

An Overview of the Applicability of ICWA in Colorado’s Private Legal Actions Involving Non-Parents; A Guideline on Arguing for and Complying with the ICWA

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In 1978, the Indian Child Welfare Act (“ICWA”) was enacted by the United States Congress to stem the removal, often unwarranted, of an alarmingly high percentage of Indian children from their families. At the time in which the ICWA was enacted, its application was primarily seen in dependency & neglect cases, which are cases in which child welfare agencies intervene into family affairs and often obtain an order to remove Indian children from their parent(s) or Indian custodian.

At the time the ICWA was codified, the Colorado legislature had not yet promulgated certain legal actions that exist today, which permit non-parents to obtain parental rights over children, including Indian children. Due to the creation of private legal actions created by the State *after* the promulgation of ICWA, the ICWA does not expressly list these later-created legal actions. Instead, ICWA has been determined to apply to these later-created state legal actions as a result of strong legal advocacy, which resulted in the creation of case law, and based upon informative academia, such as law review articles, in the area of American Indian law.

Despite the recent proliferation of the applicability of ICWA in private actions wherein Indian children are placed with non-parents, many practitioners today are still uninformed and uneducated on the variety of private legal actions in which the ICWA does – and should be argued – to apply. As such, this presentation will focus on the types of legal actions available in Colorado that provide non-parents the opportunity to obtain parental rights over Indian children, thereby requiring the applicability and protections of ICWA. The goal of this presentation is to educate attorneys and other court-involved professionals on the most-common types of private actions seen in Colorado courts where ICWA is applied and to provide guidance on how to comply with ICWA once a potential ICWA case has been identified.

When Does ICWA Apply?

ICWA applies when there is a “child custody proceeding” involving an “Indian child.” 25 U.S.C. § 1903; 25 C.F.R. § § 23.2,23.103.

Who is an “Indian child” as defined by the ICWA? 25 U.S.C. § 1903(4).

Under the Act, an “Indian child” is “any unmarried person who is under the age of 18 and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”

How does the ICWA define a “Child Custody Proceeding”? 25 U.S.C. § 1903(1).

“Child custody proceedings” include “foster care placements,” termination of the parent-child relationship, pre-adoptive placements, and adoptive placements.

This presentation focuses on the types of legal actions that fall under the broad term “foster care placements.” A “foster care placement” is defined as “any action removing an Indian child from its 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.”

Notably, ICWA does not limit the term “foster care placement” to situations in which the Indian child is in state custody. Again, the legal actions that ***do not*** involve the child being placed in state custody or otherwise actions not initiated by child welfare system are our primary focus for the purpose of conducting this review.

What are certain types of private actions that fall under the umbrella of Child Custody Proceedings/Foster Care Placements? 25 U.S.C. § 1903(1).

Private Child Custody Proceedings (Foster Care Placements) Covered by ICWA

Allocation of Parental Responsibilities Action involving a non-parent

Guardianship Actions

Stepparent Adoption Actions

Kinship Adoption Actions

Custodial Adoption Actions

Paternity/Maternity Actions (in limited circumstances; case law still undeveloped)

Private Child Custody Proceedings (Foster Care Placements) Not Covered by ICWA

Divorce proceedings or custody disputes between two parents

The APR Conundrum Involving Indian Children:

The new custody actions instituted by states across the country, although not called either foster care placements or guardianships, have the same practical effect as those proceedings specifically named in ICWA. All these actions result in a non-parent's authorization to exercise the full range of parental rights and responsibilities. Unfortunately, because private non-parent custody actions are filed in family courts or domestic relations divisions where cases governed by ICWA have not appeared before, presiding judges are often unaware of the Act's applicability. Consequently, Indian children are being separated from their parents, Indian families, and tribes without ICWA's protection. The very problem that ICWA was enacted to address is reoccurring in the present day through the implementation of new private non-parent custody causes of action. In Colorado, this is most commonly occurring within Allocation of Parental Responsibilities (“APR”) actions.

Jill E. Tompkins, Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions, 81 U. Colo. L. Rev. 1119, 1122 (2010).

