ICWA/MIFPA Manual

State of Minnesota

Guardian Ad Litem Program

ICWA Division

MINNESOTA

Guardian ad Litem Board

This manual contains information, policies and procedures intended to provide guidance to guardians ad litem providing services through the Minnesota Guardian ad Litem Program appointed to advocate for the best interests of American Indian and Alaska Native children in Minnesota State court proceedings governed by the Indian Child Welfare Act ("ICWA") and/or the Minnesota Indian Family Preservation Act ("MIFPA"). The purpose of these policies and procedures is to ensure compliance with the letter and spirit of federal and state law and to serve the best interests of American Indian/Alaska Native children in a culturally appropriate manner consistent with best practices. This manual is intended to be a flexible document modifiable as best practices, research or implementation data directs.

The term "American Indian" includes Alaska Native where applicable. The term "ICWA" includes MIFPA where applicable. Additionally, unless the context indicates otherwise, words used in the singular include the plural, the plural includes the singular; and pronouns "he", "she" or "they" are intended to include masculine, feminine and nonbinary persons.

Statutory authority for this manual is contained within Minn. Stat. § 480.35, subd. 2(b)(3) which states in relevant part that the State Guardian ad Litem Board "shall establish guardian ad litem program standards, administrative policies, procedures, and rules consistent with statute, rules of court, and laws that affect a volunteer or employee guardian ad litem's work, including the Minnesota Indian Family Preservation Act under sections 260.751 to 260.835; the federal Multiethnic Placement Act of 1994 under United States Code, title 42, section 662 and amendments; and the federal Indian Child Welfare Act under United States Code, title 25, section 1901 et seq."

The policy committee and writers of this manual wish to acknowledge and thank the many, many people who have tirelessly advocated for American Indian children and families and who have laid the groundwork for the appointment of specially trained, culturally competent GALs to represent the best interests of Indian children specifically including the Honorable Robert A. Blaeser (Ret. 4th Judicial District Court judge and Tribal Court judge). Special thanks are also given to the Honorable William A. Thorne, Jr. (Ret. Utah Court of Appeals judge and Tribal Court judge) for his assistance in editing this manual.

The State of Minnesota Guardian ad Litem Program thanks the policy team who worked to create this manual. The policy team consists of: Tara Bruening, GAL ICWA Coordinator; Richie Smith, MN DHS ICWA Unit; Raylene Urke, ICWA GAL; Susan Love, ICWA GAL; Judy Nord, CJI Staff Attorney; Kelley Leaf, GAL ICWA Coordinator; Erika Randall, GAL Manager; Laurie Kusek, GAL Manager; Kellie Dillner, GAL Coordinator; Linda Potter, Director, HR/EOD; Jody Alholinna, GAL Contract Staff Attorney; Lynn Brave Heart, ICWA Liaison.

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TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION, HISTORICAL CONTEXT, AND OVERVIEW OF APPLICABLE LAWS AND RULES.

This Chapter lays the foundation for understanding the history behind the Indian Child Welfare Act ("ICWA") and the Minnesota Indian Family Preservation Act ("MIFPA") and why ICWA and MIFPA are still needed today. This Chapter also provides an overview of laws, rules, and policies governing ICWA and MIFPA cases.

Mission Statement.

We are committed to advocating for the best interests of American Indian children by persistently applying ICWA and MIFPA to preserve American Indian families and culture.

Understanding the History Behind the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act.

Historical Context.

American Indians have occupied the lands in what is now the United States of America from time immemorial; long before there was first contact with Europeans in the 1500's.[1] For significant periods of American history, governmental policies were designed to either terminate (kill) or assimilate American Indian people into "mainstream" American society. This was attempted through various means including massacre, taking Indian lands and separating Indian people from their families, tribal culture and communities.[2] Forced removal of Indian children occurred even before the formation of the United States as a country. In 1609, the Virginia Company authorized white colonists to kidnap Indian children and convert them to Christianity for the purpose of "civilizing" local Indian populations.[3]

Federal, state and local policies of government and private agencies aimed at removing and separating Indian children from their families continued into the 1950's and 1960's with profound, destructive effects upon American Indian children and families. As stated by Ruth Hopkins, a Dakota/Lakota Sioux writer, biologist, attorney, and former tribal judge, "Invaders of

[1] *See* Daniel G. Kelly Jr., *Indian Title: The Rights of American Natives in Lands They Have Occupied since Time Immemorial*, Colum. L. Rev. 655, 655 (1975).
[2] Margaret D. Jacobs, A Generation Removed: The Fostering and Adoption of Indigenous Children in the Postwar World 258-259; Terry A. Cross, Kathleen A. Earle & David Simmons, *Child Abuse and Neglect in Indian Country: Policy Issues* 81(1) Fam. Soc. 49, 50-51 (2000).
[3] Cross *et. al.*, *supra* note 2, at 50.

Indigenous territories have tried to take everything from us — our lands, resources, cultures, languages, identities, spirit, dignity, freedom, lives, and even our children."[4]

Indian Boarding Schools and the Indian Adoption Project are two governmental policies, in a line of policies, with a primary goal of removing and separating Indian children from their families and tribal communities.

Indian Boarding Schools.

Initially, many church and government run Indian schools were located on or near reservations or Indian communities. Children would go to school during the day and return home at the end of the day or at the end of the week. This, however, allowed children to continue learning cultural and spiritual values and beliefs from their parents, relatives and tribal communities. To eradicate their traditional and cultural ways, and assimilate Indian children into the majority American culture, it became the policy of the federal government to remove Indian children from their homes and send them to boarding schools for reprogramming, often far away.[5]

Military officer Richard Henry Pratt founded the first Indian Boarding school in 1879 in Carlisle, Pennsylvania. Following an act of Congress in 1882, military style and mission Indian boarding schools were established across the nation[6] often modeled after Pratt's philosophy that Indian people needed to be stripped of who they were and completely assimilated into the majority culture. He is infamously quoted as saying, "all the Indian there is in the race should be dead. Kill the Indian in him, and save the man."[7]

Pratt's sentiment was shared by John B. Riley, Superintendent of Indian schools, who is recorded as saying:

> If it be admitted that education affords the true solution to the Indian problem, then it must be admitted that the boarding school is the very key to the situation. However excellent the day school may be, whatever the qualifications of the teacher, or however superior the facilities for instruction of the few short hours spent in the day school is, to a great extent, offset by the habits, scenes and surroundings at home — if a mere place to eat and live in can be called a home. Only by complete isolation of the Indian child from his savage antecedents can he be satisfactorily educated..." [8]

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[4] Ruth Hopkins, *How Foster Care Has Stripped Native American Children of Their Own Cultures*, TEEN VOGUE, May 22, 2018.

[5] NARF, *Let All That is Indian Within You Die*, 38 LEGAL REV. 1, 4-6 (Summer/Fall 2013).

[6] Ziibiwing Center of Anishinabe Culture & Lifeways, *American Indian Boarding Schools: An Exploration of Global Ethnic & Cultural Cleansing* 6 (2011).

[7] REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS: FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 1630 (1976).

[8] NARF, *supra* note 5 at 4.

Attending boarding schools was not optional. If families refused to send their children, the BIA withheld annuity payments, food, clothing, and supply rations.[9] Government agents, police and even soldiers were used to force children to go.[10] Some parents were sent to prison. Nineteen Hopi men designated as "Hostiles" were taken into custody by the U.S. Army on November 25, 1894 and imprisoned at Alcatraz for opposing the forced removal and education of their children at boarding schools. The terms of their confinement dictated that they were to be held in prison and subjected to hard labor until they demonstrated a full realization of "the error of their evil ways" and stopped interfering with the government's plan to civilize and educate their children.[11]

Hundreds of thousands of Indian children were sent to boarding school. After arriving, their hair was cut short. Their traditional clothing was taken and traded for stiff shoes and uniforms. They were given white, Christian names. They were punished severely for speaking their native language.[12] They were taught that their cultures and traditions were evil and sinful and they should be ashamed of who they were.[13]

While there, children were subjected to neglect and abuse of every type -- physical, sexual, psychological, emotional and spiritual. Some children were placed in cells or dungeons.[14] An innumerable number died from sickness, disease, suicide, or from trying to run away. Many disappeared without their families ever knowing what happened to them.[15]

For those children who did return home after many years of being away, they did not return "as the Christianized farmers that the boarding school policy envisioned, but as deeply scarred humans lacking the skills, community, parenting, extended family, language and cultural practices of those raised in their cultural context."[16] They returned with broken spirits.

Cultural Genocide is how many view the government's boarding school policy. American Indian people view their children as their future, carrying on traditional knowledge. Boarding schools, however, ensured that those ties to cultural knowledge and language were severed. For generations, Indian families were prevented from passing down and teaching their language,

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9 Ziibiwing Center, *supra* note 5.

10 Margaret D. Jacobs, *A Battle for the Children: American Indian Child Removal in Arizona in the Era of Assimilation*, 45 J. Ariz. Hist. 31, 35 (2004).

11 ERWIN N. THOMPSON, THE ROCK: A HISTORY OF ALCATRAZ ISLAND 1847-1972 298 (1979); Wendy Holliday, *Hopi History: The Story of the Alcatraz Prisoners*, Nat'l Park Service: Alcatraz, https://www.nps.gov/articles/hopi-prisoners-on-the-rock.htm.

12 Cross *et. al.*, *supra* note 2 at 50.

13 NARF, *supra* note 5 at 2.

14 Denise K. Lajimodiere, *The Sad Legacy of American Indian Boarding Schools in Minnesota and the U.S.*, MINNPOST, June 14, 2016, https://www.minnpost.com/mnopedia/2016/06/sad-legacy-american-indian-boarding-schools-minnesota-and-us/.

15 Alleen Brown & Nick Estes, *An Untold Number of Indigenous Children Disappeared at U.S. Boarding Schools: Tribal Nations are Raising the Stakes in Search of Answers*, THE INTERCEPT; (Sept. 25, 2018), https://theintercept.com/2018/09/25/carlisle-indian-industrial-school-indigenous-children-disappeared/

16 NARF, *supra* note 5 at 2.

religious and spiritual practices, parenting practices, and other important ways of life to children. As stated by Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, "culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People."[17]

The boarding school experience is not something of the far, distant past. Compulsory attendance continued into the 1970's and many parents and grandparents living today are boarding school survivors.[18] Generations of Indian families suffered profound trauma because of what was done to them. Connections between children, parents, extended family members and tribes were severed. Parents were denied the opportunity to parent and children the opportunity to be parented.[19] Many traditional ways were forgotten or lost. Because of the policies and actions of government, churches, agencies and individuals, "oppression, alcoholism, disease and neglect had fertile ground in which to take root."[20] Notwithstanding this, it is important to remember that American Indian people and tribal communities are also strong and resilient. These traumas are things that happened to them, but do not define them. Trauma can be healed.

The Indian Adoption Project.

The Indian Adoption Project was another devastating policy impacting Indian families. From 1958 to 1967, the federal government, contracting with the Child Welfare League of America, sent social workers to reservations and Indian communities to encourage and coerce Indian families into placing their children with white families for adoption.[21]

At the same time, child protection practices at the state level were resulting in American Indian children being removed at significantly higher rates than non-Indian children.[22] By the 1970's, one out of four American Indian children was removed, stolen, or adopted out, most often raised by non-Indian families far from their relatives and tribes.[23] The crisis was so severe that the existence of many tribal communities was threatened.[24] The belief that Indian parents were generally unfit to parent was so engrained in American society that child protection

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17 *Indian Child Welfare Act of 1978: Hearing on S. 1214 before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 193 (1978).

18 *See* Tobeluk v. Lind, 589 P.2d 873 (Alaska S.Ct. 1979) (a landmark case brought by Alaska Natives in 1972 against the State of Alaska, arguing that the state's policy of forcing parents to send their children away to boarding schools and failure to build schools close to Native communities was discriminatory).

19 Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 Hastings Race & Poverty L.J. 45, 73 (2006).

20 Cross *et. al.*, *supra* note 2 at 50.

21 *See* Karen Balcom, *The Logic of Exchange: The Child Welfare League of America, The Adoption Resource Exchange Movement and the Indian Adoption Project, 1958–1967*, 1(1) ADOPTION & CULTURE 5-67 (2007).

22 H.R. REP. NO. 95-1386 at 9 (1978).

23 *Id*.

24 81 Fed. Reg. 38,778, 38,781 (June 14, 2016) (citing 124 Cong. Rec. H38103) (codified at 25 C.F.R. §§ 23.1-144 (2017)). [25 C.F.R. §§ 23.1-144 shall hereinafter also be noted as "BIA Reg."]

agencies and courts removed Indian children with no evidence of neglect or abuse.[25] Lee Cook of the Red Lake Nation likened the removal of Indian children to the holocaust in his 1974 testimony before the U.S. Senate subcommittee hearings on Indian child welfare saying, "I think that the BIA and the state welfare workers have been carrying on like at Auschwitz."[26]

While some adoptions went well, many who survived the Indian Adoption Project or child protection removals, report significant or horrific trauma and abuse as well as a profound feeling of loss of identity.

Historical Trauma.

Trauma experienced by groups of people can have lasting impacts over generations. To describe this phenomenon, Dr. Maria Yellow Horse Brave Heart developed the term "historical trauma".

In her published article, "Wakiksuyapi: Carrying the Historical Trauma of the Lakota", Brave Heart explains historical trauma as the "cumulative wounding across generations."[27] She describes the historical trauma response of American Indians as "a constellation of features" including:[28]

Depression	Elevated mortality rates	Poor affect tolerance
Self-destructive behavior	from suicide and	Anger
Psychic Numbing	cardiovascular disease	

Substance abuse, which impacts significant numbers of families, is a common response to trauma.

THE INDIAN CHILD WELFARE ACT

ICWA.

The Indian Child Welfare Act ("ICWA")[29] was enacted by Congress in 1978 in response to disproportionately high numbers of American Indian and Alaska Native children being removed

[25] *Id*. at 70.
[26] MARGARET D. JACOB, A GENERATION REMOVED – THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 31 (2014).
[27] Maria Yellow Horse Brave Heart, *Wakiksuyapi: Carrying the Historical Trauma of the Lakota*, TULANE STUD. SOC. WELFARE 245-266, 246 (2000).
[28] *Id*. at 245-247.
[29] 25 U.S.C. §§ 1901–1963 (1978) [hereinafter "ICWA"].

from their families and tribes by nontribal agencies – both governmental and private.[30] By the 1970s, approximately 25–35% of all American Indian children were separated from their families and placed in institutions, foster homes or adoptive homes.[31] The adoption rate of Indian children was eight times that of non-Indian children.[32] Minnesota was identified as one of the states with the highest level of out-of-home placements for Indian children.[33]

Following congressional hearings during which extensive testimony and evidence was presented, Congress concluded that the "wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."[34] Congress was not only concerned about Indian children and Indian families, however, it was also concerned about the very existence of Indian tribes as evidenced by its finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[35] ICWA was enacted to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[36]

ICWA sets forth minimum, mandatory federal standards that state courts and agencies must follow in custody proceedings involving American Indian/Alaska Native children. These standards include a mandate for agencies to provide notice of state court child custody proceedings to tribes, parents and Indian custodians; the right of indigent parents and Indian custodians to court-appointed legal counsel; certain rights granted to Indian custodians; the right of tribes to intervene as parties; the requirement to obtain and present qualified expert testimony at certain stages of the proceeding; the right to have cases transferred to tribal court; the requirement to provide active efforts in support of parent/child reunification; specific placement preferences for foster care and adoptive placements; a higher standard of proof; and the right to seek invalidation of a custody order or final adoption decree if certain requirements of ICWA were not followed.

ICWA governs state court child custody proceedings involving American Indian/Alaska Native (AI/AN) children in all 50 states. ICWA does not apply in tribal court proceedings.

FEDERAL REGULATIONS AND GUIDELINES

BIA Rules and Regulations.

BIA ICWA REGULATIONS (FINAL RULE). Following the passage of ICWA in 1978, implementation

30 Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).
31 *Id*. at 33 (*referencing* H.R. REP. NO. 95-1386 at 9 (1978).
32 *Id*. at 34.
33 H.R. REP. NO. 95-1386, at 9 (1978).
34 *Id*.
35 ICWA § 1901.
36 ICWA § 1902 (emphasis added).

and application of the federal law varied across the country and within states.[37] As a result, the federal government, through the Department of the Interior, Bureau of Indian Affairs ("BIA"), promulgated regulations governing how the ICWA is to be implemented and followed in state court proceedings. These binding regulations, also known as a Final Rule, became effective on December 12, 2016. The regulations are mandatory and must be followed in all state court proceedings except when state law provides greater protections to the Indian parent or Indian custodian than the regulation.[38]

BIA ICWA GUIDELINES. In addition to, but separate from the Final Rule, the BIA also published updated ICWA Guidelines in December 2016. These guidelines replace prior guidelines published in 1979 and 2015, and are similar to, but not identical to, the BIA regulations. The ICWA Guidelines are meant to complement the Final Rule and aid state courts in applying ICWA.[39] The guidelines are not binding on state courts, but Minnesota courts have historically given some deference to these guidelines and have used these guidelines for direction in deciding ICWA cases.[40]

MINNESOTA INDIAN FAMILY PRESERVATION ACT

MIFPA.

The Minnesota Indian Family Preservation Act (MIFPA) is a state law enacted in 1985.[41] MIFPA is similar to ICWA; but strengthens and expands parts of ICWA. Where MIFPA provides a higher standard of protection to the rights of the Indian parent or Indian custodian than provided under ICWA, the state court must apply MIFPA.[42]

The purpose of MIFPA, as stated in the law, is to:

(1) Protect the long-term interests, as defined by the tribes, of Indian children, their families as defined by law or custom, and the child's tribe; and
(2) Preserve the Indian family and tribal identity, including an understanding that Indian children are damaged if family and child tribal identity and contact are denied.

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37 81 Fed. Reg. at 38,779.

38 ICWA § 1921; 81 Fed. Reg. at 38,851. (BIA Reg. § 23.143, however, provides that "the provisions of this rule will not affect a proceeding under State law for foster-care rights, pre-adoptive placement, or adoptive placement which was initiated or completed prior to 180 [days] after the publication date of this rule, but will apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody of placement of the same child.").

39 81 Fed. Reg. 96,476 (Dec. 16, 2016); BIA Guidelines for Implementing the ICWA, https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf [hereinafter "BIA Guidelines"].

40 *See* Pollard v. Crowghost, 794 N.W.2d 373 (Minn. Ct. App. 2011) (stating that "Minnesota courts have frequently looked to the guidelines published by the Bureau of Indian Affairs in construing ICWA provisions").

41 MINN. STAT. §§ 260.751-260.835 [hereinafter "MIFPA"].

42 ICWA § 1921.

> Indian children are the future of the tribes and are vital to their very existence.[43]

Some of the ways in which MIFPA expands the provisions of ICWA include the following:

- MIFPA expands the definition of "Indian Child" to include any unmarried child who is eligible for membership in a tribe, regardless of the parent's membership status.[44] (ICWA is not so expansive since it only applies when the child is a member or if the parent is a member and the child, who is the parent's biological child, is also eligible for membership.)[45]
- MIFPA expands the Notice requirement to tribes by adding situations when notice is required as well as specifying additional required methods of giving notice.[46]
- MIFPA expands protections for children in voluntary placements including private adoptions.[47]
- MIFPA defines the Minnesota specific view of "best interests of an Indian child."[48]
- MIFPA expands the definition of "parent" to include fathers as defined by tribal custom or tribal law and unmarried fathers who have taken "any action" to hold themselves out as the biological father of an Indian child.[49]
- MIFPA is designed to ensure the protection of an Indian child's long-term interests, the family's long-term interests and the tribe's long-term interests.[50]
- MIFPA provides a specific definition of QEW and specific criteria for finding and using a QEW.[51]
- MIFPA requires the social services agency to continuously involve the child's tribe[52] and to involve the child's tribe at the earliest possible time;[53] recognizing that tribes may choose to actively participate at any point in the legal proceedings.
- MIFPA requires good cause to be determined *at each stage of the proceeding* if an Indian child is placed outside of the placement preferences.[54]
- MIFPA is clear that the law applies to child custody proceedings involving an Indian child whether the child is in the physical or legal custody of an Indian parent, Indian custodian, Indian extended family member, or other person at the commencement of the proceedings.[55]
- MIFPA makes it clear that Minnesota courts shall not determine the applicability of MIFPA or ICWA based upon whether an Indian child is part of an existing Indian family or based upon the level of contact a child has with the child's tribe, reservation, society or off-reservation community.[56]

43 MIFPA § 260.753.
44 MIFPA § 260.755, subd. 8.
45 ICWA § 1903(4).
46 MIFPA § 260.761.
47 MIFPA § 260.761, subd. 3; § 260.765.
48 MIFPA § 260.755, subd. 2a.
49 MIFPA § 260.755, subd. 14.
50 MIFPA § 260.753.
51 MIFPA § 260.755, subd. 17a; § 260.771, subd. 6.
52 MIFPA § 260.755, subd. 1a.
53 MIFPA § 260.762, subd. 3.
54 MIFPA § 260.771, subd, 7(g).
55 MIFPA § 260.771, subd. 2.
56 *Id*.

MINNESOTA RULES OF COURT AND OTHER LEGAL RESOURCES

Minnesota Rules of Court.

