2. JURISDICTION

Disclaimer: *A Practical Guide to the Indian Child Welfare Act* is intended to facilitate compliance with the letter and spirit of ICWA and is intended for educational and informational purposes only. It is not legal advice. You should consult competent legal counsel for legal advice, rather than rely on the *Practical Guide*.

25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

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

25 U.S.C. § 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

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

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

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

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

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

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

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

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise

exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

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

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

(d) Pending actions or proceedings unaffected

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

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

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

25 U.S.C. § 1922. Emergency removal or placement of child; termination; appropriate action

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

Disclaimer: The above provisions of the Indian Child Welfare Act are set forth to facilitate consideration of this particular topic. Additional federal, state or tribal law may be applicable. Independent research is necessary to make that determination.

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Frequently Asked Questions

2.1 Why is jurisdiction important?

Jurisdiction refers to the authority to adjudicate, or decide, a particular legal issue or matter. Congress found that in exercising jurisdiction over Indian children, state courts had failed to recognize the essential tribal relations of Indian people and the social and cultural standards in tribal communities, and thus harmed tribal interests. 25 U.S.C. § 1901(5). The Indian Child Welfare Act (ICWA) is designed to remedy this by creating presumptive jurisdiction in tribal courts. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

The ICWA establishes a dual jurisdictional scheme, tribes have exclusive jurisdiction over child custody matters when the Indian child resides or is domiciled on an Indian reservation, or when the child is a ward of the tribal court, unless another federal law provides otherwise (such as Public Law 280). 25 U.S.C. § 1911(a). Tribes also have jurisdiction over Indian children who reside or are domiciled off the reservation, but that jurisdiction is shared with the state court. 25 U.S.C. § 1911(b).

When a state court exercises jurisdiction over an Indian child custody proceeding, it must follow the ICWA's substantive and procedural rules, such as giving notice to the tribe and the Indian parents or custodians of the proceeding, applying higher burdens of proof when removing an Indian child for foster care or adoptive placement, and following specific placement guidelines that give preference to members of the Indian child's extended family and other Indian families.

2.2 When does a state have jurisdiction?

A state court has jurisdiction over a child custody proceeding involving an Indian child in four situations: (1) where the child is domiciled or resides off an Indian reservation, and is not a ward of the tribal court, 25 U.S.C. § 1911(b); (2) where the state has been granted jurisdiction on the reservation under Public Law 280, *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005); (3) through a tribal-state agreement in which the tribe allocates jurisdiction to the state; 25 U.S.C. § 1919(a); and (4) through limited emergency jurisdiction where a reservation-resident Indian child is temporarily off the reservation and the state has removed the child in an emergency situation to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922. This emergency jurisdiction terminates when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

2.3 When does a tribe have jurisdiction?

A tribe has jurisdiction over a child custody proceeding involving an Indian child in three situations: (1) where the child is domiciled or resides on an Indian reservation, 25 U.S.C. § 1911(a); (2) when the child is a ward of the tribal court, regardless of the child's domicile or residence, 25 U.S.C. § 1911(a); and (3) concurrent jurisdiction where the child is domiciled or resides off an Indian reservation and is not a ward of the tribe's court. 25 U.S.C. § 1911(b).

A tribe that became subject to state jurisdiction under Public Law 280 may reassume exclusive jurisdiction over Indian child custody proceedings by submitting an application to the Secretary of the Interior with a plan as to how the tribe will exercise its jurisdiction. 25 U.S.C. § 1918.

2.4 What is domicile under ICWA?

Domicile looks to the person's physical presence in a certain place along with the intent to remain in that place. Children typically are unable to form the requisite intent to establish a domicile, so the domicile of the child is determined by that of the parents.

Domicile is important in child custody proceedings because it may affect the jurisdiction of the court. The term is not defined in the ICWA, so the United States Supreme Court found that the meaning of "domicile" in the ICWA is a matter of federal, not state, law because Congress intended a uniform, nationwide application. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44-47 (1989).

