

## Indian Child Welfare Act

LEGAL ADVOCACY AND BEST INTEREST  
REPRESENTATION

OCR FALL CONFERENCE 2019

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## Legislative Updates in Colorado

*What is the legislative update?* House Bill 19-1232

*Why was the bill written?* To align 19-1-126 with 2016 ICWA regulations and ensure compliance with federal law.

*How does the bill achieve that goal?* Let's look at the bill/final statute.

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## When does ICWA apply?

- ICWA applies to "child custody proceedings," defined in ICWA as any action that may culminate in one of the following outcomes:

- foster care placement,
- termination of parental rights,
- pre-adoptive placement,
- adoptive placement.

25 U.S.C. § 1903(1); 25 C.F.R. §§ 23.2, 23.103.

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## 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 parental rights have not been terminated.”

25 U.S.C. § 1903(1)(i); 25 C.F.R. § 23.2.

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## Temporary Custody/Shelter Hearing

### • What must the Court do?

- **Inquire** of parents if they know or have reason to know a child is an Indian child. 25 C.F.R. § 23.107(a)
  - **When is there “reason to know?”**
    - Someone tells the Court the child is an Indian child
    - Information is discovered showing the child is an Indian child
    - Child tells the court he is Indian
    - Parent/child/Indian custodian lives on reservation
    - Child was ward of tribal court
    - Parent or child possesses identification card indicating membership in a tribe 25 C.F.R. § 23.107(c)
- Order parents to complete ICWA affidavit within 7 days *and much more according to the new ICWA statute*. Colo. Rev. Stat. §§ 19-3-403(3.6)(a)(III), 19-1-126

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## Termination of Parental Rights

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### Case Example: Abby Walters

- Abby is injured and the ER doctors believe her parents hurt her. DHS takes custody.
- At the shelter hearing, the Court inquires of Abby's parents whether they have any Indian heritage.
- Abby's mom says "I think my great grandmother might be Cherokee or Blackfoot."
- What should the Court do next?
- What should DHS do next?
  - Send notice!
- Who decides if Abby is an Indian child?

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### Case Example: Mark McMillan

- Mark is 5 years old and his guardianship has failed. His parents' whereabouts are unknown. DHS has petitioned the Court for custody.
- Mark has blue eyes and blonde hair.
- He has a census ID number and is a member of the Oglala Sioux tribe.
- What should the Court do at the shelter hearing?
- What should DHS do?
- What hearings need to be scheduled next?
  - ICWA shelter hearing

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### ICWA Shelter Hearing

- Evidentiary hearing
- At least 10 days notice to tribe is required
- Qualified Expert Witness (QEW) must testify:
  - Qualified to testify as to prevailing social and cultural standards of tribe. 25 C.F.R. § 21.122(a)
  - Render an opinion re: whether the continued custody is likely to result in serious emotional or physical damage to the child *Id.*
  - The social worker regularly assigned to the child may not serve as the QEW in child custody proceedings concerning the child. 25 C.F.R. § 23.122(c)

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### Termination of Parental Rights: Abby Walters

- Abby's parents have not complied with their treatment plans and Mom is MIA. Mom did not complete the ICWA affidavit.
- Mom is not present the termination trial.
  - What should the Court do?
  - What if DHS never heard back from the tribes?
  - What findings on the record are necessary?
    - No reason to know Abby is an Indian child.

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### Pre-Adoptive Placement: Mark McMillan

- Mark's parental rights were terminated. He has been living with his foster family for 2 years now and they want to adopt him. No adoption has been filed.
- The Oglala Sioux tribe has petitioned the Court to transfer the case to tribal court. The tribe wants to place Mark with his grandmother, who failed an ICPC.
  - Is this an advanced stage of the proceeding?
    - NO! The pre-adoptive placement is a NEW Proceeding.
    - Stages of ICWA cases v. D&N case.

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### Transfer

- **How are petitions for transfer of a proceeding made?**
- (a) 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.
- (b) The right to request a transfer is available at any stage in each **foster-care** or **termination-of-parental-rights proceeding**.

25 C.F.R. § 23.115

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## Transfer

- Can Mark's case be transferred to the Oglala Sioux?
  - What proceeding is it in?
    - Federal regulations say foster care or termination proceedings may be transferred.
    - COA published decision says pre-adoptive and adoptive proceedings may be transferred. *People in the Interest of L.R.B.*, 2019 WL 2292327, May 30, 2019

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## Transfer

- Is there good cause to deny transfer?
- In determining whether good cause exists, the court **must not consider**:
  - (1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
  - (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
  - (3) Whether transfer could affect the placement of the child;
  - (4) The Indian child's cultural connections with the Tribe or its reservation; or
  - (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems. 25 C.F.R. §23.118(c)

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## Denied Transfer

- A trial court's order denying transfer to the Navajo Nation is an immediately appealable order.
- Pursuant to the collateral order doctrine, to be immediately appealable a decision must
  - '[1] conclusively determine the disputed question,
  - [2] resolve an important issue completely separate from the merits of the action, and
  - [3] be effectively unreviewable on appeal from a final judgment.'

*People in the Interest of L.R.B.*, 2019 WL 2292327, May 30, 2019

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## ICWA Resources

*Where can I look? The GRID!*



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## ICWA Resources

*Where else can I look? The Litigation Toolkit.*

*Why should I look at the Litigation Toolkit? There, you will find seven documents, including:*

1. the text of ICWA,
2. the text of the federal regulations,
3. a checklist created by the court of appeals,
4. an inquiry and notice tracking tool created by the OCR,
5. a resource page created by the OCR, and
6. a CDHS memorandum containing
  - a. a form Declaration of Non-Indian Heritage,
  - b. a form ICWA Family Ancestry Chart and instructions, and
  - c. a form Notice to tribes.

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