The Minnesota Rules of Juvenile Protection Procedure, the Minnesota Rules of Adoption Procedure, and the Minnesota Rules of Family Court Procedure govern cases involving ICWA and MIFPA and provide important guidance on how cases should proceed within the court system. These Rules can be found on the Minnesota State Court website at https://www.mncourts.gov and the Office of the Revisor of Statutes website at https://www.revisor.mn.gov/court_rules.

Minnesota Tribal State Agreement.

The Minnesota Tribal State Agreement ("TSA") is a comprehensive agreement negotiated between the State of Minnesota Department of Human Services and each of the eleven federally recognized tribes located within the state.[57] Minnesota is home to seven Anishinaabe (Chippewa, Ojibwe) tribes -- Grand Portage, Bois Forte, Red Lake, White Earth, Leech Lake, Fond du Lac and Mille Lacs; and four Dakota (Sioux) tribes -- Shakopee Mdewakanton, Prairie Island, Lower Sioux and Upper Sioux.

The TSA was initially signed in 1998 and was revised in 2007. It was developed to maximize tribal participation in decisions regarding child welfare services and it outlines the responsibilities and expectations of the state and tribes when Indian children are the subject of certain child custody/child protection proceedings. The TSA also requires the establishment of one or more positions to monitor compliance by local social service agencies and private child placing agencies with ICWA, MIFPA and the TSA.[58]

Agencies governed by the TSA are directed to liberally construe its terms to achieve results consistent with the policy and intent of ICWA, MIFPA and the following placement preferences:[59]

1. Indian children should be kept with their families;
2. Indian children who must be removed from their homes, should be placed within their own families and Indian tribe(s); and
3. The Department shall follow the tribal order of placement preferences consistent with ICWA.

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[57] Tribal State Agreement (Feb. 22, 2007) [hereinafter "TSA"].

[58] TSA, Part II, I; *see also* MN DEPT. HUMAN SERVICES, INDIAN CHILDREN WELFARE MANUAL, XII-3521(14) (citing to the TSA in defining the ICWA Compliance Review Team).

[59] TSA, Part 1, D.

The TSA is binding upon the Department of Human Services and local county child protection agencies. It is not binding upon guardians ad litem, other parties, or the courts, but contains many best practices that serve the best interests of Indian children. The TSA is included as Appendix 11.1.

Minnesota DHS Indian Children Welfare Manual.

The Minnesota DHS Indian Children Welfare Manual instructs county social services agencies and private child-placing agencies on their responsibilities in any child custody proceeding governed by ICWA or MIFPA.[60] The DHS Manual does not govern the work of GALs. It does, however, contain a number of best practices that serve the best interests of Indian children and may be helpful to both GALs in their role advocating for the child's best interests and to the court in determining whether the requirements of ICWA and MIFPA (especially active efforts) have been met. The Minnesota DHS Indian Children Welfare Manual is included as Appendix 11.2.

[60] MN DEPT. HUMAN SERVICES, INDIAN CHILDREN WELFARE MANUAL [hereinafter MN DHS INDIAN CHILDREN WELFARE MANUAL].

CHAPTER 2 GENERAL POLICIES AND PROVISIONS PERTAINING TO GUARDIANS AD LITEM

Applicability of this Manual.

The policies of this manual apply to all GALs, coordinators and managers governed by the Minnesota Guardian ad Litem Board.

Required ICWA/MIFPA Training for all GALs.

All GALs providing services under the Minnesota Guardian ad Litem Program shall complete training on the Indian Child Welfare Act and Minnesota Indian Family Preservation Act within their first three months of service.

Required ICWA/MIFPA Training for GALs appointed to ICWA Cases.

Any GAL assigned to an ICWA case must also complete the ICWA Foundations Training, or a comparable training approved by the GAL Board or GAL Program, as soon as practicable. Thereafter, on an annual basis beginning in the fiscal year following the year in which they began their service, GALs assigned to ICWA cases shall complete a minimum of three hours of ICWA related training in addition to the fifteen hours of annual continuing education required for all GALs. If approved by the GAL's coordinator or manager, the three hours of ICWA specific training may be satisfied by attending cultural events.

ICWA Guardian ad Litem.

An ICWA Guardian ad Litem is a specialized job classification created by the Minnesota GAL Program. While a GAL may have training and experience working with Indian families or working on cases governed by ICWA or MIFPA, a GAL may only be designated as an "ICWA Guardian ad Litem" through the Minnesota GAL Program job classification system or through a certification process approved by the Minnesota GAL Program.

Appointment of GALs in ICWA Cases.

It is the policy of the GAL Program to assign specifically designated "ICWA Guardians ad Litem" to every case governed by ICWA or MIFPA. In the event an "ICWA GAL" cannot be assigned initially, the case shall be assigned to a GAL who possesses cultural competency and who has completed the GAL ICWA Training Modules together with any additional specialized training designated by the GAL Board or the GAL Program until such time as an ICWA GAL can be assigned.

If an ICWA GAL is not initially assigned to a case because the applicability of ICWA or MIFPA was determined later in a case, the policy of the GAL Program is to reassign the case to an ICWA GAL at the time the GAL Program has reason to know that the case is subject to ICWA or MIFPA.

Best practices indicate that an ICWA GAL should represent the GAL Program at all Emergency Protective Care (EPC) hearings involving Indian children or children who may be Indian children.

The Role of the Guardian ad Litem.

Guardians ad litem governed by the Minnesota Guardian ad Litem Board have the following statutory responsibilities regardless of case type:[61]

1. Conduct an independent investigation to determine the facts relevant to the situation of the child and the family, including the child's wishes;
2. Advocate for the child's best interests by participating in appropriate aspects of the case, including advocating for services when necessary;
3. Maintain the confidentiality of information related to the case, with the exception of sharing information as permitted by law;
4. Monitor the child's best interests throughout the judicial proceeding; and
5. Present written reports on the child's best interests that include conclusions, recommendations and the facts upon which they are based.

The role of the GAL may also be governed by other applicable Rules of Court (found on the Minnesota State Court website and the Office of the Revisor of Statutes website); Administrative Rules; "Requirements and Guidelines" adopted by the Minnesota Guardian ad Litem Board; and various policies promulgated by the Minnesota GAL Program.

When GALs are appointed to cases governed by ICWA or MIFPA, the role of the GAL includes all the above responsibilities as well as additional responsibilities and considerations.

How and Why the Role of the Guardian ad Litem may be Different when Advocating for the Best Interests of American Indian/Alaska Native Children.

As discussed by Judge Abby Abinanti, Chief Judge of the Yurok Tribal Court and the first American Indian woman admitted to the California Bar, "[m]any people, when initially faced with issues involving Indian children, grapple with the concept of different treatment for Indian children. Some may feel it is not fair to the Indian child . . . to have different rules apply than those rules that apply to non-Indian children."[62]

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[61] MINN. STAT. § 260C.163, subd. 5(b); MINN. STAT. § 518.165, subd. 2a; MINN. R. GAL P. 905.01; MINN. R. ADOPT. P. 24.02.

[62] Abby Abinanti, *The Indian Child Welfare Act and CASA: Advocating for the Best Interests of Native Children*, http://www.tribal-institute.org/lists/icwa_casa.htm.

In some respects, ICWA rights the wrongs of the past and addresses disparities and inequities experienced by Indian children and families.[63] In Minnesota, Indian children continue to face significant disparities in outcomes and disproportionate representation in the child welfare system. According to a 2018 Minnesota Department of Human Services Report, American Indian children were approximately five times more likely to be involved in maltreatment assessments and investigations than white children.[64] When comparing out-of-home placements, American Indian children are approximately 16 times more likely to experience out-of-home placement than white children.[65] In 2019, American Indian children made up 1.7% of all of Minnesota's children, but constituted 25.8% of children in foster care – the highest disproportionality rate in the nation according to the data reported.[66]

The primary reason, however, that ICWA provides specific protections and minimum standards for Indian children and families is because of their political status.[67] The rights of Indian children under ICWA are not simply based on race or cultural considerations. Rather, they are based on the unique political status Indian children have as members or eligible members of federally-recognized sovereign tribal nations.[68]

The United States is made up of three sovereign entities – the federal government, tribal governments and state governments. Just as any nation or state has an interest in its children, each tribal nation has an interest in its children and each child has an interest in his or her tribal nation.[69] The relationship between tribes and their children is unique and may be viewed through a different cultural lens than non-Indians view their relationships with government.

In advocating for the best interests of Indian children, it is also important to note that "best interests" is defined more expansively for Indian children than for non-Indian children. Minnesota statutes include different definitions of best interests depending upon whether a child is subject to a third-party custody action, CHIPS action, permanency action, adoption action, etc. In addition to, or sometimes in place of those best-interests standards, ICWA decrees that the best interests of Indian children are met by protecting their rights "as an Indian and the rights of the Indian community and tribe in retaining its children in its society."[70] MIFPA also includes a very specific definition of what constitutes the best interests of an Indian child including consideration of the child's relationship with and sense of belonging to extended family and tribe.[71]

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63 *Id*.

64 MN DEP'T OF HUMAN SERVICES, CHILD. AND FAMILY SERV., MINNESOTA'S CHILD MALTREATMENT REP., 2018, 15 (Dec. 2019), https://edocs.dhs.state.mn.us/lfserver/Public/DHS-5408K-ENG.

65 MN DEP'T OF HUMAN SERVICES, FOSTER CARE: TEMP. OUT-OF-HOME CARE FOR CHILD. (April 2021), https://edocs.dhs.state.mn.us/lfserver/Public/DHS-4760-ENG.

66 NCJJ, AFCARS, DISPROPORTIONALITY RATES FOR CHILD. OF COLOR IN FOSTER CARE DASHBOARD, https://www.ncjj.org/AFCARS/Disproportionality_Dashboard.aspx.

67 Abinanti, *supra* note 58.

68 *Id*.; *See also* Morton v. Mancari, 417 U.S. 535, 554 (1974).

69 Abinanti, *supra* note 58.

70 H.R. REP. NO. 95-1386 at 23.

71 MINN. STAT. § 260.755, subd. 2a.

ICWA was enacted "specifically to address the problems that arose out of the application of subjective value judgments about what is "best" for an Indian child. Congress found that the unfettered subjective application of the "best interests" standard often failed to take into consideration tribal cultural practices and often failed to recognize the long-term advantages to children of remaining with their families and Tribes."[72]

ICWA recognizes that Indian children, like all children, do better and go on to be more productive members of the community when they can be safely raised within their own natural families, where they are loved and where they have a network of connections and interlocking relationships. Active efforts are required to try to repair safety needs so that children can remain with their own families. ICWA and MIFPA are specifically designed to remedy the problem created when states and counties did not fully appreciate the context of Indian families and communities and were too quick to judge "fitness" across jurisdictional and cultural lines applying their own view of what family, safety, and best interests meant disregarding tribal perspectives. This resulted in years and years, generation after generation, of unnecessarily removing Indian children from their families; damaging children, damaging families, and damaging communities.

As articulated in a report about the well-being of Indian children prepared with the support of multiple partners including the Shakopee Mdewakanton Sioux Community and the Center for Indian Country Development of the Federal Reserve Bank of Minneapolis:

> Many Native Americans continue to suffer the effects of historical trauma, subjugation and federal government policies that disrupt their entire way of life and ability to live out their cultural identities. Centuries of colonization, forced removal from ancestral lands, epidemic disease, deliberate genocide, suppression of Native cultures and languages, imposed religion and children's compulsory attendance at boarding school has brought untold grief to Native peoples. This unresolved pain is compounded by daily living conditions of poverty, inadequate housing, poor health, and the racism and oppression that many experience daily. The hearts and minds of Native Americans continue to struggle with these aftershocks of historical trauma. Research has shown such trauma can be biologically passed from one generation to the next. Breaking the cycle of trauma, and helping Native Americans reclaim their identities lies within our grasp and can most effectively take root if we focus on Native children.[73]

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[72] BIA Guidelines M.1 (citing H.R. REP. NO. 95-1386 at 19).

[73] Healthy Children, Healthy Nations Partners, Shakopee Mdewakanton Sioux Cmty., Ctr. for Indian Country Dev. Fed. Rsrv. Bank of Mpls., & Better Way Found., Charting Pathways on Early Childhood, Dev. and Nutrition for Minn. Native Children: Final Rep. (March 2018). (Reprinted with permission.)

PRACTICE CONSIDERATION: The relationship Indian children have to their families, culture and tribe, and the right to that relationship -- whether it is active or yet to be established -- is an invaluable right to be honored and protected.

Consultation with ICWA Coordinator or Manager.

There are times when a GAL's legal position or recommendations in the best interests of an Indian child will have serious, long-term future consequences, including legal consequences, for that child, their family and their tribe. As an Indian's child's best interests are interwoven with the best interests of the child's tribe, GALs are directed to consult with their ICWA coordinator or ICWA manager in situations where the GAL's recommendation or position in a case materially differs than that of the child's tribe regarding:

- Active efforts
- Placement
- Reunification
- Permanency
- Disposition of a case
- Transfer to tribal court

Confidentiality of Records and Information.

Maintaining confidentiality of records and information is an important legal responsibility of GALs. Minnesota law requires GALs to maintain the confidentiality of information related to a case, with the exception of sharing information as permitted by law, to promote cooperative solutions that are in the best interests of the child.[74] Minnesota law also requires GALs to conduct independent investigations to determine the facts relevant to the situation of the child and the family including interviewing parents, caregivers, and others with knowledge relevant to the case.[75]

This generally permits GALs to identify themselves as a GAL for a particular child when necessary, to obtain information or interview persons with knowledge relevant to the case; to make certain inquiries about the child, the family, and the child's situation; and to share information as necessary and permitted by law to promote cooperative solutions in the best interests of the child. Examples of this might include making inquiries into the Indian heritage of a child and sharing relevant information about a child or family at an IEP meeting; team meeting or care conference for the purpose of meeting the needs of a child or the child's family.

[74] MINN. STAT. § 260C.163, subd. 5(b)(3); § 518.165, subd. 2a(3).
[75] MINN. STAT. § 260C.163, subd. 5(b)(1); § 518.165, subd. 2a(1).

PRACTICE CONSIDERATION: If there is ever a question about whether information can be shared, the GAL should communicate with their coordinator or manager and potentially seek an order from the court authorizing the disclosure of information.

Notice of Non-compliance with the Policies of this Manual.

Failure by volunteers or employees of the Minnesota GAL Program to adhere to the policies set forth in this manual may result in disciplinary action.

CHAPTER 3 DEFINITIONS

1. Adoptive Placement: The permanent placement of an Indian child for adoption, including an action resulting in a final decree of adoption.[76]

2. Active Efforts:

   2.1 ICWA Definition: ICWA does not define active efforts. BIA Regulations define active efforts as "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians and Tribe."[77]

   2.2 MIFPA Definition: "Active efforts means a rigorous and concerted level of effort that is ongoing throughout the involvement of the local social services agency to continuously involve the Indian child's tribe and that uses the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe to preserve the Indian child's family and prevent placement of an Indian child and, if placement occurs, to return the Indian child to the child's family at the earliest possible time. Active efforts sets a higher standard than reasonable efforts to preserve the family, prevent breakup of the family, and reunify the family. Active efforts includes reasonable efforts."[78]

3. Best Interests: Best interests of an Indian Child is defined more expansively than best interests of a non-Indian child and includes a connection to the child's tribal community.

   3.1 ICWA Definition: ICWA does not specifically define best interests but imposes a federal standard on all states that the best interests of Indian children will be served by protecting "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."[79] The

[76] MIFPA § 260.755, subd.3(a).
[77] BIA Reg. § 23.2.
[78] MIFPA § 260.755, subd.1a.

[79] H.R. REP. NO. 95-1386 at 23.

ICWA is "based on the fundamental assumption that it is in the Indian child's best interest that [the child's] relationship to the tribe be protected."[80]

3.2 MIFPA Definition: "Best interests of an Indian child means compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act to preserve and maintain an Indian child's family. The best interests of an Indian child support the child's sense of belonging to family, extended family, and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe."[81]

4. Case Plan: Any plan for the delivery of services to a child and parent or guardian, or, when reunification is not required, the child alone.[82] An out-of-home placement plan constitutes a case plan.[83] An out-of-home placement plan is a written document "prepared by the responsible social services agency jointly with the parent or parents or guardian of the child and in consultation with the child's guardian ad litem, the child's tribe, if the child is an Indian child, the child's foster parent or representative of the foster care facility, and, where appropriate, the child. When a child is age 14 or older, the child may include two other individuals on the team preparing the child's out-of-home placement plan. The child may select one member of the case planning team to be designated as the child's advisor and to advocate with respect to the application of the reasonable and prudent parenting standards."[84]

5. Child Custody Proceeding: Includes four types of proceedings or placements:

(i) Foster care placements - 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;[85]

(ii) Termination of parental rights - any action resulting in the termination of the parent-child relationship;[86]

(iii) Preadoptive placement - the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement;[87] and

(iv) Adoptive placement - the permanent placement of an Indian child for adoption,

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80 *Holyfield*, 490 U.S. at 49-50, n. 24.

81 MIFPA § 260.755, subd. 2a.

82 MINN. STAT. 260C.007, subd. 3.

83 MINN. STAT. § 260C.212, subd. 1.

84 MINN. STAT. § 260C.212, subd. 1(b).

85 ICWA § 1903(1)(i); MIFPA § 260.755, subd. 3(b) (defining foster care placements as "Involuntary foster care placements").

86 ICWA § 1903(1)(ii); MIFPA § 260.755, subd. 3(d).

87 ICWA § 1903(1)(iii); MIFPA § 260.755, subd. 3(c).

including any action resulting in a final decree of adoption.[88]

6. Cultural Competency: Is demonstrated by a person's ability to work effectively with American Indian / Alaskan Native children, families and their tribes including:

(i) "being knowledgeable and respectful of the cultural norms, values, traditions, and parenting styles of the families and individual tribal communities of the children with whom you work;"[89]
(ii) understanding historical trauma and the effects of historical trauma on American Indians / Alaskan Natives;
(iii) understanding and respecting the importance of family and tribe preservation;
(iv) being able to utilize culture, extended family members and the child's tribe as resources to meet the child's needs;
(v) understanding that the rights of an Indian child, the child's family and the child's tribe are not based simply on race or culture, but are based on political status and the political relationship that exists between the government of the United States and each formally recognized tribe; and
(vi) understanding that the best interests of an Indian child are interwoven with the best interests of the Indian child's tribe and support the child's sense of belonging to family, extended family, and tribe.[90]

"Cultural competency entails cultivating an open mind and new skills; meeting people where they are, rather than making them conform to your standards."[91] Being culturally competent is an ongoing, dynamic process requiring long-term commitment.[92]

7. Designated Tribal Representative: An individual designated in writing by an Indian child's tribe to represent the tribe in child custody proceedings.[93]

8. Domicile:

8.1 The domicile of a parent or Indian custodian means the place at which the parent or Indian custodian has been physically present and regards as home. A person's true, fixed, principal, and permanent home to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.[94]

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88 ICWA § 1903(1)(iv); MIFPA § 260.755, subd. 3(a).
89 NAT'L. CASA, CASA/GAL PRE-SERVICE VOLUNTEER TRAINING CURRICULUM PRE-WORK HANDOUTS, Ch. 6, 8 (2017).
90 *See* MIFPA § 260.755, subd.2a.
91 NAT'L CASA, *supra* note 83.
92 SAMHSA, IMPROVING CULTURAL COMPETENCE. TREATMENT IMPROVEMENT PROTOCOL (TIP) SERIES NO. 59, Exec. Summ. xv (2014).
93 TSA at 12; MN DHS INDIAN CHILDREN WELFARE MANUAL at 10.
94 BIA Reg. § 23.2.

8.2 The domicile of an Indian child is the domicile of the Indian child's parents or Indian custodian. If the Indian child's parents are not married to one another, the Indian child's domicile is determined by the domicile of their custodial parent.[95]

9. Emergency Proceeding: Any court action that involves an emergency removal or emergency placement of an Indian child without the full suite of ICWA protections.[96] A condition caused by an action or inaction of an Indian child's parent or Indian custodian that places the child at risk of imminent physical damage or harm. The emergency only exists while there is an immediate danger. Once that risk of imminent harm passes, the emergency no longer exists.[97]

10. Emergency Removal: "Any removal or placement of an Indian child under State law without the full suite of ICWA protections, regardless of the label used for the removal or placement."[98] Emergency removal triggers additional filing requirements pursuant to BIA Reg. § 23.113 and may not exceed 30 days unless the court makes required findings that returning the child will result in imminent damage or harm, the case cannot be transferred to tribal court, and it has not been possible to initiation an ICWA child custody proceeding.[99]

11. Extended Family Member: "Shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent."[100] It is important to note that many tribes recognize familial ties outside of legal or blood relatives. This may correspond with, or be different from, state court definitions.

12. GAL Board: The GAL Board administers Minnesota's statewide, independent Guardian ad Litem Program responsible for advocating for the best interests of children, minor parents and incompetent adults in Juvenile and Family Court.[101]

13. ICWA GAL: A Guardian ad Litem specifically designated as an "ICWA Guardian ad Litem" in accordance with the specialized job classification created by the Minnesota GAL Program.

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95 *Id*.

96 ICWA § 1922; BIA Reg. § 23.2; BIA Guidelines § C.5.

97 CHILDREN'S JUSTICE INITIATIVE, MINNESOTA JUDGES JUVENILE PROTECTION BENCHBOOK 58 (June 2007).

98 U.S. DEPT. OF INTERIOR, BIA, FINAL RULE: INDIAN CHILD CUSTODY PROCEEDINGS 25 C.F.R. § 23 QUICK REFERENCE SHEET FOR STATE COURT PERSONNEL, https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-041404.pdf.