A child born in wedlock takes the parents' domicile. A child born out of wedlock takes the domicile of his or her mother. *Holyfield*, 490 U.S. at 43-48. If a child has no parents, such as when the parents have died, then the child takes the domicile of the person who stands *in loco parentis*, such as a

guardian or custodian. *In re S.S.*, 657 N.E.2d 935 (Ill. 1995). The domicile of a child who is a ward of the tribal court is the reservation. *In re D.L.L.*, 291 N.W.2d 278 (S.D. 1980); H.R. REP. NO. 95-1386, at 21 (2d Sess. 1978).

2.5 What is exclusive jurisdiction?

Exclusive jurisdiction exists when only one sovereign has the authority to adjudicate a certain issue or matter. Under the ICWA, tribal courts have jurisdiction, exclusive of the state courts, over cases involving an Indian child who resides or is domiciled on an Indian reservation or who is a ward of the tribal court. State courts do not have any authority in the disposition of these matters. 25 U.S.C. § 1911(a).

There are three exceptions to this general rule. The first exception involves the tribal court's extra-territorial jurisdiction over an off-reservation Indian child based on the child's membership. *John v. Baker*, 982 P.2d 738 (Alaska 1999).

Under the second exception, the state has authority to remove an Indian child who is a reservation-resident and is temporarily off the reservation in an emergency situation to prevent imminent harm to the child. In these situations, the state must expeditiously transfer the child to the jurisdiction of the tribe or restore the child to his or her parents as soon as possible. 25 U.S.C. § 1922.

The third exception relates to tribes located in Public Law 280 states, such as Alaska and California, which share concurrent jurisdiction with state courts over Indian child custody proceedings when the Indian child resides on the reservation. 25 U.S.C. § 1911(a); *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005).

Practice Tip:
Arguments have been made that grants of jurisdiction to states under Public Law 280 do not extend to involuntary public child welfare proceedings initiated by state agencies, as states did not receive civil/regulatory jurisdiction under Public Law 280. *State ex rel. Dep't Human Servs. v. Whitebreast*, 409 N.W.2d 460 (Iowa 1987); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That argument was rejected in *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005), but such arguments may still be made in Public Law 280 states outside the Ninth Circuit. *See* 78 Wis. Op. Att'y Gen. 122 (1989).

The ICWA allows tribes to reassume exclusive jurisdiction from a state in a Public Law 280 state. The tribe must submit a petition to the Secretary of the Interior along with a plan about how the tribe will exercise its jurisdiction. 25 U.S.C. § 1918(a).

Practitioners are encouraged to determine whether a specific tribal statute affects the jurisdiction of the Indian tribe at issue in the particular ICWA proceeding.

See also FAQ 2.12 below for further discussion of Public Law 280.

2.6 What is concurrent jurisdiction under ICWA?

Concurrent jurisdiction exists when two sovereigns have the potential authority to adjudicate the same legal issue or matter. Under the ICWA, § 1911(b) establishes concurrent "but presumptively tribal" jurisdiction over an Indian child who resides off a reservation. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). The ICWA requires the state court to transfer the child custody proceeding in these situations to the tribal court upon a petition of the tribe, "absent good cause to the contrary" or objection from the child's parent. 25 U.S.C. § 1911(b).

A state also has concurrent jurisdiction over an Indian child who resides on a reservation in a state that has been granted jurisdiction under Public Law 280. 25 U.S.C. § 1911(a). See FAQ 2.12 below for a further discussion of Public Law 280.

2.7 What is a "ward" of a tribal court?

The ICWA does not provide a definition of "ward." The general legal definition of the term means a person, especially a child or a legally incompetent person, placed by the court under the care of a guardian.

Cases decided under the ICWA find that a wardship status is established when a tribe exercises authority over a child. This official action can be done in several ways: by an order of the tribal court in a child custody proceeding, *In re M.R.D.B.*, 787 P.2d 1219 (Mont. 1990); or in a guardianship proceeding, *In re D.L.L.*, 291 N.W.2d 278 (S.D. 1980); or by a Resolution passed by the governing body of the tribe, such as a Tribal Council, where a tribe operates without a formal court system. *In re J.M.*, 718 P.2d 150 (Alaska 1986).