The APR Action pursuant to C.R.S. § 14-10-123:

An APR action can be initiated by a person who falls into one of the following categories, as outlined in C.R.S. §14-10-123:

1. By a parent;
2. By a person other than a parent, by filing a petition seeking the allocation of parental responsibilities for the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical care of one of the child's parents;

3. By a person other than a parent who has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care; or
4. By a parent or person other than a parent who has been granted custody of a child or who has been allocated parental responsibilities through a juvenile court order entered pursuant to section 19-1-104 (6), C.R.S., by filing a certified copy of the juvenile court order in the county where the child is permanently resident. Such order shall be treated in the district court as any other decree issued in a proceeding concerning the allocation of parental responsibilities.

A Case Study – Applying ICWA in a APR Action involving a Non-Parent:

A mother, who is a member of a federally recognized Indian Tribe, is in an abusive relationship with the child's father. Mother determines that she needs to get her child out of her home due to the violent behaviors exhibited by Father. However, she is not yet prepared to leave Father. As a result, she voluntarily places her child in the care of her parents, who are also tribal members. Six months pass with the child in the grandparents' care and physical custody. One day, Mother finally leaves Father. As a result, Mother then goes to the grandparents' home, and she requests that they return her son to her. At this time, the grandparents believe that it is in the child's best interest for the child to remain with them, as they have observed Mother fail to act in a protective capacity in the past and fear her separation from Father may only be temporary. As a result, the grandparents file a Petition for Allocation of Parental Responsibilities requesting legal parental responsibilities (custody) to be allocated to them. Does the federal Indian Child Welfare Act apply?

I've Identified a Private Action Where ICWA Could Apply; Now What?

The following are basic steps that must be followed in arguing for/complying with the ICWA in actions by the non-parent seeking APR, guardianship, or some other form of legal custody of the child. The steps should be initiated and followed by the petitioning non-parent, as in these private legal actions, it is the non-parent seeking legal custody of the child who has the burden to comply with the ICWA.

GUIDELINE¹ ON HOW TO COMPLY WITH ICWA IN A PRIVATE NON-PARENT LEGAL ACTION

Initial determining factor: Is there reason to know the child at issue is an Indian child? If so, proceed to Step 1.

Step 1: Inquire

- A. Determine if the child an "Indian child" as defined by ICWA.
 - i. Contact the tribe requesting written confirmation if the child is a member OR if the child is eligible for membership *and* confirm a biological parent's membership. Make follow up efforts to obtain information if tribe fails to respond.

¹ This Guideline is being offered for purpose of general guidance only and it does not include ALL requirements imposed by the ICWA. Similarly, it does not provide a comprehensive, in-depth discussion of all considerations that should be made and/or practice pointers that should be followed in an ICWA case.

- ii. Membership can only be determined by the tribe.
- B. Determine which tribe is the Indian child's tribe.
- i. When a child is a member of or eligible for membership in more than one tribe, only one tribe can be determined as child's tribe for purpose of proceedings.
 - ii. The tribe to which the children have the most substantial connection should be the child's tribe for the purposes of its ongoing involvement in the case. This may not be able to be determined until after Notice (see below) is given and further proceedings are held.

Step 2: Send Notice

- A. Send the child's parents, the Indian custodian, the child's tribe(s), and the BIA Notice of the child custody proceeding by registered or certified mail, return receipt requested.
- i. The Notice must include specific information and meet specific requirements. *See* 25 U.S.C. § 1912(a); 25 C.F.R. §§ 23.11, 23.111
 - ii. A copy of the initiating Petition or Complaint should also be attached to the Notice.
 - iii. A copy of the Notice(s) should be filed with the court, along with any returned receipts.
- B. Notice must be received by parents, Indian custodian(s), and the tribe(s) at least 10 days prior to any child custody proceeding (unless additional time is requested by recipient to prepare for hearing; then at least 30 days must pass between notice and hearing), and at least 15 days after notice is received by the BIA.

Step 3: Obtain Court Order on Applicability of ICWA

- A. File any and all responses received from parents, Indian custodian(s), the tribe(s), and the BIA with the Court and serve copies on all parties.
- B. If no responses are received after making diligent effort to obtain response from the tribe(s), file a written notice with Court indicating the lack of receipt of any responses.
- C. Request Court to make a finding on whether ICWA applies, and if it does, have the Court expressly identify which tribe is the child's Indian tribe.
- D. If ICWA is found not to apply, continue to make inquiries on the record at each hearing regarding whether there is reason to know child is Indian child.