99 BIA Reg. § 23.113.

100 ICWA § 1903(2). ICWA defines "extended family member" not "relative." MIFPA does not define extended family member or relative.

101 MINN. STAT. § 480.35, subd. 2.

14. Imminent Danger: Means that a child is threatened with immediate and present maltreatment that is life threatening or likely to result in abandonment, sexual abuse, or serious physical injury.[102]

Imminent danger includes a report that a child is residing with a caretaker without "authority to care for the child." In these circumstances, a child is considered abandoned or threatened with abandonment.

Authority to care for a child includes the following situations:

- A parent has executed a delegation of power by parent or guardian under Minn. Stat. § 524.5-211 for an individual to provide for a child (commonly referred to as a Delegation of Parental Authority (DOPA);
- The child is in the care of an Indian custodian, as defined by ICWA § 1903;
- The child is in the care of an individual related to them which could include a stepparent, stepbrother, stepsister, niece, nephew, grandparent, sibling, aunt, or uncle or legal guardian as defined in Minn. Stat. § 245A.02, subd. 13.

15. Indian: A person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43.[103]

16. Indian Child:

16.1 ICWA Definition: "Indian Child" means an unmarried person who is under age 18 and is either:

1) a member of an Indian tribe; or
2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.[104]

16.2 MIFPA Definition: "Indian Child" means an unmarried person who is under age 18 and is:

1) a member of an Indian tribe; or
2) eligible for membership in an Indian tribe.[105]

MIFPA differs from ICWA in that MIFPA looks only at the child's eligibility for tribal membership as determined by the child's tribe. Unlike ICWA, the application of MIFPA does not consider whether a child is biologically related to a parent, nor does MIFPA

[102] MINN. R. 9560.0214, subp. 12.
[103] ICWA § 1903(3); MIFPA § 260.755, subd. 7.
[104] ICWA § 1903(4).
[105] MIFPA § 260.755, subd. 8.

consider the parent's status as a member of a federally recognized tribe. This means that MIFPA may apply to a case even though ICWA does not.

17. Indian Child's Tribe: The Indian tribe in which an Indian child is a member or eligible for membership or, in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.[106]

18. Indian Custodian: An Indian person who has legal custody of an Indian child 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 the child.[107]

19. Indian Tribe: Any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village as defined in § 1602(c) of title 43.[108]

Currently, there are 574 federally recognized sovereign tribal nations (tribes, nations, bands, pueblos, communities, Native villages, etc.) that have a formal government-to-government relationship with the U.S. government.[109] Of these, eleven are located in Minnesota and 229 are located in Alaska.[110]

20. Parent:

20.1 ICWA Definition: Any biological parent or parents of an Indian child or any Indian person who has legally adopted an Indian child, including adoptions under tribal law or custom. Parent does not include an unwed father where paternity has not been acknowledged or established.[111]

20.2 MIFPA Definition: The biological parent of an Indian child, or any Indian person who has lawfully adopted an Indian child, including a person who has adopted a child by tribal law or custom. Parent includes a father as defined by tribal law or custom. Parent does not include an unmarried father whose paternity has not been acknowledged or established; however, paternity has been acknowledged

106 ICWA § 1903(5); MINN. STAT. § 260.755, subd. 9.
107 ICWA § 1903(6); MIFPA § 260.755, subd. 10.
108 ICWA § 1903(8); MIFPA § 260.755, subd. 12.
109 86 Fed. Reg. 7,554 (Jan. 29, 2021). A list of federally recognized Indian tribes is published annually in the Federal Register and can be found online at multiple sites. For an explanation of "federal recognition" of tribes, *see* BIA, U.S. Dep't. Interior, Frequently Asked Questions, https://www.bia.gov/frequently-asked-questions.
110 Nat'l Congress of American Indians, Policy Issues - Tribal Governance, https://www.ncai.org/policy-issues/tribal-governance.
111 ICWA § 1903(9).

when an unmarried father takes any action to hold himself out as the biological father of an Indian child.[112]

21. Relative of an Indian Child: Neither ICWA nor MIFPA use the term "relative". ICWA uses the term "extended family member" as defined above. Minn. Stat. § 260C.007, subd. 26b. defines "Relative of an Indian child" as a person who is a member of the Indian child's family as defined in the Indian Child Welfare Act section 1903, paragraphs (2), (6), and (9). This includes the child's parents; Indian custodian, if any; and any person "defined by the law or custom of the Indian child's tribe [as a relative] or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent."[113]

Under Minn. Stat. Chapter 260C, the definition of relative for an Indian child is not the same as the definition of relative for a non-Indian child. Specifically, "the legal parent, guardian, or custodian of the child's siblings; or an individual who is an important friend with whom the child has resided or had significant contact" is NOT included in the definition of relative for an Indian child.

22. Tribal Sovereignty: Tribal sovereignty refers to the right of American Indians and Alaska Natives to govern themselves. Indian Nations are recognized by the U.S. Constitution as independent, distinct political communities with authority to regulate their own internal affairs, establish their own forms of government, determine membership, enact legislation, establish court systems, etc. While the establishment of the United States subjected tribes to federal power, it did not eliminate their internal sovereignty or subordinate them to the power of state governments. Tribes retain their sovereignty and powers of self-government over their lands and members.[114]

23. Ward of Tribal Court: ICWA does not define this term. "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."[115]

Cases decided under ICWA find that wardship status is established when a tribe exercises authority over a child or over the decisions affecting the child. This can be done in several ways, including by an order of the tribal court in a child custody proceeding,[116] or in a guardianship proceeding,[117] or by a resolution passed by the governing body of the tribe, such as a tribal council, where a tribe operates without a

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112 MIFPA § 260.755, subd. 14.

113 MINN. STAT. § 260C.007, subd. 26(b) & 27; ICWA § 1903(2), (6) & (9).

114 MN HOUSE RESEARCH DEPT., AMERICAN INDIANS, INDIAN TRIBES, AND STATE GOVERNMENT 18 (Feb. 2020).

115 Native American Rights Fund, A Practical Guide to the Indian Child Welfare Act 2.7 (2007), https://narf.org/nill/documents/icwa/index.html.

116 *In re* the Welfare of R.I, 402 N.W.2d 173, 176 (Minn.Ct. App.1987).

117 *In re* D.L.L., 291 N.W.2d 278, 282 (S.D. 1980).

formal court system.[118] It is not required that the court order specifically use the words "ward of the court."[119]

[118] ICWA § 1903(12); *In re* J.M., 718 P.2d 150 (Alaska 1986).

[119] *In re* D.L.L., 291 N.W.2d at 282 (citing *In re* Jennings, 368 N.E.2d 864 (1977)).

CHAPTER 4 ICWA AND MIFPA BASICS

When Does ICWA Apply?

There are two threshold requirements for ICWA to apply:

- An Emergency Proceeding or Child Custody Proceeding (as defined by ICWA); and
- An Indian child is subject to the proceeding

What Types of Proceedings Constitute a "Child Custody Proceeding"?

Child Custody Proceedings are much broader than one might typically think and include the following:

- Involuntary foster care placement
- Voluntary foster care placement made under Minn. Stat. § 260C if the child is not returned home after 90 days
- Voluntary foster care placement made under Minn. Stat. § 260D if the child cannot be returned upon demand
- Termination of parental rights
- Preadoptive placement
- Adoptive placement
- Status offenses (e.g., runaway, truancy or other offenses that are not unlawful for adults but are unlawful because of the age of the child)
- Third-party Custody proceedings
- De Facto Custody proceedings
- Guardianship proceedings

* Protective Supervision

* Permanent Transfer of Legal and Physical Custody

* Orders for Protection

* Protective Supervision, Permanent Transfers of Legal and Physical Custody and Orders for Protection are included as they involve, or may involve, situations in which a child is being removed from a parent or Indian Custodian and the parent or Indian custodian cannot have the child returned to his or her care upon demand.

When Does MIFPA Apply?

MIFPA applies to all cases in which ICWA applies. MIFPA may also apply to cases in which ICWA does not apply. For example, if neither the child nor the child's biological parent is a member of

a federally recognized tribe, ICWA does not apply. MIFPA, however, will apply if the Indian child is eligible for tribal membership regardless of the parent's membership status and regardless of whether the parent is biologically related to the child.

As a point of note, the terminology between ICWA and MIFPA is not always the same. ICWA refers to "child custody proceedings" while MIFPA refers to "child placement proceedings." ICWA refers to "voluntary and involuntary proceedings," while MIFPA refers to "Voluntary and Involuntary foster care placements."

Impermissible Factors in Determining whether ICWA or MIFPA Applies?

In determining whether MIFPA or ICWA applies, the court shall not consider:

- Whether the child is part of an existing Indian family.[120]
- The level of contact a child has with his or her Indian tribe, reservation, society, or off-reservation community.[121]
- Whether the child is in the physical or legal custody of an Indian parent, custodian or extended family member.[122]
- The level of participation of the parents or child in tribal cultural, social, religious, or political activities.[123]
- The relationship between the child and his/her parent(s).[124]
- Whether the parent(s) ever had custody of the child.[125]
- The Indian child's blood quantum.[126]

In other words, the court shall not determine or make a judgment about the child's "Indianness."

When Does Neither ICWA nor MIFPA Apply?

- Custody proceedings between parents when custody is awarded to one of the parents including, but not limited to, divorce proceedings
- Certain custody proceedings where a parent of an Indian child seeks modification of a prior custody order to have custody returned to the parent[127]

120 MIFPA § 260.771, subd. 2; BIA Reg. § 23.103(c).
121 MIFPA § 260.771, subd. 2.
122 MIFPA § 260.771, subd. 2; BIA Reg. § 23.103(c).
123 *Id*.
124 BIA Reg. § 23.103(c).
125 *Id*.
126 *Id*.
127 Gerber v. Eastman, 673 N.W.2d 854 (Minn. Ct. App.2004) (holding that ICWA does not apply when a non-Indian father seeks permanent sole legal and physical custody of his biological child after the state district court

- Delinquency proceedings
- Criminal proceedings
- Voluntary custody proceedings in which a parent or Indian custodian can, at any time, demand return of his or her child
- Tribal Court proceedings

Applicability of ICWA Beyond Age 18.

If ICWA applies at the commencement of a proceeding; it will continue to apply even if an Indian child reaches age 18 during the pendency of the proceeding.[128]

Inquiry and Identification of a Child as an Indian Child.

The applicability of ICWA or MIFPA to a child custody proceeding "turns on the threshold question of whether the child in the case is an Indian child. It is, therefore, critically important that there be an inquiry into whether the child is an Indian child as soon as possible. If this inquiry is not timely, a child-custody proceeding may fail to comply with ICWA [or MIFPA] and thus may deny various protections to Indian children and their families. The failure to timely determine if ICWA [or MIFPA] applies can also cause unnecessary delays as the court and the parties may need to redo certain processes or the action may be invalidated or dismissed."[129]

Pursuant to MIFPA, the local social services agency or private licensed child-placing agency is required to inquire of the child, the child's parents and custodians, and other appropriate persons whether there is any reason to believe that a child brought to the agency's attentions may have lineage to an Indian tribe.[130] This inquiry must occur right away at the time the child comes to the attention of the local social services agency.[131] The court additionally is required to establish whether an Indian child is involved and the identity of the Indian child's tribe.[132]

Pursuant to ICWA, the court:

- Has an affirmative obligation to inquire, on the record at the commencement of the proceeding, whether a child is an Indian child.[133]
- Is required to ask each participant (including attorneys, parents, custodians, and

has granted permanent sole legal and physical custody to the child's Indian maternal grandmother who resides with the child on the reservation).

128 BIA Reg. § 23.103(d).

129 81 Fed. Reg. at 38,802.

130 MIFPA § 260.761, subd. 1. (Note that the "reason to believe" language of MIFPA differs from the "reason to know" language of ICWA.)

131 *Id*.

132 MIFPA § 260.771, subd. 2.

133 BIA Reg. § 23.107(a). *See also* Pollard v. Crowghost, 794 N.W.2d 373 (Minn. Ct. App. 2011) (holding that the district court had an affirmative obligation to inquire whether the child was an Indian child and whether the Indian Child Welfare Act applied to the determination of whether the child's paternal grandparents were entitled to permanent legal and physical custody of the child as de facto custodians.)

relatives) whether they know or have reason to know that the child is an Indian child.[134]
- Is required to instruct the parties to inform the court if they subsequently receive information that would provide reason to know the child is an Indian child.[135]

The inquiry and responses should be on the record.[136]

In juvenile court proceedings, unless the court makes a finding that the child is an Indian child, the court has an ongoing obligation to inquire about the child's Indian heritage at every stage of the proceeding.[137] If, at any time during the proceedings, the juvenile court has reason to believe that the child has Indian ancestry or heritage, the court must direct the petitioner to continue to investigate whether the child is an Indian child.[138]

PRACTICE CONSIDERATION: While GALs do not have a specific statutory duty to inquire about a child's Indian heritage, the GAL has a professional responsibility to do so to meaningfully answer the court's inquiry when it is made as required by court rules[139] and to protect the best interests of the Indian child. Any information received by the GAL regarding the child's American Indian heritage should be shared with the assigned social worker and with the court. In addition to straightforward questions about heritage, additional questions a GAL might ask the child, parents, relatives, teachers or other persons with information regarding the family include: Has anyone in the family, including grandparents, great, great grandparents or extended relatives ever lived on tribal land? Participated in tribal events? Received services from a tribal office/agency or the federal Indian Health Service? Received benefits from a tribe?

Treating the Child as an Indian Child, and Applying ICWA and MIFPA, Unless and Until Determined Otherwise When There is Reason to Know a Child is an Indian Child.

If there is reason to know that a child is an Indian child, but the court does not have sufficient evidence to determine whether the child is an Indian child, the court must treat the child as an Indian child, and treat the matter as though ICWA applies, unless and until it is determined on the record that the child does not meet the definition of an Indian child.[140] If the court determines on the record that a child is not an Indian child under ICWA or MIFPA, the case may proceed under non-ICWA or non-MIPFA standards.[141]

134 BIA Reg. § 23.107(a); 81 Fed. Reg. at 38,803.
135 BIA Reg. § 23.107(a).
136 *Id*.
137 MINN. R. JUV. PROT. P. 29.02.
138 MINN. R. JUV. PROT. P. 29.02.
139 *Id*.
140 BIA Reg. § 23.107(b); MINN. R. JUV. PROT. P. 29.01.
141 BIA Guidelines § B.1.

PRACTICE CONSIDERATION: If there is reason to know the child is an Indian child, GALs should flag the case in Cosmos as ICWA until or unless it is determined to be a non-ICWA case.

Reason to Know that a Child is an Indian Child.

At least one state supreme court has found that a court has "reason to know" that a child is an Indian child if any participant in the proceeding indicates that the child has tribal heritage.[142]

Although the following list is not exhaustive of possible "reasons to know," BIA Regulations state that the court has reason to know a child is an Indian child if: [143]

1) The court is informed that the child is an Indian child.
2) The court is informed that information has been discovered indicating that the child is an Indian child.
3) The child subject to the proceeding gives the court reason to know he or she is an Indian child.
4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native Village.
5) The court is informed that the child is or has been a ward of a tribal court; or
6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian tribe.

Tribal Membership.

Just like other sovereign governments, tribal governments have the sole authority to determine their citizenship or membership. A determination by an Indian tribe that a child is a member of the tribe or is eligible for membership in the tribe is conclusive.[144] State courts may not substitute their own determination of whether a child is or is not a member or eligible for membership in a tribe.[145] Similarly, it is not permissible for the state court, the GAL, or other persons involved with a case to question, challenge or seek verification of information upon which the tribe's membership decision was made. Indian Tribes determine membership eligibility and can change that determination and criteria.

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142 In the Matter of the Dependency of Z.J.G. and M.E.J.G., minor children, No. 98003-9 (Wash. Sept. 3, 2020).

143 BIA Regs § 23.107(c).

144 MIFPA § 260.755, subd. 8; 81 Fed. Reg. at 38807; *See In re* the Welfare of S.N.R., 617 N.W.2d 77, 84 (Minn. Ct. App. 2000).

145 BIA Reg. § 23.108(b).

Tribal Membership Versus Enrollment.

It is important to note that membership can be a distinct legal concept from enrollment. Membership and enrollment are not necessarily the same thing. ICWA and MIFPA look only at membership for applicability not enrollment. As set forth in the Minnesota DHS Indian Children Welfare Manual:

> Enrollment is the term commonly used to refer to the status of an Indian person as a part of a specific Indian tribe. However, while enrollment is the common means to establishing membership in an Indian tribe, it is not the only means. A person may have membership in a tribe without being enrolled according to criteria established by that tribe. These criteria may be established by tribal ordinance and may be unique to the tribe.[146]

What if a Child is Eligible for Membership in More than One Tribe?

According to BIA Regulations, if a child is eligible for membership in more than one tribe, deference should be given to the tribe in which the child is already a member unless otherwise agreed to by the tribes. If the tribes are unable to reach an agreement, the state court is to designate the tribe with which the child has more significant contacts as the Indian child's tribe. A determination of the Indian child's tribe for purposes of ICWA does not constitute a determination for any other purpose.[147]

Assisting with Applying for Tribal membership.

Active efforts do not specifically include or exclude assistance in applying for tribal membership for a child. In any particular case, it may be beneficial to assist the child in seeking tribal membership as this may result in additional protections, services and programs being made available to the child.

Securing tribal membership may also have long-term benefits for an Indian child including potential access to housing benefits, financial benefits, educational benefits, medical benefits, employment benefits, cultural connections and political rights in their tribe. Assistance with membership inquiries now may diminish potential hurdles the child might encounter if attempting to make those connections for the first time as an adult, and may also assist in resolving identity questions common to young people as they mature.

BIA Guidelines recommend that social workers (or the party seeking placement in a voluntary adoption) facilitate obtaining tribal membership for the child.[148]

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146 MN DHS INDIAN CHILDREN WELFARE MANUAL at 24.
147 BIA Reg. § 23.109.
148 BIA Guidelines § B.8.

PRACTICE CONSIDERATION: Before engaging in efforts to assist with tribal membership; GALs should consult with their ICWA coordinator or manager.

Intervention / A Tribe's Right to be Involved.

Tribes have an inherent sovereign right to protect the health, safety, and welfare of their children, not only for the benefit of the child and their family, but for the benefit of the tribe as well.

ICWA and MIFPA specifically recognize this right and authorize an Indian child's tribe to intervene in any proceeding governed by ICWA or MIFPA at any point in the proceeding.[149] Regardless of when a tribe receives notice, the tribe can choose when or if it becomes actively involved including participating in case planning; requesting active efforts on behalf of the family; participating in placement decisions and other important decisions impacting the child; and requesting transfer to tribal court.

The child's Indian custodian also has the right to intervene in any child custody proceeding.[150]

Under Minnesota's Rules of Juvenile Protection Procedure, the following persons or entities are automatically parties to the CHIPS and Permanency proceedings involving an Indian child and do not need to file a notice of intervention:[151]

- Indian child's parent
- Indian custodian
- Indian child's tribe

Determining State or Tribal Court Jurisdiction.

Determining jurisdiction means deciding which court (state court or tribal court) will have the right to hear a case, apply its laws, and make legal decisions about an Indian child and that child's family. The provisions concerning jurisdiction over Indian child custody proceedings are at the very heart of ICWA.[152]

An Indian tribe has <u>exclusive</u> jurisdiction 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); or

149 MIFPA § 260.761, subd. 6; ICWA § 1911(c).
150 ICWA § 1911(c).
151 MINN. R. JUV. PROT. P. 28.02 & 32.01, subd. 1.
152 *Holyfield*, 490 U.S. at 36.

- Is a ward of a tribal court (regardless of where the child lives or is domiciled).[153]

For children not domiciled on the reservation, ICWA creates concurrent, but presumptively tribal jurisdiction.[154]

This means, that any time an Indian child is a ward of tribal court or is domiciled on a reservation not subject to Public Law 280, the child custody proceeding involving that child must be transferred to tribal court or dismissed from state court. If the Indian child is not domiciled on the reservation and is not a ward of tribal court, both Minnesota courts and the tribe have concurrent (joint) jurisdiction, however, jurisdiction presumptively lies with the tribe.

It may be argued that Public Law 280 – a federal law, grants Minnesota state courts concurrent jurisdiction over certain child custody proceedings even when the Indian child is living or domiciled on a Minnesota reservation (but is not a ward of tribal court).[155] Public Law 280, however, does not apply to the Red Lake Nation (which was never subject to Pub. Law 280) or to the Bois Forte Band of Chippewa (following Pub. Law 280 jurisdiction retrocession).

PRACTICE CONSIDERATION: If a GAL has questions about whether a child may be a ward of tribal court or whether the state court has jurisdiction or concurrent jurisdiction, consult with your ICWA coordinator or manager or seek a consult with the ICWA Division staff attorney.

Determining Whether a Child is a Ward of Tribal Court.

In any child custody proceeding governed by ICWA, the state court must determine if the child is a ward of tribal court. A child may be a tribal court ward regardless of where child resides or is domiciled.