Practice Tip:
From a practice perspective, the word "ward" should be included in the tribal order, judgment or decree. However, courts reviewing tribal actions have found wardship status established by looking at the intent of the order and the nature of the court's order, especially when the order indicates that the court will retain jurisdiction over the matter until a certain date or event. *In re M.R.D.B.*, 787 P.2d 1219, 1222 (Mont. 1990); *Powell v. Crisp*, No. E1999-02539-COA-R3-CV, 2000 WL 1545064 (Tenn. Ct. App. 2000).

Once a child is made a ward of the tribal court, the tribe generally has exclusive jurisdiction, regardless of the child's residence or domicile. 25 U.S.C. § 1911(a); *M.R.D.B.*, 787 P.2d at 1222; *D.L.L.*, 291 N.W.2d 278.

2.8 Who determines jurisdiction?

As noted above, jurisdiction over Indian child custody matters is statutorily defined under the ICWA. Nonetheless, many factual issues implicate jurisdiction, such as whether the child is an Indian and whether the child is domiciled on an Indian reservation. These issues may be decided in tribal, federal and state courts, and ultimately the Supreme Court of the United States. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *In re Halloway*, 732 P.2d 962 (Utah 1986).

2.9 Does a tribe have transfer jurisdiction under ICWA over children who are eligible for membership?

Yes. The ICWA defines an Indian child as a child who is a member of an Indian tribe, or a child who is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4).

A tribe's determination that a child is a member of, or is eligible for membership in, a tribe is conclusive evidence that a child is an Indian child within the meaning of the ICWA. *See also*, Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Bureau of Indian Affairs Nov. 26, 1979) (guidelines for state courts). Neither enrollment nor blood quantum is required as long as the child is recognized as a member of the tribe or as eligible for membership. *In re Riffle* (*Riffle II*), 922 P.2d 510, 513 (Mont. 1996).

Practice Tip:
The ICWA's definition of "Indian child" is more expansive than most tribal laws, and thus expands tribal jurisdiction over a broader category of Indian children, for example, children who are eligible for enrollment but who have not yet been formally enrolled or recognized. Tribes and practitioners should review tribal constitutions and codes to ensure that tribal law is consistent with ICWA. If a tribal law more narrowly defines the tribe's jurisdiction than provided under ICWA, it is likely that a court would hold that ICWA preempts the more limited tribal law.

2.10 How does jurisdiction differ from service/financial responsibility?

Jurisdiction and service responsibility are distinct legal concepts. Jurisdiction refers to the authority of a government to adjudicate or decide a particular legal matter in its court, while service responsibility refers to the particular government which is responsible for providing services to the children and families involved in a particular child welfare proceeding.

American Indian and Alaskan Native people are citizens of their tribe, the United States, and the state in which they reside. This status entitles them to services provided by the state for which they and other citizens of the state are eligible, even if the tribe exercises jurisdiction in a particular case. *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir. 1993), *limited by Blessing v. Freestone*, 520 U.S. 329 (1997) (standing under § 1983 limited). In child welfare situations, most of the services provided to children and families will be federally funded in part, with a non-federal match required from the state. Most federal funding sources, such as Title IV-E Foster Care and Adoption Assistance, have requirements tied to the receipt of these funds that prohibit states from discriminating upon the basis of race or political subdivision within the state.

How jurisdiction and service responsibility are applied, however, can vary from state to state. In some areas, state agencies routinely participate in tribal court child custody proceedings as the entity with primary service responsibility, while the tribe exercises jurisdictional authority over the case. In other areas, tribes may have both jurisdiction and service responsibility; or the tribe may not have jurisdiction, but retain some level of service responsibility. Gaining an understanding of how

jurisdiction and service responsibility work in any particular situation is critical to being able to successfully coordinate services and receive proper authority to make decisions affecting American Indian and Alaskan Native children and families.

