\_\_\_ d. Tribe

2. Types of cases in which orders can be invalidated:

- a. CHIPS
- b. Termination of parental rights
- c. Voluntary placements
- d. Adoption
- e. Status offenses
- f. Delinquency cases where child was placed due to parent's unfitness or child's needs, and not because of delinquent act
- g. Guardianship
- h. Third party custody cases
- i. Custody award in OFP or other proceeding to father who has not acknowledged paternity, who has not adopted child under tribal law or custom, and who does not qualify as Indian custodian

3. Bases for invalidation:

- a. Tribe had exclusive jurisdiction [25 U.S.C. §1911(a)]
- b. Trial court failed to transfer jurisdiction to tribal court when neither parent objected and there was not "good cause" to deny transfer [25 U.S.C. §1911(b)]
- c. Child, Indian custodian or the tribe was denied right to intervene at any point in the proceedings [25 U.S.C. §1911(c)]
- d. Court failed to give full faith and credit to public acts, records or judicial proceedings of a tribe [25 U.S.C. §1911(d)]
- e. Court failed to give proper notice to parent, Indian custodian, tribe, or BIA, including information on right to intervene [25 U.S.C. §1912(a)]
- f. Proceedings took place too soon after notice [25 U.S.C. §1912(a)]
- g. Indigent parent or Indian custodian not given court appointed counsel [25 U.S.C. §1912(b)]
- h. Child not given court appointed attorney if appointment is in best interests of child [25 U.S.C. §1912(b)]

- \_\_\_\_\_ i. Any party denied right to examine all reports or other documents filed with the court [25 U.S.C. §1912(c)]
- \_\_\_\_\_ j. Party seeking placement failed to show (1) that it made active efforts to provide remedial services and rehabilitative programs designed to prevent family breakup and (2) that those efforts have proven unsuccessful [25 U.S.C. §1912(d)]
- \_\_\_\_\_ k. Lack of qualified expert testimony that continued custody by parent or Indian custodian is likely to result in serious emotional or physical damage to child [25 U.S.C. §1912(e) & (f)]
- \_\_\_\_\_ l. Incorrect burden of proof applied [25 U.S.C. §1912(e) & (f)]
- \_\_\_\_\_ m. Voluntary consent to placement improperly done [25 U.S.C. §1913(a)]
  - \_\_\_\_\_ (i) consent given prior to or within 10 days of birth
  - \_\_\_\_\_ (ii) consent not in writing
  - \_\_\_\_\_ (iii) consent not recorded in court, and not accompanied by judge's certificate
- \_\_\_\_\_ n. Parent or Indian custodian not allowed to withdraw consent to placement [25 U.S.C. §1913(b)]
- \_\_\_\_\_ o. Child not returned to parent or Indian custodian after consent to placement withdrawn [25 U.S.C. §1913(b)]
- \_\_\_\_\_ p. Parent not allowed to withdraw consent to termination of parental rights or adoptive placement prior to entry of decree [25 U.S.C. §1913(c)]
- \_\_\_\_\_ q. Child not returned to parent if consent to termination of parental rights or adoptive placement withdrawn within ten days or prior to entry of decree, whichever occurs later [25 U.S.C. §1913(c); Minn. Stat. §259.24 subd. 6a]
- \_\_\_\_\_ r. Adoption decree not vacated if parent withdraws consent due to fraud or duress [25 U.S.C. §1913(d); Minn. Stat. §259.24 subd. 6a]
- \_\_\_\_\_ s. Child not returned to parent after finding that consent to adoption was obtained through fraud or duress [25 U.S.C. §1913(d)]

K. STATUTORY CONSTRUCTION:

- 1. State or federal law that provides highest standard of protection to rights of parent or Indian custodian applies [25 U.S.C. §1921; In Re Adoption of M.T.S., 489 N.W.2d 285 (Minn. App. 1992)]

- 2. ICWA, BIA Guidelines for State Courts, federal regulations implementing the ICWA, and all state statutes, regulations and rules implementing the ICWA shall be liberally construed in favor of result consistent with the following preferences [44 Fed. Reg. 67586]:
  - \_\_\_\_\_ a. Indian children should be kept with their families;
  - \_\_\_\_\_ b. State courts should defer to tribal judgment on matters concerning the custody of tribal children; and
  - \_\_\_\_\_ c. Indian children who must be removed from their homes should be placed within their own families or tribes
- 3. Statutes passed to benefit Indians must be liberally construed to effectuate their purposes; doubtful expressions are to be resolved in favor of Indians [Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976)]
- 4. State law definitions of terms cannot be used to frustrate the policies of the ICWA [Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989)]
- 5. Remedial statutes should be broadly construed to effectuate their purpose [Tcherepnin v. Knight, 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967)]

#### L. SOURCES:

Indian Child Welfare Act, 25 U.S.C. §§1901-1963

BIA Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584-67595 (November 26, 1979)

The BIA Guidelines were developed in compliance with the Administrative Procedures Act and in response to a Congressional directive. [44 Fed. Reg. 67584; 25 U.S.C. §1952]. However, because the BIA concluded that the separation of powers doctrine precluded the agency from exercising supervisory control over state courts, the BIA interpretation of the ICWA was published as non-binding guidelines. This explains why they are found in the Federal Register, but not the Code of Federal Regulations. Nevertheless, this interpretation by an administrative agency should be given great deference by the courts. [Udall v. Tallman, 85 S. Ct. 792, 801 (1965)]. This rule of statutory construction is even more compelling here, where the BIA is not merely an interested agency, but is acting in its role as trustee to Indian tribes and families. See Navajo Nation v. Hodel, 645 F.Supp. 825, 827 (D. Ariz. 1986) [finding that Congress created a special trust relationship between the government and Indians for purposes of the ICWA.] As trustee, the BIA is bound to act with a high degree of care.

House Report No. 1386, 95th Cong., 2nd Sess. (1978), reprinted in 1978

U.S.Cod Cong. & Admin. News 7530

House report issued at time of passage of the ICWA

Minnesota Indian Family Preservation Act, Minn. Stat. §§257.35-257.3578

Minnesota Department of Human Services Social Services Manual, Chapter XIII  
– Indian Children

Policy of the state of Minnesota relating to Indian children; binding on the courts to the extent it provides more protection to the parents or Indian custodians than does the ICWA [Matter of Welfare of B.W., 454 N.W.2d 437 (Minn. App. 1990)]