If the child is already a ward of tribal court, the state court may exercise only emergency jurisdiction over the child custody proceeding and must then dismiss the proceeding if the emergency is over or transfer the case to tribal court. Before dismissing or transferring the case, the state court must notify the tribal court of the pending dismissal or transfer and ensure the tribal court is provided all information regarding the proceeding including, but not limited to, the pleadings and any court record.[156]

153 ICWA § 1911(a).
154 *Holyfield*, 490 U.S. at 36.
155 *Holyfield*, 490 U.S. at n.16; TSA Part 1, C.1.
156 ICWA § 1911(a) & 1922; BIA Regs § 23.110; MIFPA § 260.771, subd. 1; MINN. R. JUV. PROT. P. 28.07, subd. 2 & 31.02 & 42.08, subd. 3.

According to the Minnesota Rules of Juvenile Protection Procedure, prior to directing the return of the child to tribal court, the district court judge must communicate with a tribal court judge to:

- Inform the tribal court judge that the district court has ordered the emergency removal of the ward; and

- Inquire of the tribal court judge about any orders regarding the safe transition of the ward so that such orders can be enforced by the district court pursuant to the full faith and credit provisions of ICWA § 1911(d) and Rule 10 of the General Rules of Practice for District Courts.[157]

When an Indian child is not a ward of tribal court, and is not domiciled or living on the reservation, the tribal court does not have exclusive jurisdiction, and a state court may exercise concurrent jurisdiction over the proceeding.[158]

PRACTICE CONSIDERATION: It is important for the GAL to inquire whether the child might be a ward of tribal court and share that information with the assigned social worker and the court. A child may be a ward of tribal court if the child or the child's family was ever subject to, or involved in, a proceeding in tribal court. The inquiry should be broad as the types of proceedings over which a tribal court may identify a child as a ward of the court might include education related matters, probate or guardianship matters, conservatorship matters, adoptions, child welfare matters, or other custody matters. Moreover, a family may never have actually appeared in tribal court even though a judicial or administrative proceeding may have been initiated or taken place.

While the actual wording or designation of a child as a ward may be included in a tribal order, judgment or decree, wardship may also be 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.[159]

Full Faith and Credit Given to Tribal Court Orders.

Minnesota courts are required to give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the

157 MINN. R. JUV. PROT. P. 31.02.
158 ICWA § 1911(a)
159 *See* generally https://narf.org/nill/documents/icwa/faq/jurisdiction.

same extent that Minnesota gives full faith and credit to the public acts, records, and judicial proceedings of any other entity.[160]

Transfers to Tribal Courts When State Courts Have Concurrent Jurisdiction.

For Indian children who are not wards of tribal court and not domiciled on the reservation, ICWA creates concurrent (meaning both tribal court and state court have the legal authority to decide the case), but presumptively tribal jurisdiction.[161] If a child custody proceeding involving an Indian child is in state court, and a request is made to transfer the case to tribal court, the state court must transfer the case unless:

- A parent (Indian or non-Indian), objects to the transfer;
- The state court finds good cause not to transfer; or
- The tribal court declines to accept the case.[162]

Who is permitted to request a transfer to Tribal Court?

- A parent (Indian or non-Indian);
- An Indian custodian; or
- The Indian child's tribe. [163]

PRACTICE CONSIDERATION: GALs are not included in the statutory list of persons or entities having the right to request a transfer to tribal court.

How can a request to transfer be made?

A request to transfer to tribal court can be made orally on the record or writing.[164]

When can a request to transfer be made?

A request to transfer a case from state court to tribal court can be made at any stage of the proceedings.[165]

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160 ICWA § 1911(d); MINN. R. GEN. PRACT. 10.

161 *Holyfield*, 490 U.S. at 36.

162 MIFPA § 260.771, subd. 3(a); ICWA § 1911(b). (MIPFA specifically provides for the transfer of involuntary foster care, termination of parental rights, preadoptive and adoptive proceedings to tribal court. The plain language of ICWA is silent as to the transfer of preadoptive and adoptive proceedings to tribal court.)

163 *Id*.

164 MINN. R. JUV. PROT. P. 31.01; BIA Reg. § 23. 115(a).

165 BIA Reg. § 23.115(b); *see also* MIFPA § 260.771, subd. 3 which places no time constraints on transferring a case.

Who has the right to object to a transfer from state court to tribal court?

Any parent (Indian or non-Indian), or any party, may object to a request to transfer.[166] A parent, however, has veto power over a transfer. A parent's objection can be submitted in writing or it can be stated on the record. If a parent objects, no hearing is necessary, and the court is required to issue an order denying the transfer request.[167]

If a party other than a parent objects to the transfer, that party must serve and file a written notice of motion and motion providing a written explanation of the reason for their opposition and must demonstrate good cause as to why the court should deny the transfer.[168]

What constitutes "Good Cause" to deny a transfer to tribal court?

A determination of good cause is fact-specific and must be determined by the court on a case-by-case basis. If any party, other than the parent, objects to transfer to tribal court, that party has the burden to prove by clear and convincing evidence that good cause exists.[169]

In considering whether good cause exists, the state court must not consider any of the following factors:

- Socioeconomic conditions of the tribal community.[170]
- Perceived adequacy or inadequacy of tribal social services.[171]
- Perceived adequacy or inadequacy of tribal court.[172]
- Whether the proceeding is at an advanced stage if the Indian child's parent, custodian or tribe did not receive notice until an advanced stage.[173]
- Whether there have been prior proceedings involving the child for which no petition to transfer was filed.[174]
- Whether transfer could affect the placement of the child[175]
- The Indian child's cultural connections with the tribe or its reservation.[176]

Minnesota law articulates only two circumstances under which the court may find good cause to deny a transfer to tribal court: [177]

166 BIA Reg. § 23.118.
167 ICWA § 1911(b); MIFPA § 260.771, subd. 3; MINN. R. JUV. PROT. P. 31.01.
168 MINN. R. JUV. PROT. P. 31.01.
169 MIFPA § 260.771, subd. 3a(a).
170 *Id*.
171 *Id*.
172 MIFPA § 260.771 subd. 3(a).
173 BIA Reg. § 23.118.
174 *Id*.
175 *Id*.
176 *Id*.
177 MIFPA § 260.771 subd. 3(b).

1) The Indian child's tribe does not have a tribal court or other administrative body vested with authority of child custody proceedings; or

2) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses and the tribal court is unable to mitigate the hardship by means permitted in the tribal court's rules. Without evidence of undue hardship, travel distance alone is not a basis for denying a transfer.

PRACTICE CONSIDERATION: The same respect afforded to any state or federal court should be afforded to tribal courts. If a GAL has questions about transferring a case to tribal court, the GAL should communicate with his or her ICWA coordinator or manager.

Before a GAL objects to a transfer to tribal court, the GAL shall consult with his or her ICWA coordinator or manager.

Standards of Proof

Standard of proof refers to the level of evidence or amount of proof required of a party to meet a legal burden. There are generally three standards of proof in civil cases governed by MIFPA and ICWA. From the lowest level of proof to the highest level of proof, they are:

1. Preponderance of the Evidence – The majority of the evidence supports the conclusion.[178]

2. Clear and Convincing Evidence – The evidence is "unequivocal, intrinsically probable and credible, and free from frailties."[179] The evidence is clear that certain facts have been proved and convincing that all the necessary elements to be proved are present and have been proven. This standard of proof is more than a preponderance of the evidence but less than proof beyond a reasonable doubt.[180]

3. Beyond a Reasonable Doubt - The decision-maker has a high degree of certainty that the issue to be proven has been proven, although they need not be 100 percent convinced.[181] This is the same level of certainty required for criminal conviction, where all reasonable doubts have been resolved.

Standard of Proof - Emergency Removals / EPC Hearings:

[178] MINNESOTA JUDICIAL BRANCH, GLOSSARY OF COURT-RELATED TERMS, https://www.mncourts.gov/Help-Topics/Glossary-of-Court-Related-Terms.aspx.

[179] *In re* Griffith, 883 N.W.2d 798, 800 (Minn. 2016) (quoting Gassler v. State, 787 N.W.2d 575, 583 (Minn. 2010).

[180] Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978).

[181] MINNESOTA JUDICIAL BRANCH, *supra* note 162.

At an emergency hearing involving an Indian child (EPC hearing if the matter is a CHIPS or Permanency matter in Juvenile Court), the Petitioner must prove by clear and convincing evidence that emergency removal or placement of an Indian child is necessary to prevent "imminent physical damage or harm" to the child.[182] QEW is not required for emergency removals, however, emergency removals are supposed to be short in duration and may not last more than 30 days unless certain circumstances are present and the court makes specific findings.[183]

Standard of Proof - Involuntary Out-of-Home Placements / Foster Care / Third-Party Custody:

Any person or agency seeking to have an Indian child placed out of home or seeking to be awarded custody of an Indian child without the consent and agreement of the Indian child's parent or Indian custodian, must prove by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proved unsuccessful. [184]

Second, any person or agency seeking involuntary placement or award of custody of an Indian child must prove by clear and convincing evidence, supported by QEW testimony, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[185]

The evidence presented must demonstrate "a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding."[186] "Without a causal relationship, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child."[187]

Standard of Proof - Active Efforts:

The court is to apply the same standard of proof to the determination of active efforts as is required by the underlying action. (E.g., clear and convincing evidence for foster care placements and beyond a reasonable doubt for TPRs.) [188]

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182 MINN. R. JUV. PROT. P. 28.04, subd. 3 (stating that in all juvenile protection matters, other than termination of parental rights, the standard of proof is clear and convincing evidence).

183 BIA Reg. § 23.113.

184 ICWA § 1912(d); *In re* Welfare of M.S.S., 456 N.W.2d, 418 (Minn. Ct. App. 1991); BIA Guidelines § E.6.

185 ICWA § 1912(e); MINN. STAT. § 260.762, subd. 3 (requirements for local social service agencies); MINN. STAT. § 260.771, subd. 6.

186 BIA Reg. § 23.121(c).

187 BIA Reg. § 23.121(d).

188 *In re* Welfare of M.S.S., 456 N.W.2d, 418 (Minn. Ct. App. 1991); BIA Guidelines § E.6.

Standard of Proof - Good Cause to Deviate from Placement Preferences:

The party seeking deviation from the placement preferences must prove good cause by clear and convincing evidence.[189]

Standard of Proof - Default Adjudications:

In a juvenile protection matter, if a parent, legal custodian, or Indian custodian fails to appear for an admit-deny hearing, a pretrial hearing, or a trial after being properly served with a summons or notice, the court may receive evidence in support of the petition. Notwithstanding this, the evidence in support of the petition must be proven by the applicable standard of proof (e.g., clear and convincing evidence or beyond a reasonable doubt).[190] The default evidence must demonstrate that active efforts have been made to prevent the break-up of the Indian family and that the efforts were unsuccessful.[191] The evidence must also include the requisite QEW testimony.

Standard of Proof - Termination of Parental Rights:

The petitioner must prove beyond a reasonable doubt that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[192]

The evidence must also demonstrate "a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding."[193] "Without a causal relationship, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself demonstrate beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child."[194]

Active Efforts are required.[195] QEW is required supporting a determination 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 beyond a reasonable doubt.[196]

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189 MIFPA § 260.771, subd. 7(d); *In re* Custody of S.E.G., 507 N.W.2d 872, 878 (Minn. Ct. App. 1993) *rev'd on other grounds* 521 N.W.2d 357 (Minn. 1994); *see also* BIA Reg. § 23.132 (stating that the party seeking departure from the placement preferences "should" bear the burden of proof by clear and convincing evidence).

190 MINN. R. JUV. PROT. P. 18.01 and 18.02.

191 ICWA § 1912(d).

192 ICWA § 1912(f). MIFPA § 260.771, subd. 6.

193 BIA Reg .§ 23.121(c).

194 BIA Reg § 23.121(d).

195 ICWA § 1912(d); MIFPA § 260.762, subd. 3.

196 ICWA § 1912(f); MIFPA § 260.771, subd. 6.

Standard of Proof - Transfers of Permanent and Legal Physical Custody ("TPLPC"):

The person or agency seeking transfer or an award of Permanent and Legal Physical Custody in a juvenile court permanency proceeding must prove by clear and convincing evidence that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage.[197] Active efforts are required.[198]

Neither ICWA nor MIFPA specifically addresses TPLPCs and there is not consensus among practitioners whether QEW is required for a TPLPC if QEW was previously provided to support an initial out-of-home placement. Best practice is to seek QEW for TPLPCs regardless of whether QEW was previously provided in support of the initial out-of-home placement.

Standard of Proof - Petition for Restoration of Parental Rights:

If the local social services agency or another party opposes a biological parent's petition for restoration of parental rights, the party in opposition must prove, beyond a reasonable doubt, that active efforts were provided to the parent towards reunification; that continued custody of the child by the parent is likely to result in serious harm to the child supported by qualified expert testimony; and that return of custody is not in the child's best interests.[199]

197 MINN. R. JUV. PROT. P. 28.04, subd. 3.
198 MIFPA § 260.762, subd. 3.
199 *In re* Welfare of the Child of E.A.C., 812 N.W.2d 165, 175-176 (Minn. Ct. App. 2012).

CHAPTER 5 EMERGENCY PROCEEDINGS / EPC HEARINGS

What is an Emergency Proceeding?

An emergency proceeding is any court action involving the emergency removal or placement of an Indian child without the full suite of ICWA protections.[200] Emergency proceedings must not extend for longer than necessary to prevent imminent physical damage or harm to the child. Once a child is no longer in danger of imminent physical damage or harm (immediate and present maltreatment that is life threatening or likely to result in abandonment, sexual abuse, or serious physical injury), the emergency removal or placement must immediately terminate.[201] If there is sufficient evidence of abuse or neglect, a proceeding that provides the full suite of due process and ICWA protections should be initiated.[202]

There are a number of ways in which an Indian child might be subject to an emergency removal from his or her parent or Indian custodian including:

- 72-hour health and welfare hold or other emergency court order.[203]
- An Order for Protection under Minn. Stat. § 518B if the child is placed with, or temporary custody is awarded to, someone other than a parent or Indian custodian.
- An emergency *ex parte* custody order under Minn. Stat. § 257C.03, subd. 5 and § 518.131 if temporary custody is awarded to someone other than a parent or Indian custodian.

What Must be Demonstrated Before an Indian Child can be Removed in an Emergency Situation?

Regardless of case type, (e.g., CHIPS, Order for Protection, Third-party custody, etc.), if ICWA or MIFPA applies, emergency removal of an Indian child from his or her parent or Indian Custodian is permissible only in situations "where removal is necessary to prevent imminent physical damage or harm to the child."[204]

Section 23.113(d) of the BIA Regulations contains a detailed list of criteria to be followed when emergency removal or continued emergency placement of an Indian child is sought. The petition should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child.[205]

The emergency petition should also contain the following information:

200 ICWA § 1922; BIA Reg. § 23.2; BIA Guidelines § C.5.
201 BIA Reg. § 23.113(a).
202 BIA Guidelines § C.5.
203 MINN. STAT. § 260C.175.
204 ICWA § 1922; BIA Reg. § 23.113.
205 BIA Reg. § 23.113(d).

1) The name, age, and last known address of the Indian child;
2) The name and address of the child's parents and Indian custodians, if any;
3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;
4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov);
5) The residence and the domicile of the Indian child;
6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;
7) The Tribal affiliation of the child and of the parents or Indian custodians;
8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;
9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and
10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.[206]

How Soon Must a Hearing be Held After Emergency Removal of an Indian Child?

If any child is taken into protective emergency custody (American Indian or non-Indian), the court is required to hold a hearing within 72 hours of the time the child was taken into custody excluding Saturdays, Sundays and legal holidays.[207] This hearing is the EPC hearing (Emergency Protective Care Hearing); sometimes referred to as the Emergency Removal Hearing, 72-Hold Hearing or Hold Hearing.

EPC Hearings.

The purpose of the EPC hearing is to determine whether the child can be returned home or whether the child must be placed or continued in emergency protective care.[208]

At the EPC hearing, the court must determine (if not already determined) whether the child is an Indian child. This determination is made through review of the petition, other documents, and a thorough on-the-record inquiry of whether the child has Indian ancestry or heritage.[209]

206 *Id*.
207 MINN. STAT. § 260C.178.
208 MINN. R. JUV. PROT. P. 42.01.
209 MINN. R. JUV. PROT. P. 29.01; BIA Reg. § 23.107(a).

Once before the court, to remove or maintain the emergency placement of a child, the court must:

- Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;
- Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency has ended;
- At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child; and
- Immediately terminate (or ensure the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.[210]

Emergency Placement Preferences.

The plain language of ICWA does not address whether ICWA's placement preferences apply to emergency removals. The Minnesota DHS Indian Children Welfare Manual requires, and the BIA Guidelines recommend,[211] that the local social service agencies place Indian children according to ICWA's placement preferences in an emergency placement.[212]

Best practice is to follow the placement preferences set forth in ICWA, which prioritize the placement preferences of the Indian child's tribe. If the Indian child's tribe does not specify its own placement preferences, the preferences set forth in ICWA should be followed. This will also help prevent subsequent disruptions if the child needs to be moved to a preferred placement if a child-custody proceeding is initiated (*e.g.,* through a CHIPS or permanency petition). As placement with relatives is a priority under ICWA (unless the child's tribe determines a different order of placement preference), adhering to ICWA's placement preferences is also consistent with Minnesota law requiring the responsible social services agency to identify and consider placement with a relative without delay in all foster care placements.[213]

How Long Can Emergency Proceedings Last?

The emergency status of the proceeding should last no longer than necessary to prevent imminent physical damage or harm to the child and not beyond 30 days. The emergency proceeding may only extend beyond 30 days if the court finds that:[214]

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210 BIA Reg. § 23.113(b).
211 BIA Guidelines § C.6.
212 MN DHS INDIAN CHILDREN WELFARE MANUAL at 41.
213 MINN. STAT. § 260C.221(a).
214 BIA Reg. § 23.113(e).

1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian tribe; and
3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2 of the BIA Regulations. (In juvenile court, a "child custody proceeding" is a proceeding commenced by a CHIPS Petition or a Permanency Petition with the requisite notice given to the Indian child's tribe, parents or Indian custodian; legal counsel made available to the parents and Indian custodian; etc.)

Admit/Deny Hearings for CHIPS or Permanency Proceedings Following Emergency Removal.

Because initiation of a child custody proceeding (CHIPS or Permanency proceeding) requires application of the full suite of ICWA protections,[215] an Admit/Deny Hearing on a CHIPS or Permanency Petition should not be held, and the Indian child's placement may not be converted from emergency protective care to foster care until:

1) The requisite ICWA notices have been given.
2) At least 10 days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary of the Interior (as evidenced by the green return receipt cards) or at least 30 days if an additional 20 days has been requested.
3) The child's parents or Indian custodian have been appointed legal counsel if indigent; and
4) QEW is provided to support the child's continued out-of-home placement *unless* the child has been returned to the care of his or her parent or Indian custodian.

If the Admit/Deny hearing cannot be held, and the Indian child cannot be returned home because the placement continues to be necessary to prevent imminent physical damage or harm to the child, the child should be ordered/continued in emergency protective care, not foster care.

Ending or Terminating Emergency Proceedings.

An emergency proceeding can be terminated by one or more of the following actions:

- Returning the child to the parent or Indian custodian;
- Transferring the child/case to tribal court jurisdiction; or
- Initiating a child custody proceeding subject to ICWA (e.g., initiating a CHIPS or Permanency

[215] U.S. DEPT. OF INTERIOR, BIA, FINAL RULE: INDIAN CHILD CUSTODY PROCEEDINGS 25 C.F.R. § 23 QUICK REFERENCE SHEET FOR STATE COURT PERSONNEL, https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-041404.pdf.

proceeding with the full suite of ICWA protections including QEW testimony).[216]

PRACTICE CONSIDERATION: If an Indian child is removed on an emergency basis, the child must be restored to his or her parent(s) as soon as the child is no longer in immediate danger of physical damage or harm that is life threatening or likely to result in abandonment, sexual abuse, or serious physical injury.[217] This comports with standards that apply to all child-welfare cases and protects the "fundamental liberty interest" that parents have in the care and custody of their children.[218] If circumstances warrant, however, the state agency or petitioning party may initiate a child custody proceeding to which the full set of ICWA protections would apply.[219]

216 BIA Reg. § 23.113(c).
217 ICWA § 1922.
218 BIA Guidelines § C.3 (citing Troxel v. Granville, 530 U.S. 57 (2000)).
219 BIA Guidelines § C.3.

CHAPTER 6 ICWA / MIFPA GENERAL PRACTICE PROVISIONS

Voluntary Proceedings.

Voluntary proceedings are generally those proceedings in which an Indian parent or Indian custodian is voluntarily, without any coercion, agreeing to a foster care placement, award of custody, termination of parental rights or adoption.[220]

ICWA and MIFPA cover three types of voluntary proceedings:

1) voluntary foster care placements,
2) voluntary termination of parental rights proceedings, and
3) voluntary adoption proceedings.

If an Indian parent or Indian custodian provides a voluntary consent to foster care (including award of custody to a third-party), termination of parental rights or adoption, their consent will not be valid unless it is:

- Given after ten days of the child's birth.[221]
- Recorded before a judge of a court of competent jurisdiction,[222] and
- Accompanied by the presiding judge's certificate that:[223]

    1) the terms and consequences of the consent were fully explained in detail and fully understood by the parent or Indian custodian; and
    2) the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood.