Step 4: Determine if parent or Indian Custodian is Indigent; Right to Court-Appointed Counsel

- A. An indigent parent or indigent Indian custodian has a right to court-appointed counsel in any involuntary removal, placement, or termination proceeding. 25 USC §1912(b).
- B. Direct or otherwise suggest in writing to parent or Indian custodian to file appropriate JDF forms with Court for it to make a determination on indigency.
- C. If parent or Indian Custodian is found to be indigent, notify them of their right to court-appointed counsel. Assist parent or Indian Custodian in making such a request if they so

desire. NOTE: Special requirements apply to certain private cases, such as APR cases, where the Secretary of Interior should be required to pay for the court-appointed counsel instead of the state.

- i. It is best practice to send a written “Notice of Rights Related to Court Appointed Counsel Pursuant to ICWA” under 25 USC §1912(b).
- ii. This Notice should be sent by registered or certified mail, return receipt requested.
- iii. A copy of the Notice should be filed with the court, along with any returned receipts.

Step 5: Tribe May Intervene

- A. The Indian child’s Tribe has an absolute right to Intervene in ICWA cases. 25 U.S.C. § 1911(c).
 - i. Under the ICWA, a child’s tribe has rights that are independent of the rights of the child and the child’s parents, so that the tribe may protect its interests.
 - ii. The Tribe’s position is therefore not required to mirror or be consistent with the parent(s) or Indian custodian’s position.

Step 4: If ICWA Determined to Apply, Continue to Provide Tribe Notice of Proceedings

- A. Once it is determined that ICWA applies, even if the Tribe fails to intervene, notice of all hearings must still be sent to the tribe.
- B. Notices of hearings should be sent by registered or certified mail, return receipt requested.
 - i. A copy of the notices should be filed with the court, along with any returned receipts.
 - ii. Even if the Tribe fails to appear, the court should be requested to attempt to call the Tribe at the outset of the proceeding.

Step 6: Consider/Advise on Transfer to Tribal Court

- A. ICWA allows the parent, Indian custodian, or child’s tribe to request that the child custody proceeding be transferred to tribal court. 25 USC §1911(b).
- B. If the tribe requests a transfer of the proceeding to its tribal court, the parents or Indian custodian must be advised of their right to object to the transfer.
 - i. It is best practice to send a written “Notice of Rights Related to Transfer Pursuant to ICWA” to the parents or Indian custodian, informing them of their absolute right to object to transfer the case to Tribal Court under 25 USC §1911(b).
 - ii. This Notice should be sent by registered or certified mail, return receipt requested.
 - iii. A copy of the Notice should be filed with the court, along with any returned receipts.
- C. The state court must transfer the proceeding to the tribal court unless “good cause” exists not to transfer the case. Most commonly, “good cause” is established if either or both of the child’s parents object to the transfer, a child over the age of 12 objects to the transfer, the child’s tribe does not have a tribal court, or the tribal court declines the transfer. 25 USC §1911(b).