2.11 Can jurisdiction be transferred between tribes?

Yes. A tribe may transfer a case to another tribe according to its own law and judicial procedures. Where two tribes assert an interest in a child custody proceeding in state court involving a child who is enrolled or eligible for enrollment in both tribes, one tribe may defer jurisdiction to the other tribe. *See, e.g., In re T.I.*, 2005 SD 125, 707 N.W.2d 826.

2.12 What effect do Public Law 280 and other similar laws have on the ICWA?

Public Law 280 grants certain states concurrent jurisdiction over child custody proceedings in cases that otherwise would fall within the exclusive jurisdiction of the tribe. Public Law 280 states include: Alaska, California, Minnesota (except the Red Lake Nation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation).

Some tribes have become subject to Public Law 280 through land claim settlement and recognition acts. For example, the Passamoquoddy and Pennobscot Tribes of Maine are subject to a specific statutory provision concerning their jurisdiction over child custody proceedings arising on their respective reservations. The State of Maine has exclusive jurisdiction on those reservations until the tribes assume exclusive jurisdiction from it. 25 U.S.C. § 1727.

Practice Tip:
Practitioners are encouraged to determine whether a specific state law or tribal statute affects the jurisdiction of the Indian tribe at issue in the particular ICWA proceeding, as states and tribes have altered their jurisdictional prerogatives under the ICWA in a number of ways. Tribes in Public Law 280 states are permitted under the ICWA to reassume exclusive jurisdiction from the state. 25 U.S.C. § 1918(a). The tribe must submit a petition to the Secretary of the Interior along with a plan about how the tribe will exercise its jurisdiction. Therefore, in Public Law 280 states, the practitioner should check state laws and federal regulations to determine whether the tribe has reassumed its exclusive jurisdiction from the state.

In addition, in many Public Law 280 states, both mandatory and optional states, Indian tribes exercise exclusive jurisdiction over their reservation-domiciled children through agreements with the state, such as in Oregon and Washington, or through state laws, such as in Minnesota, without having gone through the reassumption process. 25 U.S.C. § 1919.

The grant of jurisdiction to the states under Public Law 280 does not deprive tribal courts of concurrent jurisdiction. *Native Village of Venetie I.R.A. Council v. Alaska* (*Venetie II*), 944 F.2d 548, 559-62 (9th Cir. 1991); *Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians*, 2000 WI 79, ¶¶ 31-32, 236 Wis. 2d 384, 402, 612 N.W.2d 709, 717; *In re M.A.*, 40 Cal. Rptr. 3d 439, 441-43 (Ct. App. 2006); *Doe v. Mann* (*Mann II*), 415 F.3d 1038 (9th Cir. 2005).

Arguments have been made that grants of jurisdiction to states under Public Law 280 do not extend to involuntary public child welfare proceedings initiated by state agencies, as states did not receive civil/regulatory jurisdiction under Public Law 280. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *State ex rel. Dep't of Human Servs. v. Whitebreast*, 409 N.W.2d 460 (Iowa 1987). That argument was rejected in *Mann II*, 415 F.3d 1038, but such arguments may still be made in Public Law 280 states outside the Ninth Circuit. *See* 78 Wis. Op. Att'y Gen. 122 (1989).

2.13 Can tribes decline to accept a transfer of jurisdiction?

Yes. The ICWA permits a tribal court to decline jurisdiction by refusing to accept the transfer of jurisdiction from a state court. 25 U.S.C. § 1911(b).

**** Access to the full-text of opinions and additional materials is at www.narf.org/icwa ****

The following list is representative of cases that discuss the topic. The list is not exhaustive. The practitioner should conduct independent research.

FEDERAL CASES

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Boozer v. Wilder, 381 F.3d 931 (9th Cir. 2004)
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Iowa
In re J.W., 498 N.W.2d 417 (Iowa Ct. App. 1993)

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Searle v. Searle, 2001 UT App 367, 38 P.3d 307

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