Any parent or Indian custodian may withdraw consent to a voluntary foster care placement or voluntary award of custody at any time and the child must be returned to the parent or Indian custodian.[224]

In any voluntary termination of parental rights or adoption proceeding, the parent may withdraw consent for any reason at any time prior to entry of the final decree of TPR or adoption, and the child must be returned to the parent.[225]

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220 ICWA § 1913.
221 ICWA § 1913(a)
222 *Id*.
223 *Id*.
224 ICWA § 1913(b).
225 ICWA § 1913(c).

PRACTICE CONSIDERATION: A child-custody proceeding may be voluntary as to one parent and involuntary as to the other parent. Additionally, a child-custody proceeding may start out as voluntary but turn involuntary or may look voluntary but may really be involuntary if the parent is unable to demand the child's immediate return. For example, if a parent or Indian custodian is agreeable to a foster care placement or is agreeable to transferring custody to a third party, the proceeding is not a voluntary proceeding simply because the parent is *voluntarily agreeing*. The proceeding is only voluntary if the parent or Indian custodian is able to demand and receive the immediate return of their child. If the parent or Indian custodian is unable to demand and receive the child's immediate return, the proceeding is an *involuntary* proceeding regardless of whether the parent or Indian custodian is supportive of it. QEW is generally not required for voluntary proceedings.

Involuntary Proceedings.

Involuntary proceedings are proceedings in which parents or Indian custodians cannot have their children returned upon demand. Except that, involuntary proceedings generally do not include custody proceedings between the Indian child's parents.

Involuntary custody proceedings can include:

1) Foster care placement
2) Termination of parental rights
3) Preadoptive placement
4) Status offenses (e.g., runaway, truancy)
5) Third-party Custody proceedings
6) De Facto Custody proceedings
7) Guardianship proceedings
8) Protective Supervision
9) Trial home visits
10) Permanent Transfer of Legal and Physical Custody
11) Orders for Protection

Involuntary proceedings require active efforts and QEW testimony.

Notice Requirements for Involuntary Child Custody Proceedings.

ICWA, MIFPA, BIA Regulations, and the Rules of Juvenile Protection Procedure require that specific notices be given to the parents (Indian and non-Indian), Indian custodian, and the

Indian child's tribe in any involuntary child custody proceeding.[226] There are generally three types of notices:

1. Notices by the social services agency (often referred to as the State Notice or MIFPA Notice):
2. Notices by the Petitioner. (The Petitioner is typically the local social service agency, but not always. Depending upon the case, the Petitioner may be a GAL, an adoption agency, a preadoptive parent, or a relative or non-relative seeking custody or guardianship of an Indian child.)
3. Notices by court administration.

While all notices are important, the primary notice requirements GALs are likely to encounter are the notices required by the Petitioner. (Note that MIFPA has more notice requirements than ICWA and requires notice to be given in both voluntary and involuntary placements or proceedings including private adoptions.)

Notice Required of the Petitioner. If ICWA or MIFPA applies, or if there is reason to know that a child is an Indian child, notice of the pending proceeding must be provided to:

- The Indian child's parents.[227]
- The Indian custodian.[228]
- The Indian child's tribe or potential tribes through its ICWA designated agent.[229]

A copy of the notice must also be provided to the BIA Regional Director.[230] The address of Minnesota's BIA Regional Office is:

> Bureau of Indian Affairs Regional Office
> 5600 W. American Boulevard, Suite 500
> Bloomington, MN 55437
> Telephone: 612-713-4400

If the identity or location of the Indian parents or Indian custodian and the Indian child's tribe cannot be determined after diligent effort (which will be reviewable by the court), notice must be given to the Secretary of the Interior who then has fifteen days after receipt to provide the notice to the parent or Indian custodian and the tribe.[231] Notices to the Indian child's tribe(s) and Indian custodian must contain a provision advising them of their right to intervene.

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226 ICWA § 1912(a); BIA Reg. § 23.111; MIFPA § 260.761; MINN. R. JUV. PROT. P. 30.
227 ICWA § 1912(a); BIA Reg. § 23.11(a); MIFPA §§ 260.761 & 260.765.
228 *Id*.
229 *Id*.
230 BIA Reg. § 23.11(a).
231 ICWA § 1912(a); BIA Reg. § 23.107.

Notice to each of the above must be sent **by registered or certified mail** with return receipt requested,[232] and the original or a copy of each notice and each return receipt must be filed in the court file. While notice may, as a courtesy, be sent by personal service or electronically, the BIA Regulations state that personal service does not replace the registered/certified mail requirement.[233]

No hearing for foster care placement, custody, termination of parental rights, or adoption (other than emergency proceedings wherein the court must find that returning the Indian child to his or her parent or Indian custody would subject the child to imminent physical damage or harm), shall take place until at least 10 days after receipt of notice by all parents, Indian custodians and the tribe or the Secretary of the Interior.[234] Additionally, the hearing must be continued for an additional 20 days if requested by parent, Indian custodian, or tribal social services agency.[235]

PRACTICE CONSIDERATION: The GAL should ascertain whether notice has been provided as required by ICWA or MIFPA. One way of doing this is to check Minnesota Government Access ("MGA") for filing of the registered or certified mail return receipt card which is green in color and often referred to as the "Green Card."

Appointment of Legal Counsel.

In any removal, placement or termination of parental rights case governed by ICWA, parents and Indian custodians have the right to court-appointed legal counsel if the court determines that the parent or Indian custodian does not have the ability to pay for an attorney.[236]

Additionally, the court has the discretion to separately appoint legal counsel for the Indian child if the court finds that such appointment is in the child's best interests.[237] Where state law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary of Interior upon appointment of counsel, and the Secretary of Interior, upon certification of the presiding judge, shall pay reasonable fees and expenses.[238]

PRACTICE CONSIDERATION: If given the opportunity, the GAL should encourage the court to appoint an attorney who understands and accepts the responsibility for ensuring compliance with both ICWA and MIFPA.

232 BIA Reg. § 23.11(a).
233 BIA Reg. § 23.111.
234 ICWA § 1912(a); MIFPA § 260.761, subd. 3.
235 ICWA § 1912(a).
236 ICWA § 1912(b).
237 *Id*.
238 *Id*.

Qualified Expert Witness Testimony (QEW).

Qualified expert witness testimony is required for all:

- Removals / Foster care placements / Third-party custody determinations (except when an emergency exists);[239]
- Terminations of parental rights;[240] and
- Requests to deviate from the placement preferences if the request is based upon the extraordinary physical or emotional needs of the child.[241]

No non-emergency out-of-home placement may be made without QEW testimony which supports a finding that continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to child.[242]

MIFPA requires the party presenting QEW testimony to make diligent efforts to locate and present testimony of a QEW designated by the Indian child's tribe.[243] Qualifications of the QEW designated by the tribe are not subject to challenge.[244] If a tribally designated QEW is not available, there are provisions in MIFPA for lesser qualified experts that require court approval.[245]

Under ICWA's BIA Regulations, a QEW must have specific knowledge of the Indian child's tribe's culture and customs,[246] and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.[247] The court or any party may request assistance of the Indian child's tribe or Regional BIA Office in locating persons qualified to serve as expert witnesses.[248] The social worker regularly assigned to the case cannot serve as QEW.[249]

Although the petitioner is responsible for presenting the testimony of a QEW; other parties may also present testimony of a QEW.

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239 ICWA § 1912(e). QEW is required, however, once the emergency is over. A proceeding cannot continue indefinitely as an "emergency proceeding" to avoid the QEW requirement.
240 ICWA § 1912(f).
241 MIFPA § 260.771, subd. 7(b)(3).
242 ICWA §§ 1912(e) & 1912(f); MIFPA § 260.771, subd. 6.
243 MIFPA § 260.771, subd. 6(b).
244 MIFPA § 260.771, subd. 6 (b).
245 MIFPA § 260.771, subd. 6.
246 MIFPA § 260.755, subd. 17a.
247 BIA Reg. § 23.122(a).
248 BIA Reg. § 23.122(b).
249 BIA Reg. § 23.122(c).

What if the Tribe does not provide a QEW?

If a party is unable to obtain testimony from a tribally designated QEW, the party cannot simply identify an alternate QEW. Rather, the party must first present clear and convincing evidence to the court of the diligent efforts made to obtain a tribally designated qualified expert witness.[250]

If clear and convincing evidence establishes that diligent efforts were unsuccessful in producing QEW testimony from the Indian child's tribe, the party must demonstrate to the court that a proposed QEW is, in descending order of preference:[251]

(1) A member of the child's tribe who is recognized by the Indian child's tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; or

(2) An Indian person from an Indian community who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and contemporary and traditional child-rearing practices of the Indian child's tribe.[252]

When use of a tribally designated QEW is not possible, the Tribal State Agreement indicates that consideration should be given to identifying a QEW who demonstrates knowledge and understanding of the following criteria:

(1) Knowledge and understanding of the meaning of membership in the child's tribe.
(2) Knowledge and understanding of the meaning of clan relationship and extended family relationship in the child's tribe.
(3) Knowledge and understanding of traditional disciplinary measures used within the child's tribe.
(4) Knowledge and understanding of ceremonial and religious practices and cultural traditions within the child's tribe.
(5) Knowledge and understanding of medicine and traditional healing of the child's tribe.
(6) Knowledge and understanding of the effect of acculturation or assimilation with the child's tribe.[253]

If clear and convincing evidence establishes that diligent efforts were still unsuccessful in producing a QEW, a party may use an expert witness, as defined by Rule 702 of the Minnesota Rules of Evidence, who has substantial experience in providing services to Indian families and

250 MIFPA § 260.771, subd. 6(c).
251 MIFPA § 260.771, subd. 6(d).
252 *Id*.
253 TSA Part 1, E.33.

who has substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community.[254]

PRACTICE CONSIDERATION: As the best interests of the Indian child are met through the application of and compliance with ICWA and MIFPA, the GAL should be aware of the QEW requirements and timelines in which QEW testimony should be provided in each case. Notwithstanding this, it is the policy of the GAL Program that GALs should not serve as QEWs.

If the GAL disagrees with the tribe's QEW or wishes to present QEW testimony for another reason (for example in a case where QEW is required, but no QEW has been provided), the GAL shall consult with their ICWA coordinator or manager.

Case Plans.

Case Plans are plans prepared by the local social services agency setting forth services to be provided to a child, parent or guardian designed to safely maintain the child in the home or to reunite the child with the custodial parent.[255] The local welfare agency is responsible for creating a written case plan within 30 days of determining that child protective services are needed or upon joint agreement with the family that supportive services are needed.[256] Development of the case plan should include the child's tribe or designated tribal representative.[257]

Out-of-Home Placement Plans.

Out-of-home placement plans are included within the definition of case plans and must be submitted to the court within 30 days of the child's out-of-home placement.[258] In creating a case plan for a family, Minnesota law requires the responsible social services agency to make efforts to engage both parents in case planning.[259] If parents do not participate in the case planning process, the agency is nonetheless required to notify the court of its efforts to involve the parents and of the services the agency will provide or attempt to provide despite the parent's refusal to cooperate or disagreement with services.[260]

Parents may ask the court to modify the plan to require different or additional services. The court has discretion to approve the plan as presented by the agency or it may modify the plan to require services requested by the parent.[261] The case plan and the court's approval of the case plan should

254 MIFPA § 260.771, subd.6(d)(2).
255 MINN. STAT. § 260C.007, subd. 3; § 260C.201, subd. 6(b).
256 MINN. STAT. § 260E.26.
257 MIFPA § 260.761, subd. 2.
258 MINN. STAT. § 260C.178, subd. 7(a).
259 MINN. STAT. § 260C.178, subd. 7(c).
260 *Id*.
261 *Id*.

be based on the contents of the petition.[262] Unless the parent agrees to voluntarily comply, the court may not order a parent to comply with the provisions of the plan until the court adjudicates the child as a child in need of protection or services and orders disposition.[263] Even though the court may not order a parent to comply with the out-of-home placement plan prior to adjudication; the court may still find that the responsible social services agency has made reasonable efforts (and presumably active efforts) towards reunification if the agency makes efforts to implement the terms of an out-of-home placement plan approved under this section and the parent has not complied.[264]

Additionally, prior to adjudication, the court can order the parent to do certain assessments in order to support development of a reunification plan if the court has ordered the child into foster care or into the home of a noncustodial parent.[265] Those assessments are:

- a chemical dependency evaluation,
- a mental health evaluation,
- a medical examination, and
- a parenting assessment.[266]

The statutory requirements for out-of-home placement plans are numerous. A summary of some of the requirements are set forth below:

- An out-of-home placement plan shall be prepared by the responsible social service agency within 30 days after any child is placed in foster care by court order or a voluntary placement agreement.[267]
- An out-of-home placement plan should be prepared jointly with the parent(s) or legal guardian of the child in consultation with the child's guardian ad litem, the child's tribe, if the child is an Indian child, the child's foster parent or representative of the foster care facility, and, where appropriate, the child.[268]
- If the child is age 14 or older, the child may include two other individuals on the team preparing the child's out-of-home placement plan.[269]
- The plan must be submitted to the court for approval and ordered by the court, either as presented or modified after a hearing.[270]
- The plan must be signed by the parent(s), or legal guardian, the child's guardian ad litem, a representative of the child's tribe, the responsible social services agency, and, if possible, the child.[271]

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262 *Id*.
263 MINN. STAT. § 260C.178, subd. 7(d).
264 *Id*.
265 MINN. STAT. § 260C.178, subd. 1(l).
266 *Id*.
267 MINN. STAT. § 260C.212, subd. 1(a).
268 MINN. STAT. § 260C.212, subd. 1(b).
269 *Id*.
270 *Id*.
271 *Id*.

The plan must be explained to all persons involved in its implementation and must include: [272]

- A description of the foster care home or facility selected, including how the out-of-home placement plan is designed to achieve a safe placement for the child in the least restrictive, most family-like, setting available which is in close proximity to the home of the parent or parents or guardian of the child when the case plan goal is reunification.
- How the placement is consistent with the best interests and special needs of the child.
- A description of the problems or conditions in the home of the parent or parents which necessitated removal.
- The changes the parent or parents must make for the child to safely return home.
- A description of the services offered and provided to prevent removal of the child from the home and to reunify the family.
- The visitation plan for the parent(s) or guardian, and other relatives;
- The visitation plan for siblings if siblings are not placed together in foster care.
- Efforts to ensure the child's educational needs are being met and that the child is able to remain in the same school he or she was enrolled in prior to foster care unless that is not in the child's best interests.
- Efforts by the agency to ensure the child's medical needs are met.
- The preparation of an Independent Living Plan for children age 14 and older.

PRACTICE CONSIDERATION: GALs should review Minn. Stat. § 260C.212 and become familiar with the requirements regarding out-of-home placement plans. GALs are important members of the case planning team and are able to make recommended changes or additions to ensure the best interests of the Indian child are met.

Placement Preferences.

ICWA has two sets of placement preferences – one for foster care and preadoptive placements and one for adoptive placements. Both sets of placement preferences are binding upon the court and parties and must be followed unless the court finds good cause to deviate from them. The adoptive placement preferences are included Chapter 7.

Foster Care or Preadoptive Placement Preferences.

Any Indian child placed into foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which the child's special needs, if

[272] Minn. Stat. § 260C.212, subd. 1(c).

any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child.[273]

If the child's tribe has established a different order of preference by resolution, that order must be followed first so long as the placement is the least restrictive setting appropriate to the particular needs of the child.[274]

If the child's tribe has not established a different order of preference, placement preference must be given, in the following descending order to: [275]

(i) a member of the Indian child's extended family;
(ii) a foster home licensed, approved, or specified by the Indian child's tribe;
(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(iv) an 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.

Where appropriate, the court shall also consider the preference of the Indian child or the Indian child's parent.[276]

The Tribal State Agreement and Minnesota DHS Indian Children Welfare Manual state that out-of-home placement of Indian children with their siblings or half siblings in a non-relative, non-Indian home does not meet placement preference requirements. This type of placement does not constitute a placement with "family" or with "relatives." A child's family, relatives or kinship relationships shall be determined in regard to the parent(s) and/or Indian custodian(s), not to other children in the placement home.[277]

Additionally, in CHIPS and Permanency proceedings, relative of an Indian Child is defined differently that relative for non-Indian children. Minnesota Statutes § 260C.007, subd. 26b. defines "Relative of an Indian child" as a person who is a member of the Indian child's family as defined in the Indian Child Welfare Act section 1903, paragraphs (2), (6), and (9).

PRACTICE CONSIDERATION: The placement preferences provide priority placement to "extended family members" as defined by ICWA; not "relatives" as defined in state law. The definition of "relatives" under state law may be very different than the definition of "extended family members" under ICWA.

273 ICWA § 1915(b).
274 ICWA § 1915(c).
275 *Id*.
276 ICWA § 1915(c); BIA Reg. § 23.131(d).
277 TSA Part 1(E)(31); MN DHS INDIAN CHILDREN WELFARE MANUAL at 15.

Good Cause to Deviate from the Placement Preferences.

Any party seeking to deviate from the placement preferences bears the burden of proving by clear and convincing evidence that good cause exists to deviate.[278] A court's determination of good cause must be made in writing.[279] MIFPA's definition of good cause differs from good cause defined by the BIA Regulations. If MIFPA provides greater protections to Indian parents or custodians, then MIFPA is to be applied over ICWA and the BIA Regulations.[280]

Good Cause to Deviate from Placement Preferences Pursuant to MIFPA.

Pursuant to Minnesota statutes, an Indian child may only be placed outside the order of placement preferences if the court makes a good cause determination based upon:[281]

1) The reasonable request of the Indian child's parents, if one or both parents attest that they have reviewed the placement options that comply with the order of placement preferences.

2) The reasonable request of the Indian child if the child is able to understand and comprehend the decision that is being made.

3) The testimony of a qualified expert designated by the child's tribe and, if necessary, testimony from an Indian person from an Indian community who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and contemporary and traditional child-rearing practices of the Indian child's tribe, that supports placement outside the order of placement preferences due to extraordinary physical or emotional needs of the child that require highly specialized services; or

4) The testimony by the local social services agency that a diligent search has been conducted that did not locate any available, suitable families for the child that meet the placement preference criteria.

In determining the suitability of a proposed placement of an Indian child, the standards to be applied must be the prevailing social and cultural standards of the Indian child's

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278 MIFPA § 260.771, subd. 7(d); *In re* Custody of S.E.G., 507 N.W.2d 872, 878 (Minn. Ct. App. 1993) *rev'd on other grounds* 521 N.W.2d 357 (Minn. 1994); *see also* BIA Reg. § 23.132 (stating that the party seeking departure from the placement preferences "should" bear the burden of proof by clear and convincing evidence).

279 MIFPA § 260.771, subd. 7(e).

280 ICWA § 1921.

281 MIFPA § 260.771, subd. 7.

community, and the agency shall defer to the tribal judgment as to suitability of a particular home when the tribe has intervened pursuant to ICWA.[282]

Active Efforts for Extended Family Members: A good cause finding under this subdivision must consider whether active efforts were provided to extended family members who are considered the primary placement option to assist them in becoming a placement option for the child as required by section 260.762.[283]

Bonding and Attachment to Foster Family: Testimony of the child's bonding or attachment to a foster family alone, without the existence of at least one of the factors set forth above, shall not be considered good cause to keep an Indian child in a lower preference or non-preference placement.[284]

When a child is placed outside the order of placement preferences, good cause to continue this non-preferred placement must be determined at every stage of the proceedings.[285]

Good Cause to Deviate from Placement Preferences Pursuant to ICWA's BIA Regulations.

Pursuant to the BIA Regulations, good cause to deviate from ICWA's placement preferences should be based on one or more of the following considerations:[286]

1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference.

2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made.

3) The presence of a sibling attachment that can be maintained only through a particular placement.

4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.

5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference

282 MINN. STAT. § 260C.215, subd. 6(b).
283 MIFPA § 260.771, subd. 7(f).
284 MIFPA § 260.771, subd. 7(c).
285 MIFPA § 260.771, subd. 7(g).
286 BIA Reg. § 23.132(c).

> Criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.[287]

Deviation from the placement preferences may not be based upon the socioeconomic status of one placement relative to another placement[288] or solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement made in violation of ICWA.[289]

What Steps Should be Taken if the GAL does not Support the Tribe's Designated Custodial Placement for the Indian Child?

The GAL shall engage in a consult with their ICWA coordinator or manager.

What Role Should GALs Play in Identifying Placement Options?

In addition to working with the child's tribe to identify placement options, the responsible social services agency is required to conduct a comprehensive relative search within 30 days of the child's removal from home, to identify and notify all relatives of the child's pending or current placement.[290]

Although the GAL does not have a statutory duty to identify placement options, the Indian child's best interests will generally be met through the efforts of all parties, including the GAL, in identifying possible placement options that comply with ICWA and sharing those options with the social service agency social worker assigned to the case and to the court.

PRACTICE CONSIDERATION: GALs must carefully consider whether the fact that an Indian child has developed a relationship with a non-preferred placement outweighs the long-term best interests to a child that arise from maintaining connections to family, culture and the child's tribal community. Where a child is in a non-preferred placement, moving the child to a preferred placement is required by law unless the court makes a good cause determination. Best practice also supports the child being placed in a preferred placement. Until that is possible, it is best practice to facilitate connections between the Indian child and extended family and other potential preferred placements.

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287 ICWA § 1915(d); BIA Reg. § 23.132(c)(5).
288 BIA Reg. § 23.132(d).
289 BIA Reg. § 23.132(e).
290 MINN. STAT. § 260C.221.