Step 7: Satisfying Active Efforts Requirement

- A. The petitioning non-parent must make “active efforts” to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. 25 U.S.C. §1912(d).
- B. After providing these active efforts, for the non-parent to prevail, the efforts must have proved unsuccessful.
- C. **Examples of “active efforts” that can be utilized in private custody actions are:**
 - i. Reintegration therapy with the child;
 - ii. Drug and/or alcohol evaluations and/or rehabilitation services, including drug testing;
 - iii. Mental health evaluations and subsequently recommended treatment or services;
 - iv. Transportation of the parent or Indian custodian (or transportation of the child) if transportation is an issue for the parent or Indian custodian so that visits can occur during the pending of the proceeding;
 - v. Vocational rehabilitation services if obtaining or maintaining steady employment is an issue for the parent or Indian custodian;
 - vi. Domestic violence classes for perpetrators; or
 - vii. Domestic violence services for victims.
- D. In making any of the above-listed efforts, any services provided should be offered, arranged, and paid for by the petitioning non-parent.
 - i. The active efforts may be provided prior to the filing of the legal action or subsequent to its filing. It is recommended that the case is identified as a potential ICWA case prior to the filing of the legal action and active efforts are made *prior* to the filing to avoid extreme delay in the proceedings.
- E. It is best practice to obtain thorough documentation to utilize as evidence at trial of the services offered, payments made, and results of the treatment. If the parents or Indian custodian fails to respond to offered services, document the lack of response or utilization of the offered service by sending formal written letters to the parent or Indian custodian. All of the above-mentioned documentation should be utilized as exhibits at trial.
- F. A non-parent can request the Court to order the parent or Indian custodian to sign a Release of Information permitting the non-parent to obtain information and reports on the parent or Indian custodian’s participation, compliance, and/or success within the service or program.

Step 8: Understand Heightened Burdens of Proof

- A. **Typical Burdens of Proof:**
 - i. Under Colorado law, “preponderance of the evidence” standard governs temporary removal of a child from his or her home, such as in APR and guardianship actions.
 - ii. Typical parental rights terminations, such as private adoption actions, are governed by the “clear and convincing evidence” standard.
- B. **ICWA Burdens of Proof:**
 - i. Under ICWA, in child custody proceedings, which includes APR actions and guardianship actions, the court must find by clear and convincing evidence that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(e).

- ii. Under ICWA, in a private adoption/termination of parental rights proceeding, the court may not order termination of parental rights unless it determines by evidence beyond a reasonable doubt that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. Furthermore, the state court must find beyond a reasonable doubt that active efforts to reunify and rehabilitate the Indian family have been made and have failed. 25 U.S.C. §1912(f).

C. Qualified Expert Witness Requirement:

- iii. In both child custody/foster care proceedings and termination proceedings, the findings listed above must be supported by the testimony of a qualified expert witnesses with specific knowledge of the Tribe's culture and customs regarding child rearing. 25 U.S.C. §1912(e) - (f).

Step 9: Understanding, Utilizing, and Complying with the ICWA Placement Preferences

- A. Out of home placement of a child in a child custody proceeding, which includes APR and guardianship actions, must be made in the following order, unless there is good cause shown or unless the child's Tribe has established a different placement preference order:
 - 1. Members of the child's extended family;
 - 2. A foster home licensed, approved, or specified by the Indian child's tribe;
 - 3. A tribally-approved or Indian-operated children's institution; or
 - 4. A children's institution approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs. The placement should also be the least restrictive option available, approximate a family if feasible, and meet the child's special needs, if any. Where appropriate, the court is directed to consider the preference of the Indian child or parent. 25 U.S.C. §1915(b).
- B. In a post-termination or adoption proceeding, the placement of the child must be made in the following order, unless there is good cause shown or unless the child's Tribe has established a different placement preference order:
 - 1. Member of the child's extended family;
 - 2. Other members of the child's Tribe; or
 - 3. Other Indian families. 25 U.S.C. §1915(a).

Application of ICWA Steps to Case Study; Primary Hurdles to Overcome

Upon the Court finding that ICWA applies to the above-listed case study, the most significant hurdles to the grandparents' continued custody will be proving (1) active efforts to prevent the breakup of an Indian family and (2) the likelihood of serious harm to the child if the parents are granted custody. The grandparents must demonstrate that they have engaged in active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that these efforts have proved unsuccessful. Before a state court may enter a custody order effectuating removal of the child, the grandparents must also prove by clear and convincing evidence – supported by the testimony of qualified expert witnesses – that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The “likelihood of serious harm” standard also creates a higher hurdle than the “best interest of the child” test that is ordinarily applied in private custody cases.

Jill E. Tompkins, Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions, 81 U. Colo. L. Rev. 1119, 1151 (2010).

If representing the petitioning non-parent, these requirements can be met with thoughtful, dedicated, and creative legal representation. Likewise, if representing the parent or Indian custodian in defending such a legal action, these stringent legal standards and heightened legal burdens of proof should be asserted consistently throughout the case and used offensively to successfully prevent the breakup of the Indian family.

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