> Terry Cross, member of the Seneca Nation and former Executive Director of the National Indian Child Welfare Association ("NICWA"), poignantly reminds that, "Foster care is one of the few places in American society where one culture can decide what is in the best interest of an individual from another culture."[291]

Sibling Placement and Separation.

Placing siblings together and maintaining sibling relationships is important to Indian children and is an important policy objective of the State of Minnesota for all children. In 2018, the State legislature passed the Foster Care Sibling Bill of Rights which provides all children in foster care the rights set forth below.

Foster Care Sibling Bill of Rights[292]

A child placed in foster care who has a sibling has the right to:

(1) be placed in foster care homes with siblings when possible, and when it is in the best interest of each sibling, in order to sustain family relationships.

(2) be placed in close geographical distance to the child's siblings, if placement together is not possible, to facilitate frequent and meaningful contact.

(3) have frequent contact with the child's siblings in foster care and, whenever possible, with the child's siblings who are not in foster care, unless the responsible social services agency has documented that contact is not in the best interest of any sibling. Contact includes but is not limited to telephone calls, text messaging, social media and other Internet use, and video calls.

(4) annually receive a telephone number, address, and e-mail address for all siblings in foster care, and receive updated photographs of siblings regularly, by regular mail or e-mail.

(5) participate in regular face-to-face visits with the child's siblings in foster care and, whenever possible, with the child's siblings who are not in foster care. Participation in these visits shall not be withheld or restricted as a consequence for behavior and shall only be restricted if the responsible social services agency documents that the visits are contrary to the safety or well-being of any sibling. Social workers, parents, foster care providers, and older children must cooperate to ensure regular visits and must coordinate dates, times, transportation, and other accommodations, as necessary. The

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[291] Terry L. Cross, *Child Welfare In Indian Country: A Story of Painful Removals*, HEALTH AFFAIRS 2256, 2258 (December 2014).

[292] MINN. STAT. § 260C.008, subd. 1.

timing and regularity of visits shall be outlined in each sibling's service plan, based on the individual circumstances and needs of each child. A social worker need not give explicit permission for each visit or possible overnight visit, but foster care providers shall communicate with social workers about these visits.

(6) be actively involved in each other's lives and share celebrations, if they choose to do so, including but not limited to birthdays, holidays, graduations, school and extracurricular activities, cultural customs in the siblings' native language, and other milestones.

(7) be promptly informed about changes in sibling placements or circumstances, including but not limited to new placements, discharge from placements, significant life events, and discharge from foster care.

(8) be included in permanency planning decisions for siblings, if appropriate; and

(9) be informed of the expectations for and possibility of continued contact with a sibling after an adoption or transfer of permanent physical and legal custody to a relative.

These listed rights are not exhaustive. One of the discoveries of the recent pandemic has been the ease with which video or electronic contact can occur to help maintain relationships. Children in foster care should have contact with siblings and other relatives whenever the opportunity is available.

It is important to note that adult siblings also have rights. Any adult sibling of a child in foster care has the right to be considered as a foster care provider, adoptive parent, and relative custodian for his or her siblings.[293]

Additional laws or requirements impacting siblings, include the following:

- Courts are required to review a responsible social services agency's efforts to place siblings together (whether full, half or step who are also ordered into foster care) at each hearing that siblings are not placed together.[294]
- Siblings should be placed together for adoption.[295]
- A court order for sibling separation is required before the local social services agency can cease efforts to place siblings together or separate siblings already placed together.[296]
- Extended family includes siblings as defined by law or custom of a tribe and a sibling who is 18 years or older.[297]
- The BIA Regulations state that foster care and preadoptive placement preferences include

[293] MINN. STAT. § 260C.008, subd. 1(b).
[294] MINN. STAT. § 260C.178, subd. 1 (k); *see also* MINN. STAT. § 260C.212, subd. 2(d).
[295] MINN. STAT. § 260C.613, subd. 3.
[296] MINN. STAT. §§ 260C.605, subd. 1(d)(9); 260C.613, subd. 3; and 260C.617.
[297] ICWA § 1903(2).

placement in reasonable proximity to the Indian child's home, extended family or sibling.[298] The Regulations also indicate that the presences of a sibling attachment that can only be maintained through a particular placement may constitute good cause to deviate from the placement preferences.[299] However, the Minnesota Tribal State Agreement and the Minnesota DHS Indian Children Welfare Manual state that out-of-home placement of Indian children with their siblings or half siblings in a non-relative, non-Indian home does not meet placement preference requirements and does not constitute a placement with "family" or with "relatives." A child's family, relatives or kinship relationships shall be determined in regard to the parent(s) and/or Indian custodian(s), not to other children in the placement home.[300]

- If two siblings are state wards, but are under the jurisdiction of different courts, the courts are required to communicate with each other regarding the siblings' needs and are required to conduct review hearings in a manner that will permit coordinated planning by the various agencies involved regarding decisions for the siblings.[301]
- If siblings are separated through adoption, communication or contact agreements should ordinarily be utilized to ensure the establishment or continuation of the sibling relationship.[302]

298 .. Reg. § 23.131.
299 BIA Reg. § 23.132.
300 TSA Part 1(E)(31); MN DHS INDIAN CHILDREN WELFARE MANUAL at 15.
301 MINN. STAT. § 260C.617(c).
302 *See* generally Ch. 8 of this Manual regarding communication and contact agreements.

Active Efforts.

When are Active Efforts Required?

ICWA's BIA Guidelines recommend that state agencies work with tribes, parents and other parties as soon as possible, even in emergency situations, to begin providing active efforts to keep the family together or to reunify the family.[303]

ICWA and MIFPA require that active efforts, as opposed to reasonable efforts, be provided to the Indian child's parents, Indian custodian, and sometimes extended family members, in any foster care or termination of parental rights proceeding to preserve the Indian child's family, to prevent placement of an Indian child, and to prevent the breakup of the Indian family.[304] Active efforts must be documented in detail in the record, and the court must conclude, prior to ordering an involuntary foster-care placement or termination of parental rights, that active efforts have been made and those efforts have been unsuccessful.[305]

Pursuant to ICWA, the petitioner must demonstrate that active efforts have been provided but need not be the one to actually provide active efforts.[306] While the Petitioner is often the local county social service agency, that is not always the case. Pursuant to MIFPA, the local social service agency is responsible for delivering active efforts to prevent removal, and if removal occurs, the timely return of the child to their home.

What are Active Efforts?

Active efforts includes reasonable efforts as required by Title IV-E of the Social Security Act,[307] but sets a higher standard than reasonable efforts in providing services necessary to preserve an Indian family, prevent breakup of the family, and reunify the family.[308]

Under MIFPA, active efforts means a rigorous and concerted level of effort that:

- Starts prior to removal of a child;[309]
- Is ongoing throughout the entire time that the local social services agency is involved with a family;[310]
- Continuously involves the Indian child's tribe;[311]
- Includes acknowledging traditional helping and healing systems of an Indian child's tribe

303 BIA Guidelines § C.5.
304 MIFPA §§ 260.755, subd. 1a and 260.762, subd. 3(5); ICWA § 1912(d); BIA Reg. § 23.120.
305 *Id*.
306 ICWA § 1912(d).
307 42 U.S.C. §§ 670 to 679c.
308 MIFPA § 260.755, subd. 1a.
309 *Id*.
310 *Id*.
311 *Id*.

and using these systems as the core to help and heal the Indian child and family;[312] and
- Uses the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe to preserve the Indian child's family and prevent placement of an Indian child.

What is Required Under the Active Efforts Standard?

- Returning and reunifying the Indian child with his or her family at the earliest possible time if placement occurred.[313]
- The local social services agency to make efforts at the earliest point possible to identify whether a child may be an Indian child.[314]
- The local social services agency to identify and request participation of the Indian child's tribe at the earliest point possible and throughout the investigation or assessment, case planning, provision of services, and case completion.[315]
- Any agency considering placement of an Indian child to make active efforts to identify and locate extended family members.[316]
- The local social services agency to work with the Indian child's tribe and family to develop an alternative plan to out-of-home placement.[317]
- The local social services agency to request that a tribally designated representative with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the tribal community evaluate the circumstances of the Indian child's family and assist in developing a case plan that uses tribal and Indian community resources.[318]
- The local social services agency to provide concrete services and access to both tribal and nontribal services to members of the Indian child's family, including but not limited to:[319]
    - ✓ Financial assistance
    - ✓ Food
    - ✓ Housing
    - ✓ Health care
    - ✓ Transportation

312 MIFPA § 260.762, subd. 1.
313 MIFPA § 260.755, subd. 1a.
314 MIFPA § 260.762, subd. 3(1).
315 *Id*.
316 MIFPA § 260.761, subd. 7.
317 MIFPA § 260.762, subd 2(1).
318 MIFPA § 260.762, subd. 3(2).
319 MIFPA § 260.762, subd. 3(3).

- ✓ In-home services
- ✓ Community support services
- ✓ Specialized services

- The local social services agency to notify and consult with the Indian child's extended family members (as identified by the child, child's parents, or tribe) about:[320]

- Providing support to the child and parents.
- Informing the local social services agency and court as to cultural connections and family structure.
- Assisting in identifying appropriate cultural services and supports for the child and parents.
- Identifying and serving as a placement and permanency resource for the child.

- The local social services agency to seek assistance from the tribe, the Department of Human Services, or other agencies with expertise in working with Indian families if there was difficulty contacting or engaging with extended family members.[321]

- The local social services agency to provide services and resources to relatives who are considered the primary placement option for an Indian child to help the relative overcome barriers to providing care to the Indian child.[322]

BIA Regulations define active efforts as "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan."[323]

"To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians and Tribe."[324]

Why are Active Efforts Important?

Active efforts are important not only to give families a fair and honest chance, but also to increase the likelihood of successfully making the changes necessary to correct the conditions the led to out-of-home placement.

320 MIFPA § 260.762, subd. 3(4).
321 MIFPA § 260.762, subd. 3(4).
322 MIFPA § 260.762, subd. 3(5).
323 BIA Reg. § 23.2.
324 *Id*.

Examples of Active Efforts.

Below are some examples of the differences between reasonable efforts and active efforts:[325]

REASONABLE EFFORTS	ACTIVE EFFORTS
Developing a case plan with input from the parent(s).	In addition to developing a case plan with input from the parent(s); requesting that tribally designated representative(s) with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the tribal community, evaluate the family circumstances and assist in developing a case plan that uses all available resources, including tribal and Indian community resources.
Providing the parent with a referral to service providers including agencies contracted by the county social services.	Consulting with the parent and tribe(s) about the availability of tribal support for the family including traditional and customary practices as well as other existing tribal services and using these tribally based family preservation and reunification services whenever available. If no tribally based services are available, referring parent(s), Indian custodian(s), and children to other Indian agencies for services. Working jointly with the parent to set up services. Ensuring the parent has transportation to participate in the service. Providing transportation if the parent is without transportation; and following up with the parent to resolve any issues that prevent the parent from fully utilizing the services.
Communicating with the parent to identify persons who may be supportive of the parent or family.	Notifying, inviting, and actively communicating with representatives of the Indian child's tribe at the earliest point possible and seeking their participation and advice throughout the case in providing support and services to the Indian

[325] These examples are found in significant part in the TSA Part 1(E)(4).

REASONABLE EFFORTS	ACTIVE EFFORTS
	child's family; in permanency planning; and in placement decisions.
Conducting a relative search or kinship search by asking parents for names of relatives.	Conducting a diligent relative search or kinship search for the Indian child's extended family members by communicating with parents, extended family members, the child, and tribal social services.
Providing a foster care placement.	When out of home placement is contemplated, seeking guidance from the Indian child's tribe on how the family is structured, how the family can seek help, what family and tribal resources are available and what barriers the family faces at that time that could threaten its preservation. Working with the Indian child's tribe and family to develop an alternative plan to out-of-home placement or to identify, assist, license and utilize an extended relative placement.
Identifying a family's needs and making referrals to various agencies or services to meet those needs.	Providing concrete services and access to both tribal and non-tribal services including, but not limited to, financial assistance, food, housing, health care and transportation when needed in an on-going manner throughout the case to directly assist the family in accessing and engaging in those services. Following-up with the parent to resolve any issues that prevent the parent from fully utilize the services and to identify any gaps in service that would be helpful.
Providing visitation services.	Arranging visitation (including transportation assistance, virtual visits, or electronic visits) that will take place as frequently as possible and whenever possible in the home of the parent(s), Indian custodian(s), other family members, or in some other non-institutional setting, to keep the child in close contact with parent(s), siblings, and other relatives, regardless of their age, and to allow the child

REASONABLE EFFORTS	ACTIVE EFFORTS
	and those with whom the child is visiting to have natural and unsupervised interaction whenever and as frequently as is consistent with protecting the child's safety. When the child's safety requires supervised visitation, consulting with tribal representative(s) to determine and arrange the most natural setting that ensures the child's safety including, when possible, giving the parent an opportunity to assume or learn child care skills in the foster home so as to maximize contact parent/child contact and the parent's value as a parent.
Making attempts to communicate with parents by contacting them by phone, U.S. Mail or other electronic means.	Consulting with extended family members for help and guidance and using them as a resource for the child. If there is difficulty working with the family, seeking assistance from an agency, including tribal social services, with expertise in working with Indian families and/or finding family members or friends that might serve as intermediaries where trust is lacking.
Identifying suitable extended family members as possible placement options for the child.	Providing services to extended family members to allow them to be considered for placement of the child. Determining suitability of a placement option in accordance with the prevailing social and cultural standards of the Indian child's community as opposed to the standards of other communities.
Closing the case following reunification or a transfer of legal and physical custody.	Providing post-reunification services and monitoring or providing ongoing supportive services following a TPLPC to ensure the Indian child's needs are being met including ensuring continuity of services or assistance in transferring services; assisting the family in obtaining the child's birth certificate and social security card; ensuring medical insurance is in place; assisting with having the child's educational and/or medical records

REASONABLE EFFORTS	ACTIVE EFFORTS
	transferred; assisting the family in applying for benefits to which the family or child may be entitled; etc.

Reunification.

Assessing whether an Indian child can safely return to the care of his or her parent or Indian custodian is a crucial and weighty responsibility that must occur continually whenever an Indian child is placed out-of-home.

Active efforts require reunification at the earliest possible time.[326] Reunification should occur as soon as the safety threat, likely to result in serious physical damage or harm to the child, is adequately mitigated or is no longer present. Restoring a child to his or her family will help reduce the child's trauma caused by out-of-home placement and will also promote the stability of the family and the tribe. The family can continue to work on its needs while the child is home. Moreover, having the child home while services are available can be beneficial in identifying additional strengths or needs of the parent and/or child.

PRACTICE CONSIDERATION. Out-of-home placement can be devastating and confusing for children and can jeopardize a child's wellbeing.[327] The longer a child remains in placement, the greater the chance the child will move from one foster placement to another, increasing the risk of negative social and emotional outcomes.[328] Reunifying children as soon as possible can reestablish relationships with siblings, relatives, friends, teachers, classmates, communities, culture, and other resiliency factors critical to a child's wellbeing.

It is important to note that reunification does not necessitate closing the case. Nor should reunification wait until the case is ready to be closed. Rather, legal proceedings, case plans, and supportive services can continue for a family after reunification occurs. The use of Family Group Conferences and Safety Plans can be very helpful in addressing safety concerns and permitting children to return to the care of their families.

If the GAL's position or recommendation regarding the issue of reunification is materially different than that of the Indian child's tribe, the GAL shall consult with their ICWA coordinator or manager.

326 MIFPA § 260.755, subd. 1a.
327 Nina Williams-Mbengue, *The Social and Emotional Well-Being of Children in Foster Care*, NAT'L. CONF. OF STATE LEGISLATURES, 2016.
328 *Id*.

Invalidation for Violation of ICWA.

The following persons or entities may petition the court to invalidate an action for foster-care placement or termination of parental rights where it is alleged that sections 1911 (pertaining to jurisdiction and intervention by the child's tribe), 1912 (pertaining to notice, appointment of legal counsel, active efforts and QEW), or 1913 (pertaining to voluntary foster care placements, TPRs and adoptions) of ICWA were violated:[329]

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;
(2) A parent or Indian custodian from whose custody the child was removed; and
(3) The Indian child's tribe.

A request for invalidation may be made by petition, or by motion if an action is pending, and in juvenile court, an evidentiary hearing must be held within 30 days of the filing of the petition or motion.[330] To petition for invalidation, there is no requirement that the petitioner's rights be violated. Rather, a petitioner may challenge the action based on any violations of sections 1911, 1912, or 1913 during the course of the proceeding.[331] This means that an Indian child's tribe or an Indian child may seek invalidation for violations of an Indian parent's rights or an Indian child or a parent may seek invalidation for violation of a tribe's rights.

ICWA does not articulate what remedies are available to the court if a petition for invalidation is granted. One possible remedy is dismissal of the action, although invalidation is separate from dismissal and does not necessarily require dismissal. Typically, if an action is invalidated, but not dismissed, invalidation resets the action back to the beginning. For example, if a permanency proceeding were invalidated, the permanency order may be vacated, and the permanency matter may reset to the Admit/Deny hearing stage.

Improper Removal or Retention of an Indian Child.

If, during the course of the proceeding, any party asserts, or the court has reason to believe, that the Indian child may have been improperly removed from the custody of a parent or Indian custodian or improperly retained after a visit or other temporary placement or relinquishment, the court must expeditiously determine whether there was improper removal or retention. If the court finds there was improper removal or retention, the court must terminate the proceeding and the child must be returned immediately to their parent or Indian custodian, unless returning the child to their parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.[332]

329 ICWA § 1914.
330 MINN. R. JUV. PROT. P. 28.09.
331 ICWA § 1914, BIA Reg. § 23.137(c).
332 ICWA § 1920; BIA Reg. § 23.114(b).

PRACTICE CONSIDERATION: As the permanency timeclock in child protection and permanency cases begins to run from the time of the court-ordered placement, this clock should be re-set and the cumulative out-of-home placement days reduced or eliminated if the foster care proceeding is invalidated or the court determines that the Indian child was improperly removed from his or her parent or Indian custodian.

CHAPTER 7 PERMANENCY PROCEEDINGS

Permanency Timelines.

Except for children in foster care under Chapter 260D, Minnesota law requires the court to commence proceedings to determine the permanent status of a child by holding an admit-deny hearing not later than 12 months after the child is placed in foster care or in the care of a noncustodial or nonresident parent.[333]

When calculating the 12-month out-of-home permanency timeline, the date of the child's placement in foster care is the earlier of:

- the first court-ordered placement, or
- 60 days after the date of voluntary placement in foster care by the child's parent or guardian.[334]

The following out-of-home placements are included in calculating the permanency timeline:

- All days in court ordered foster care within the previous 5 years.[335]
- All days in court-ordered placement in the home of the noncustodial parent within the previous 5 years.[336]
- All days in a trial home visit with the parent from whom the child was removed within the previous 5 years.[337]
- All days in protective supervision with the noncustodial parent within the previous 5 years.[338]

Note: If the child has been placed in foster care within the previous five years under one or more previous petitions, and the previous five years are cumulated in determining the permanency timeline, the court may extend the permanency timeline up to 6 months if it is in the child's best interests and the court finds compelling reasons to do so.[339]

Permanency Options.

Minnesota statute contains five permanency options if a child is unable to be reunified with his or her parent or Indian custodian. These options are:[340]

1) Termination of parental rights (voluntary or involuntary).

333 MINN. STAT. § 260C.503, subd. 1.
334 MINN. STAT. § 260C.503, subd. 3.
335 MINN. STAT. § 260C.503, subd. 3(b)(1).
336 *Id*.
337 MINN. STAT. § 260C.503, subd. 3.
338 *Id*.
339 MINN. STAT. § 260C.503, subd. 3(b)(2).
340 MINN. STAT. § 260C.515.

2) Guardianship to the Commissioner of the Department of Human Services when the parent provides a voluntary consent to adoption and there is an identified prospective adoptive parent agreed to by the responsible social services agency who is willing to adopt.
3) Permanent legal and physical custody to a relative.
4) Permanent custody to the responsible social services agency for continued placement in foster care.
5) Temporary legal custody to the responsible social service agency.

Under Minnesota law, termination of parental rights and adoption, or guardianship to the Commissioner of Human Services through a consent to adopt are preferred permanency options for a child who cannot return home.[341] If the court finds that TPR or guardianship to the Commissioner is not in the child's best interests, the court may transfer permanent legal and physical custody of the child to a relative when that is in the child's best interests.[342] Minnesota law is clear that the best interests of an Indian child must be determined consistent with ICWA and MIFPA.[343]

PRACTICE CONSIDERATION: The cultural belief and custom of many tribes is that there is no need to terminate a child's relationship with his or her parents or relatives and that in fact it is not possible to terminate the relationship of a child to his or her family. As the best interests of an Indian child must support the child's sense of belonging to family, extended family and tribe, termination of parental rights may be contrary to the best interests of the Indian child in a number of circumstances. Customary adoption in tribal court, however, may be an option and should be considered.

What if Permanency Timelines Conflict with ICWA?

Minnesota's permanency timelines are the result of federal law; namely the Adoption and Safe Families Act ("ASFA") which was first enacted in 1997 to prevent foster care drift and to help ensure that children achieve a safe, stable, permanent home.[344] The Indian Child Welfare Act enacted in 1978 to keep American Indian families together, to protect the best interests of Indian children, and to promote the continued existence of Indian tribes, is also a federal law. In the plain language of these two statutes, neither law specifically prevails over the other.

Frequently, ASFA, ICWA and Minnesota state law can be applied in the same proceeding without conflict. Other times, however, an apparent conflict may arise. For example, a conflict may arise between the permanency timelines and the requirement that active efforts be

341 MINN. STAT. § 260C.513(a).
342 *Id*.
343 MINN. STAT. § 260C.001, subd. 2(a) and 3.
344 Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 [hereinafter ASFA].

provided; or there may be a conflict between the permanency timelines and what is in the best interests of the Indian child, the Indian child's family, or the Indian child's tribe.

There are a number of arguments to be made that ICWA should prevail over ASFA or rigid application of permanency timelines. ICWA contains no specific time limits on active efforts, and what active efforts are required in each case will depend on the specific facts of that case.

ASFA itself contains exceptions to the permanency timelines including when:

> (i) at the option of the State, the child is being cared for by a relative;
>
> (ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
>
> (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts…are required to be made with respect to the child.[345]

PRACTICE CONSIDERATION: Minnesota courts may not order permanent placement of an Indian child unless the court finds that the local social services agency made active efforts.[346] (*See* Active Efforts section above in Chapter 6.) If the local social services agency has failed to provide active efforts, or if a relative is in need of additional services or resources to overcome barriers to providing care to the Indian child, further active efforts may be required despite impending permanency timelines.

If the GAL has questions about active efforts or permanency timelines, the GAL should consult with his or her ICWA coordinator or manager.

Child's Best Interests in Permanency Matters.

No child may be permanently separated from his or her parents unless statutory requirements have been met and the court additionally finds that it is in the best interests of the child.[347]

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345 ASFA § 103(a)(3).

346 MIFPA § 260.762, subd. 3.

347 *See* In re Welfare of Children of K.S.F., 823 N.W.2d 656, 668 (Minn. Ct. App. 2012) (holding that once a district court determines the existence of at least one statutory ground for termination, it must also find that termination is in the child's best interests); MINN. STAT. § 260C.511(b).

"The "best interests of the child" means all relevant factors to be considered and evaluated."[348] In the case of an Indian child, best interests must be determined consistent with ICWA and must include the best interests of an Indian child as defined in MIFPA.[349] Best interests also includes a review of the relationship between the child and relatives and the child and other important persons with whom the child has resided or had significant contact.[350]

PRACTICE CONSIDERATION: If the facts of a particular case lead the GAL to believe that a permanency proceeding should not be initiated; that the permanency timelines should otherwise for practical purposes be extended; that an alternative permanency disposition is in the child's best interests, or that none of the permanency options are in the best interests of the Indian child, the GAL should consult with his or her ICWA coordinator or manager.

PRACTICE CONSIDERATION: Under Minnesota law, an order terminating parental rights or an order for adoption should have no effect on any rights or benefits a child derives from his or her descent from a member of a federally recognized Indian tribe including enrollment.[351] Tribes, however, are not bound by this, and the determination of whether a child remains eligible for membership or tribal benefits following a TPR or adoption is left to the determination of each tribe.

In advocating for the best interests of the Indian child, the GAL should attempt to ascertain how placement decisions or permanency dispositions may impact the Indian child's tribal rights or benefits.

348 MINN. STAT. § Minn. Stat. § 260C.511.
349 MINN. STAT. § 260C.001, subd. 3; § 260C.511.
350 *Id*.
351 MINN. STAT. § 260C.317, subd. 2; § 259.59, subd. 2.

CHAPTER 8 PRE-ADOPTION / ADOPTION PROCEEDINGS

Adoption proceedings or adoptive placement proceedings governed by ICWA and MIFPA include any action resulting in a final decree of adoption, and include proceedings such as stepparent adoptions, agency adoptions, direct-placement adoptions; relative adoptions; state ward (Guardianship) adoptions; etc.

Policy and Purpose of Adoption.

The policy and purpose of adoption under state law is to ensure "that the best interests of adopted persons are met in the planning and granting of adoptions; and that the laws and practices governing adoption recognize the diversity of Minnesota's population and the diverse needs of person affected by adoption."[352]

The policy and purpose of ICWA, in adoption matters involving Indian children, is to "… protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishment of minimum federal standards for the…placement of such children in foster or adoptive homes which reflect the unique values of Indian culture."[353]

This means that adoptions involving Indian children must protect the child's best interests as an *Indian* child and must include consideration of how the adoption will promote the stability and security of the child's Indian tribe and family, and how the adoptive home reflects the unique value of the child's Indian culture.

Effect of a State Court Adoption.

Once an adoption is finalized under Minnesota state law (regardless of whether the child is an Indian child or a non-Indian child), the adopted child becomes the legal child of the adoptive parents the same as if the child were naturally born to them.[354] The adopted child no longer has any legal relationship to his or her previous birth/legal parents[355] or relatives and those parents no longer have any legal relationship to nor responsibility for the child.[356] The child's birth certificate is changed to reflect the name(s) of the child's adoptive parents as the child's parents, and the previous birth certificate is sealed.

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352 Minn. § 259.20.
353 ICWA § 1902 (emphasis added).
354 MINN. STAT. § 259.59, subd. 1.
355 Unless one of the parents remains the child's legal parent such as in a stepparent adoption. *See* MINN. STAT. § 259.59, subd. 2.
356 MINN. STAT. § 259.59.

Customary Adoptions in Tribal Court.

Customary adoptions granted in tribal court under tribal code often look different than adoptions granted in state court. For example, in some tribal courts, parental rights are suspended as opposed to terminated. Unlike terminations of parental rights, suspension of parental rights may allow children and their natural parents to maintain a relationship with one another; maintain mutual rights of inheritance; and maintain other rights or responsibilities not typical in a state court adoption. Depending upon tribal code, a customary adoption often leaves open the possibility of family reunification or restoration of parental rights under various future circumstances such as the death of an adoptive parent or termination of the adoptive parent's rights.

PRACTICE CONSIDERATION: In any case in which adoption is contemplated, the GAL should ascertain whether customary adoption is an option meeting the Indian child's best interests and consult with his or her coordinator or manager to determine whether and how this option should be pursued.

State Court Adoptions Governed by ICWA and MIFPA.

If an adoption is occurring in Minnesota state court, state law provides a significant number of requirements that must be met before any child may be adopted. ICWA and MIFPA provide additional protections and requirements including the following:

- Consents to adoption must be executed in writing before a judicial officer accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent in English or interpreted in a language understood by the parent.[357]

- Consent may not be given within ten days of the child's birth or it is not valid.[358]

- Consents may be withdrawn for any reason any time up to finalization of the adoption and the child shall be returned to the parent.[359]

- Notice of the preadoptive or adoptive placement must be provided to the tribal social services.[360]

- Placement preferences established by ICWA, or the Indian child's tribe if different from ICWA, must be followed in the absence of the court finding good cause to deviate from

357 ICWA § 1913(a).
358 *Id*.
359 ICWA § 1913(c).
360 MIFPA § 260.761, subd. 3.

the placement preferences.[361]

Notice Requirements in Adoption Cases.

Whenever an Indian child is voluntarily placed in a pre adoptive or adoptive placement, notice must be provided to the tribal social service agency by:

- the local social services agency,
- the private child-placing agency,
- the petitioner in the adoption, or
- any other party

who has reason to believe that a child who is the subject of any adoptive or preadoptive placement proceeding is, or may be, an Indian child.[362] The notice must be sent by registered mail with return receipt requested and must advise the tribe of its right to intervene at any point in the proceeding.[363]

The agency or notifying party must include the identity of the parents in the notice unless the parents provide written objection to the disclosure of their identity.[364] If the identity or location of the Indian child's tribe cannot be determined, the notice must be given to the United States Secretary of the Interior, who will have 15 days after receipt of the notice to provide the notice to the tribe.[365]

No preadoptive or adoptive placement proceeding may be held until at least 10 days after receipt of the notice by the tribe or Secretary of the Interior. Upon request, the tribe must be granted up to 20 additional days to prepare for the proceeding.[366]

Unknown Father.

Under MIFPA, if the local social services agency, private child-placing agency, the court, petitioner, or any other party has reason to believe that a child who is the subject of an adoptive placement proceeding is or may be an Indian child, but the father of the child is unknown and has not registered with the Minnesota fathers' adoption registry, that agency or person must provide sufficient information to the tribe believed to be the Indian child's tribe to enable the tribe to determine the child's eligibility for membership in the tribe.[367] Information to be provided to the tribe includes, but is not limited to:[368]

361 ICWA § 1915(a); MIFPA § 260.771, subd. 7.
362 MIFPA § 260.761, subd. 3.
363 *Id*.
364 *Id*.
365 *Id*.
366 *Id*.
367 MIFPA § 260.761, subd. 4.
368 *Id*.

- The legal and maiden name of the birth mother.
- The birth mother's date of birth.
- The names and dates of birth of the birth mother's parents and grandparents; and
- If available, information pertaining to the possible identity, tribal affiliation, or location of the birth father.

Pre-Adoption and Adoption Placement Preferences.

ICWA sets forth different placement preferences depending upon whether the placement is a preadoptive placement or an adoptive placement. Preadoptive placement preferences are the same as foster-care placement preferences. (*See* Chapter 6 for preadoptive and foster-care placement preferences.)

In any adoptive placement of an Indian child, if the child's tribe has established an order of preference by resolution that is different than ICWA's placement preferences, the tribe's order of placement preferences shall be followed first so long as the placement is the least restrict setting appropriate to the particular needs of the child.[369]

If the child's tribe has not established a different order of preference, placement preference must be given, in the following descending order to:[370]

i. a member of child's extended family;
ii. other members of Indian child's tribe; or
iii. other Indian families.

The Tribal State Agreement and Minnesota DHS Indian Children Welfare Manual state that out-of-home placement of Indian children with their siblings or half siblings in a non-relative, non-Indian home does not meet placement preference requirements. This type of placement does not constitute a placement with "family" or with "relatives." A child's family, relatives or kinship relationships shall be determined in regard to the parent(s) and/or Indian custodian(s), not to other children in the placement home.[371]

Where appropriate, the preference of the Indian child or the Indian child's parent shall also be considered.[372]

369 ICWA § 1915(c); MIFPA § 260.771, subd.7.
370 ICWA § 1915(a); MIFPA § 260.771, subd.7.
371 TSA Part 1(E)(31); MN DHS INDIAN CHILDREN WELFARE MANUAL at 15.
372 ICWA § 1915(c); BIA Reg. § 23.130(c).

Deviation from Adoptive Placement Preferences.

Any party seeking to deviate from the adoptive placement preferences must establish by clear and convincing evidence that good cause exists to deviate.[373] A court's determination of good cause must be made in writing.[374]

Good Cause to Deviate from Adoptive Placement Preferences Under MIFPA.

Pursuant to Minnesota statutes, an Indian child may be placed outside the order of placement preferences only if the court determines good cause based on:[375]

1) The reasonable request of the Indian child's parents, if one or both parents attest that they have reviewed the placement options that comply with the order of placement preferences.

2) The reasonable request of the Indian child if the child is able to understand and comprehend the decision that is being made.

3) The testimony of a qualified expert designated by the child's tribe and, if necessary, testimony from an Indian person from an Indian community who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and contemporary and traditional child-rearing practices of the Indian child's tribe, that supports placement outside the order of placement preferences due to extraordinary physical or emotional needs of the child that require highly specialized services; or

4) The testimony by the local social services agency that a diligent search has been conducted that did not locate any available, suitable families for the child that meet the placement preference criteria.

Determining Suitability of Proposed Placement: In determining the suitability of a proposed placement of an Indian child, the standards to be applied must be the prevailing social and cultural standards of the Indian child's community, and the agency shall defer to the tribal judgment as to suitability of a particular home when the tribe has intervened pursuant to ICWA.[376]

Active Efforts: A good cause finding under this subdivision must consider whether active efforts were provided to extended family members who are considered the primary placement option

373 MIFPA § 260.771, subd. 7(d); BIA Reg. § 23.132(b).
374 MIFPA § 260.775, subd. 7(e).
375 MIFPA § 260.771, subd. 7.
376 MINN. STAT. § 260C.215, subd. 6(b).

to assist them in becoming a placement option for the child.[377]

Bonding and Attachment to Foster Family: Testimony of the child's bonding or attachment to a foster family alone, without the existence of at least one of the factors in paragraph (b), shall not be considered good cause to keep an Indian child in a lower preference or non-preference placement.[378]

When a child is placed outside the order of placement preferences, good cause to continue this non-preferred placement must be determined at every stage of the proceedings.[379]

Good Cause to Deviate from Adoptive Placement Preferences Under ICWA BIA Regulations

Pursuant to the BIA Regulations, good cause should be based on one or more of the following considerations:[380]

1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference.

2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made.

3) The presence of a sibling attachment that can be maintained only through a particular placement.

4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.

5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.[381]

Deviation from the placement preferences may not be based upon the socioeconomic status of

377 MIFPA § 260.771, subd. 7(f).
378 MIFPA § 260.771, subd. 7(c).
379 MIFPA § 260.771, subd. 7(g).
380 BIA Reg. § 23.132(c).
381 ICWA § 1915(d); BIA Reg. § 23.132(c)(5).

one placement relative to another placement[382] or solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement made in violation of ICWA.[383]

PRACTICE CONSIDERATION: An important consideration in any adoption proceeding is the child's right and interest, as an Indian child, to be placed according to the placement preferences set forth in law, and to be raised in a family where his or her identity, sense of belonging, and connection to family, tribal community, customs and culture will be honored and fostered.

Communication and Contact Agreements.

Communication and contact agreements, often referred to simply as "contact agreements" are legally binding agreements that address the rights of parents or others (including siblings) to receive information about, communicate with, or have contact with a child following the child's adoption. This may be facilitated in any number of ways including exchanging photographs; sharing relevant information about the child; phone calls; letters; emails; text messages; social media interaction; video visits; in-person visits; attendance at sporting events, cultural events or other special events in the child's life; etc.

There is no contact agreement provision in ICWA or MIFPA. Contact agreements are specifically provided for in other areas of Minnesota law. However, the law is different depending upon what type of adoption is involved. Specifically, the law governing contact agreements for the adoption of children who are under guardianship of the Commissioner of the Department of Human Services is different than the law governing contact agreements for children being adopted in non-child protection cases.

Adoptions of children in non-child protection cases are governed by Minnesota Statutes Chapter 259. Adoptions of children who are under the guardianship of the Commissioner incident to a child protection or permanency case ("state wards") are governed by Minnesota Statutes Chapter 260C.

Who can Enter into a Communication and Contact Agreement?

The chart below highlights the differences between contact agreements in non-state ward adoptions and contact agreements in state ward adoptions:

382 BIA Reg. § 23.132(d).
383 BIA Reg. § 23.132(e).

Non-State Ward Adoptions[384]	Adoptions of Children Under the Guardianship of the Commissioner[385]
Contact agreements can be entered into by: • Adoptive Parents • Birth Parents • Foster Parents with whom the child resided before being adopted • A birth relative with whom the child resided before being adopted • Birth relatives if the child is adopted by a birth relative upon the death of both birth parents. For purposes of this statute, "birth relative" means a parent, stepparent, grandparent, brother, sister, uncle, or aunt of a minor adoptee.	Contact agreements can be entered into by: • Adoptive Parents • Birth Parents • Foster Parents with whom the child resided before being adopted • Any relative with whom the child resided before being adopted • The parent or legal custodian of a • sibling of the child, if the sibling is a minor, or any adult sibling of the child. "Relative" is not defined in this section of the statute; however, "Relative of an Indian child" is defined in Chapter 260C as a member of the Indian child's family as defined in ICWA which includes relative as defined by the law or custom of the Indian child's tribe.

Regardless of adoption type, contact agreements are voluntary. The court may not order a contact agreement against the wishes of a party who may be bound by the agreement.[386]

To be enforceable, contact agreements must be:

- Contained within a written court order entered before or at the time of the final adoption hearing.[387]
- Approved in writing by the parties entering into the agreement and approved by a representative of the agency if the child is in the custody of or under the guardianship of an agency.[388]
- In the best interests of the child.[389]

384 MINN. STAT. § 259.58.
385 MINN. STAT. § 260C.619.
386 MINN. STAT. § 259.58(a); MINN. STAT. § 260C.619(d).
387 MINN. STAT. § 259.58(a); MINN. STAT. § 260C.619(b).
388 MINN. STAT. § 259.58(a); MINN. STAT. § 260C.619(d).
389 MINN. STAT. § 259.58(a); MINN. STAT. § 260C.619(f).

A birth parent must approve of an agreement between adoptive parents and any other birth relative or foster parent unless an action has been filed against the birth parent by a county under Chapter 260.[390]

PRACTICE CONSIDERATION: GALs can play an integral role in advocating for the best interests of an Indian child and the child's ability to establish or maintain connections to the child's siblings, extended family, culture and tribe through communication and contact agreements.

While Indian tribes are not listed in statute as specific parties to communication and contact agreements, it is common practice in a number of districts to include Indian tribes in contact agreements concerning Indian children and to include specific provisions governing the adoptive family's role and responsibility in fostering the Indian child's connection to his or her family, culture and tribe.

Although parties cannot be compelled to enter into a communication or contact agreement, the GAL may advise the parties and the court that a communication or contact agreement is in the best interests of the Indian child. The GAL may also consider presenting evidence in opposition to the court granting a final adoption as being contrary to the minor child's best interests if the parties decline to enter into a communication or contact agreement. If this situation arises, the GAL should engage in a consultation with his or her ICWA coordinator or manager.

Adoptee's Rights to Information Following Adoption.

Adoption records in Minnesota are kept confidential for 100 years.[391] Adoptees, however, may be able to access certain information about their birth parent(s) and their original birth record depending upon the year the adoption was finalized and whether the birth parent provided permission or withheld permission for the release of such information.

Information Available from the Agency Involved in the Adoption.

If an agency was involved in the adoption, the following information must be provided by the agency:

- **Social and Medical History**. If a person aged 19 years or older was adopted on or after August 1, 1994, and the adoptee or the adoptive parent requests the non-identifying social and medical history of the birth family provided at the time of the adoption, agencies must

390 MINN. STAT. § 259.58(a).
391 MINN. STAT. § 259.79, subd. 3.

provide it.[392]

If an adopted person aged 19 years or older, or the adoptive parent, asks the agency to contact the birth parents and request current non-identifying social and medical history, agencies must reach out to the birth parents to inquire if the birth parent(s) is willing to provide such information.[393]

- **Information about Genetic Siblings**. A person who is at least 19 years old who was adopted or committed to the guardianship of the Commissioner of Human Services following a TPR, has a right to be advised of other siblings who were adopted or who were committed to the guardianship of the Commissioner of human services and not adopted.[394]

- **Identifying information**. For persons placed for adoption on and after August 1, 1982, the agency responsible for supervising the placement shall provide the adoptee, upon request, information regarding the name, last known address, birthdate and birthplace of the birth parents named on the adoptee's original birth record unless the birth parent completed an affidavit objecting to the release of information.[395] A birth parents' objection ceases to have any effect upon that parent's death.[396]

If the birth parent filed an affidavit precluding the adoptee from obtaining identifying information, the adoptee may petition the court pursuant to Minn. Stat. § 259.61, requesting access to the court's adoption file. If the adoptee makes such a request to the court, the birth parent must be given the opportunity to present evidence to the court that nondisclosure of identifying information is of greater benefit to the birth parent than disclosure to the adoptee.[397]

Access to Original Birth Records Regardless of Agency Involvement.

Any adopted person who is 19 years of age or older may request the Minnesota Commissioner of Health to disclose information from his or her original birth record.[398] The Commissioner of Health must then notify the department of human services, the county social services agency or the adoption agency involved with the adoption of the adoptee's request.[399]

392 MINN. STAT. § 259.83, subd. 1a.
393 MINN. STAT. § 259.83, subd. 1a(b).
394 MINN. STAT. § 259.83, subd. 1b.
395 MINN. STAT. § 259.83, subd. 3.
396 MINN. STAT. § 259.83, subd. 3(f).
397 MINN. STAT. § 259.83, subd. 3(e).
398 MINN. STAT. § 259.89, subd. 1.
399 MINN. STAT. § 259.89, subd. 1.

Within six months, the agency or the Commissioner of Human Services must attempt to notify each birth parent of the adoptee's request.[400] If the birth parent(s) objects to disclosure of information, the birth parent(s) may file an affidavit with the Commissioner of health within 30 days stating that the information on the original birth record should not be disclosed.[401] If the birth parent consents to disclosure, the information may be disclosed to the adoptee.[402]

If the Commissioner of human services certifies that it was unable to notify a birth parent of the request within the six-month period, and if neither birth parent has at any time filed an unrevoked consent to disclosure with the Commissioner of health, the information may be disclosed as follows:

(a) For adoptions prior to August 1, 1977 -- the adoptee may petition the appropriate court for disclosure of the original birth record and the court shall grant the petition if after consideration of the interests of all known persons involved, the court determines that disclosure of the information would be of greater benefit than nondisclosure.

(b) For adoptions taking place on or after August 1, 1977 – the Commissioner of Health shall release the requested information to the adoptee.

If, however, either birth parent has filed an affidavit, that has not been revoked, objecting to disclosure of the original birth certificate, the Commissioner of Health is prevented from disclosing the information to the adoptee until the birth parent revokes the affidavit or dies.[403] If the birth parent dies, and had filed an affidavit objecting to disclosure, the court shall grant a petition for disclosure brought by the adoptee if the court determines that disclosure would be of greater benefit than non-disclosure.[404]

Rights of Indian Tribes to Access an Adoptee's Original Birth Record under Minnesota Law.

Notwithstanding the above barriers, the Minnesota state registrar is required to provide a copy of an adoptee's original birth record to a federally recognized American Indian tribe for the sole purpose of determining the adoptee's eligibility for enrollment or membership in the tribe.[405]

Additional Rights of Indian Adoptees Provided by ICWA:

400 MINN. STAT. § 259.89, subd. 2.
401 MINN. STAT. § 259.89, subd. 2(3).
402 MINN. STAT. § 259.89, subd. 4.
403 MINN. STAT. § 259.89, subd. 4 & 5.
404 MINN. STAT. § 259.89, subd. 5
405 MINN. STAT. § 259.89, subd. 6.

Upon the request of an Indian adoptee age 18 or older, the court that entered the final adoption decree shall inform the adoptee of his or her biological parents' tribal affiliation (if any) and shall provide whatever other information may be necessary to protect the adoptee's rights flowing from that tribal relationship.[406]

If the Indian adoptee does not know which court issued the final adoption decree, the adoptee can request this information from the Secretary of the Interior as the information maintained by the court should also be conveyed to and maintained by the Secretary. Section 1951 of ICWA provides that upon the request of an Indian adoptee over the age of 18, the adoptee's adoptive or foster parents, or an Indian tribe, the Secretary of the Interior shall disclose information necessary for the Indian adoptee to seek tribal enrollment or to determine what tribal rights or benefits associated with enrollment may be available.[407]

If the biological parent(s) signed an affidavit requesting anonymity, the Secretary may not disclose the information, but shall certify that the child's parentage and other circumstances of birth that may entitle the child to enrollment under criteria established by the tribe.[408]

PRACTICE CONSIDERATION: Because Indian adoptees may not be able to access information from the Secretary of the Interior if state courts fail to convey this information to the Secretary, the GAL should remind the court, at all final adoption hearings, of the court's responsibility to convey the following information to the Secretary of the Interior as required by section 1951(a) of ICWA:

1) A copy of the final adoption decree; and
2) Any other documentation necessary to show:
   a) the name of the child;
   b) the tribal affiliation of the child;
   c) the names and addresses of the biological parents;
   d) the names and address of the adoptive parents; and
   e) the identity of any agency having files or information relating to the adoptive placement.

Right of Parent to Petition for Restoration of Custodial Rights Following Adoption.

One of the rights afforded parents under ICWA, is the right of a biological parent to petition the court for restoration of his or her custodial rights in the event that parent's child is

406 ICWA § 1917.
407 ICWA § 1951(b).
408 *Id.*

subsequently adopted and the adoption is vacated, or set aside, or if the adoptive parents voluntarily consent to termination of their parental rights.[409]

If the biological parent files a petition seeking restoration of their parental rights, the local social services agency must provide the parent with active efforts toward reunification,[410] and the court must grant the petition unless there is a showing that return of custody is not in the best interests of the Indian child.[411]

If the local social services agency or another party opposes restoration of parental rights, that party must prove to the court, beyond a reasonable doubt, that active efforts were provided to the parent towards reunification; that continued custody of the child by the parent is likely to result in serious harm to the child supported by qualified expert testimony; and that return of custody is not in the child's best interests.[412]

409 25 U.S.C. § 1916(a).
410 *In re* Welfare of the Child of E.A.C., 812 N.W.2d 165 (Minn. Ct. App. 2012).
411 25 U.S.C. § 1916(a).
412 *Id*. at 175-176.

CHAPTER 9 FAMILY COURT PROCEEDINGS

A Note about this Chapter: Because family court cases governed by ICWA and MIFPA differ in a number of ways from juvenile court cases or adoption cases, this chapter is generally intended to serve as a "stand-alone" chapter specific to family court proceedings. Accordingly, this chapter includes and restates provisions included in other chapters of this manual with the intent to minimize the GAL's need to cross-reference or turn to those chapters with the exception of the Definitions including in Chapter 3.

When Does the Indian Child Welfare Act ("ICWA") Apply?

There are three threshold requirements for ICWA to apply:

1) An Emergency Proceeding or Child Custody Proceeding (as defined by ICWA);
2) An Indian child is subject to the proceeding

When Does the Minnesota Indian Family Preservation Act ("MIFPA") Apply?

MIFPA applies to all cases in which ICWA applies. MIFPA may also apply to cases in which ICWA does not apply. For example, if neither the child nor the child's biological parent is a member of a federally recognized tribe, ICWA does not apply. MIFPA, however, will apply if the Indian child is eligible for tribal membership regardless of the parent's membership status and regardless of whether the parent is biologically related to the child.

As a point of note, the terminology between ICWA and MIFPA is not always the same. ICWA refers to "child custody proceedings" while MIFPA refers to "child placement proceedings." ICWA refers to "voluntary and involuntary proceedings," while MIFPA refers to "Voluntary and Involuntary foster care placements."

Who is an "Indian Child?"

ICWA Definition: A child is an "Indian Child" if:

1) The child is unmarried and under the age of 18, and the child is a member of a federally recognized Indian tribe; or
2) The child is eligible for membership in a federally recognized Indian tribe and is a biological child of a member of a federally recognized Indian tribe.[413]

MIFPA Definition: A child is an "Indian Child" if:

[413] ICWA § 1903(4).

1) The child is unmarried and under the age of 18, and the child is a member of an Indian tribe; or
2) The child is eligible for membership in an Indian tribe.[414]

MIFPA differs from ICWA in that MIFPA looks only at the child's eligibility for tribal membership as determined by the Indian child's tribe. The application of MIFPA does not consider whether a child is biologically related to a parent, nor does MIFPA consider the parent's status as a member. This means that MIFPA may apply to a case even though ICWA does not.

Types of Family Court Child Custody Proceedings Governed by ICWA and MIFPA.

The types of family court child custody proceedings governed by ICWA or MIFPA include:

- Third-party custody proceedings.[415]
- De Facto custody proceedings.[416]
- Order for Protection proceedings.[417]

When Does Neither ICWA nor MIFPA Apply in Family Court?

- Divorce proceedings or other family court child custody proceedings between the child's parents unless custody of an Indian child is, or may be, awarded to someone other than the child's parent or Indian custodian.
- Voluntary proceedings in which a parent or Indian custodian can, at any time, demand return of his or her child (e.g., Minn. Stat. § 257B Stand-By Custodians).
- Certain custody proceedings where a parent of an Indian child seeks modification of a prior custody order and seeks to have custody returned to the parent.[418]

Impermissible Factors in Determining Whether ICWA or MIFPA Applies to a Child Custody Proceeding?

414 MIFPA § 260.755, subd. 8.

415 *See In re* Custody of A.K.H., 502 N.W.2d 790 (Minn. Ct. App. 1993) (holding that the third-party petitioner's request for custody constitutes a foster care placement as it would "remov[e] an Indian child from its parent," such that the parent could not have the child "returned upon demand," and that parental rights had not been terminated). *See also* MINN. STAT. § 257C.02(a) specifically stating that third-party custody and de facto custody matters are governed by ICWA and MIFPA.

416 *Id*.

417 ICWA and MIFPA may also apply to proceedings occurring under MINN. STAT. § 518B – orders for protection, if there is a possibility that custody of an Indian child may be removed from a parent or Indian custodian and awarded to a non-parent.

418 *See* Gerber v. Eastman, 673 N.W.2d 854 (Minn. Ct. App. 2004) (holding that ICWA does not apply when a non-Indian father seeks permanent sole legal and physical custody of his biological child after the state district court has granted permanent sole legal and physical custody to the child's Indian maternal grandmother who resides with the child on the reservation).

In determining whether ICWA or MIFPA applies, the court may not consider:

- Whether the child is part of an existing Indian family.[419]
- The level of contact a child has with his or her Indian tribe, reservation, society, or off-reservation community.[420]
- Whether the child is in the physical or legal custody of an Indian parent, custodian or extended family member.[421]
- The level of participation of the parents or child in tribal cultural, social, religious, or political activities.[422]
- The relationship between the child and his/her parent(s).[423]
- Whether the parent(s) ever had custody of the child.[424]
- The Indian child's blood quantum.[425]

In other words, the court shall not determine or make a judgment about the child's "Indianness."

Applicability of ICWA Beyond Age 18.

If ICWA applies at the commencement of a proceeding; it will continue to apply even if an Indian child reaches age 18 during the pendency of the proceeding.[426]

Other Applicable Rules and Regulations.

In addition to the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act, the Bureau of Indian Affairs' (BIA) Regulations concerning ICWA;[427] the BIA Guidelines concerning ICWA;[428] and the Rules of Family Court Procedure apply to ICWA and MIFPA cases heard in family court.

Inquiry and Identification of a Child as an Indian Child.

The applicability of ICWA or MIFPA to a child custody proceeding "turns on the threshold question of whether the child in the case is an Indian child. It is, therefore, critically important that there be an inquiry into whether the child is an Indian child as soon as possible. If this inquiry is not timely, a child-custody proceeding may fail to comply with ICWA [or MIFPA] and

419 MIFPA § 260.771, subd. 2; BIA Reg. § 23.103(c).
420 MIFPA § 260.771, subd. 2.
421 MIFPA § 260.771, subd. 2; BIA Reg. § 23.103(c).
422 *Id*.
423 BIA Reg. § 23.103(c).
424 *Id*.
425 *Id*.
426 BIA Reg. § 23.103(d).
427 25 C.F.R. § 23; 81 Fed. Reg. at 38,778.
428 81 Fed. Reg. 96,476.

thus may deny various protections to Indian children and their families. The failure to timely determine if ICWA [or MIFPA] applies can also cause unnecessary delays as the court and the parties may need to redo certain processes or the action may be invalidated or dismissed."[429]

Pursuant to MIFPA, the family court must establish whether an Indian child is involved and the identity of the Indian child's tribe.[430]

Pursuant to ICWA, the family court:

- Has an affirmative obligation to inquire, on the record at the commencement of the proceeding, whether a child is an Indian child.[431]
- Is required to ask each participant (including attorneys, parents, custodians, and relatives) whether they know or have reason to know that the child is an Indian child.[432]
- Is required to instruct the parties to inform the court if they subsequently receive information that would provide reason to know the child is an Indian child.[433]

The inquiry and responses should be on the record.[434]

PRACTICE CONSIDERATION: While GALs do not have a specific statutory duty to inquire about a child's Indian heritage, the GAL has a professional responsibility to do so to meaningfully answer the court's inquiry when it is made as required by court rules[435] and to protect the best interests of the Indian child. Any information received by the GAL regarding the child's American Indian heritage should be shared with the court and the parties. In addition to straightforward questions about heritage, additional questions a GAL might ask the child, parents, relatives, teachers or other persons with information regarding the family include: Has anyone in the family, including grandparents, great, great grandparents or extended relatives ever lived on tribal land? Participated in tribal events? Received services from a tribal office/agency or the federal Indian Health Service? Received benefits from a tribe?

429 81 Fed. Reg. at 38,802.
430 MIFPA § 260.771, subd. 2.
431 BIA Reg. § 23.107(a). *See also* Pollard v. Crowghost, 794 N.W.2d 373 (Minn. Ct. App. 2011) (holding that the district court had an affirmative obligation to inquire whether the child was an Indian child and whether the Indian Child Welfare Act applied to the determination of whether the child's paternal grandparents were entitled to permanent legal and physical custody of the child as de facto custodians.)
432 BIA Reg. § 23.107(a); 81 Fed. Reg. at 38,803.
433 BIA Reg. § 23.107(a).
434 *Id.*
435 *Id.*

Treating the Child as an Indian Child, and Applying ICWA and MIFPA, Unless and Until Determined Otherwise When There is Reason to Know a Child is an Indian Child.

If there is reason to know that a child is an Indian child, but the court does not have sufficient evidence to determine whether the child is an Indian child, the court must treat the child as an Indian child, and treat the matter as though ICWA applies, unless and until it is determined on the record that the child does not meet the definition of an Indian child.[436] If the court determines on the record that a child is not an Indian child under ICWA or MIFPA, the case may proceed under non-ICWA or non-MIPFA standards.[437]

PRACTICE CONSIDERATION: As many family law practitioners and some family court judicial officers have limited knowledge or experience with ICWA or MIFPA, the role of the GAL is particularly critical in helping to identify whether a child is an Indian child and in ensuring compliance with the requirements of ICWA and MIFPA. If this inquiry is not timely or broadly made, the protections of ICWA and MIFPA may not be afforded to the child at all, or if applied late, may result in invalidation, disruption and instability for the child.

Reason to Know that a Child is an Indian Child.

At least one state supreme court has found that a court has "reason to know" that a child is an Indian child if any participant in the proceeding indicates that the child has tribal heritage.[438]

Although the following list is not exhaustive of possible "reasons to know," BIA Regulations state that the court has reason to know a child is an Indian child if:[439]

1) The court is informed that the child is an Indian child.
2) The court is informed that information has been discovered indicating that the child is an Indian child.
3) The child subject to the proceeding gives the court reason to know he or she is an Indian child.
4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native Village.

436 BIA Reg. § 23.107(b).
437 BIA Guidelines § B.1.
438 In the Matter of the Dependency of Z.J.G. and M.E.J.G., minor children, No. 98003-9 (Wash. Sept. 3, 2020).
439 BIA Reg. § 23.107(c).

5) The court is informed that the child is or has been a ward of a tribal court; or
6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian tribe.

PRACTICE CONSIDERATION: If there is reason to know the child is an Indian child, GALs should flag the case in Cosmos as ICWA until or unless it is determined to be a non-ICWA case.

Tribal Membership.

Just like other sovereign governments, tribal governments have the sole authority to determine their citizenship or membership. A determination by an Indian tribe that a child is a member of the tribe or is eligible for membership in the tribe is conclusive.[440] State courts may not substitute their own determination of whether a child is or is not a member or eligible for membership in a tribe.[441] Similarly, it is not permissible for the state court, the GAL, or other persons involved with a case to question, challenge or seek verification of information upon which the tribe's membership decision was made. Indian Tribes determine membership eligibility and can change that determination and criteria.

Tribal Membership Versus Enrollment.

It is important to note that membership can be a distinct legal concept from enrollment. Membership and enrollment are not necessarily the same thing. ICWA and MIFPA look only at membership for applicability not enrollment. As set forth in the Minnesota DHS Indian Children Welfare Manual:

> Enrollment is the term commonly used to refer to the status of an Indian person as a part of a specific Indian tribe. However, while enrollment is the common means to establishing membership in an Indian tribe, it is not the only means. A person may have membership in a tribe without being enrolled according to criteria established by that tribe. These criteria may be established by tribal ordinance and may be unique to the tribe.[442]

What if a Child is Eligible for Membership in More than One Tribe?

According to BIA Regulations, if a child is eligible for membership in more than one tribe, deference should be given to the tribe in which the child is already a member unless otherwise agreed to by the tribes. If the tribes are unable to reach an agreement, the state court is to

440 *See In re* the Welfare of S.N.R., 617 N.W.2d 77, 84 (Minn. Ct. App. 2000).
441 BIA Reg. § 23.108(b).
442 MN DHS INDIAN CHILDREN WELFARE MANUAL at 24.

designate the tribe with which the child has more significant contacts as the Indian child's tribe. A determination of the Indian child's tribe for purposes of ICWA does not constitute a determination for any other purpose.[443]

If a Family Court Proceeding is Governed by ICWA or MIFPA, What Then?

If ICWA or MIFPA applies, additional requirements and considerations will apply to the proceeding including:

- Special notice requirements to parents, Indian Custodians, relevant tribe(s) and the BIA.
- The right of the Indian child's tribe to intervene as a party.
- The right of the child's Indian custodian to intervene as a party.
- Appointment of legal counsel for the parent or Indian custodian if indigent.
- Appointment of legal counsel for the child if it is in the child's best interests.
- Possible transfer of the matter to tribal court.
- Compliance with the requirement to provide active efforts.
- The requirement to present QEW testimony 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 before custody of an Indian child can be awarded to someone other than the child's parent.
- Compliance with ICWA's placement preferences.
- Application of the best interests of an Indian child standard as set forth in MIFPA.
- Expeditious determination and possible immediate termination of the proceeding by the court if the Indian child was improperly removed or retained from the custody of the parent or Indian custodian.
- The case being subject to ICWA's invalidation procedures.

Notice Requirements for Involuntary Child Custody Proceedings.

In accordance with ICWA and its BIA Regulations, petitioners have specific notice requirements they must meet in any involuntary child custody proceeding. These notice requires are additional to whatever notice is required by state statute or Rules of Court. If ICWA or MIFPA applies, or if there is reason to know that a child is an Indian child, notice of the pending child custody proceeding must be provided to:

- The Indian child's parents;[444]
- The Indian custodian; and[445]

443 BIA Reg. § 23.109.
444 ICWA § 1912(a); BIA Reg. § 23.11(a).
445 *Id*.

- The Indian child's tribe or potential tribes through its ICWA designated agent.[446]

A copy of the notice must also be provided to the BIA Regional Director.[447] The address of Minnesota's BIA Regional Office is:

> Bureau of Indian Affairs Regional Office
> 5600 W. American Boulevard, Suite 500
> Bloomington, MN 55437
> Telephone: 612-713-4400

If the identity or location of the Indian parents or Indian custodian and the Indian child's tribe cannot be determined, notice must be given to the Secretary of the Interior who then has fifteen days after receipt to provide the notice to the parent or Indian custodian and the tribe.[448] Notice to Indian child's tribes and Indian custodians must contain a provision advising them of their right to intervene.

Notice to each of the above must be sent **by registered or certified mail** with return receipt requested,[449] and the original or a copy of each notice and each return receipt must be filed in the court file. While notice may, as a courtesy, be sent by personal service or electronically, the BIA Regulations state that personal service does not replace the registered/certified mail requirement.[450]

PRACTICE CONSIDERATION: The GAL should ascertain whether notice has been provided as required by ICWA. One way of doing this is to check MGA for filing of the Registered or Certified Mail Return Receipt Card which is green in color and often referred to as the "Green Card."

No hearing for custody, other than hearings in an emergency proceeding, may take place until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary of the Interior.[451] Additionally, any non-emergency hearing must be continued for an additional 20 days if requested by parent, Indian custodian, or tribal social services agency.[452]

What is an Emergency Proceeding?

An emergency proceeding is any court action involving the emergency removal or placement of an

446 *Id*.
447 BIA Reg. § 23.11(a).
448 ICWA § 1912(a).
449 BIA Reg. § 23.11(a).
450 BIA Reg. § 23.111.
451 ICWA § 1912(a); BIA Reg. § 23.112.
452 BIA Reg. § 23.112.

Indian child without the full suite of ICWA protections.[453] Emergency proceedings must not extend for longer than necessary to prevent imminent physical damage or harm to the child. Once a child is no longer in danger of imminent physical damage or harm (immediate and present maltreatment that is life threatening or likely to result in abandonment, sexual abuse, or serious physical injury), the emergency removal or placement must immediately terminate.[454] If there is sufficient evidence of abuse, neglect or abandonment, a proceeding that provides the full suite of due process and ICWA protections should be initiated.[455]

There are a number of ways in which an Indian child might be subject to an emergency removal from his or her parent or Indian custodian including:

- An Order for Protection under Minn. Stat. § 518B if the child is placed with, or temporary custody is awarded to, someone other than a parent or Indian custodian.
- An emergency *ex parte* custody order under Minn. Stat. § 257C.03, subd. 5 and § 518.131 if temporary custody is awarded to someone other than a parent or Indian custodian.

What Must be Demonstrated Before an Indian Child can be Removed in an Emergency Situation?

Regardless of case type, (e.g., Order for Protection, Third-party custody, etc.), if ICWA or MIFPA applies, emergency removal of an Indian child from his or her parent or Indian Custodian is permissible only in situations "where removal is necessary to prevent imminent physical damage or harm to the child."[456]

Section 23.113(d) of the BIA Regulations contains a detailed list of criteria to be followed when emergency removal or continued emergency placement of an Indian child is sought. The petition should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child.[457]

The emergency petition should also contain the following information:

1) The name, age, and last known address of the Indian child;

[453] BIA Reg. § 23.2; U.S. DEPT. OF INTERIOR, BIA, FINAL RULE: INDIAN CHILD CUSTODY PROCEEDINGS 25 C.F.R. § 23 QUICK REFERENCE SHEET FOR STATE COURT PERSONNEL, https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-041404.pdf.
[454] BIA Reg. § 23.113.
[455] BIA Guidelines § C.5.
[456] ICWA § 1922; BIA Reg. § 23.113.
[457] BIA Reg. § 23.113(d).

2) The name and address of the child's parents and Indian custodians, if any;
3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;
4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov);
5) The residence and the domicile of the Indian child;
6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;
7) The Tribal affiliation of the child and of the parents or Indian custodians;
8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;
9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and
10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.[458]

Emergency Placement Preferences.

The plain language of ICWA does not address whether ICWA's placement preferences apply to emergency removals.

Best practice is to follow the placement preferences set forth in ICWA, which prioritize the placement preferences of the Indian child's tribe. If the Indian child's tribe does not specify its own placement preferences, the preferences set forth in ICWA should be followed.

How Long Can Emergency Proceedings Last?

The emergency status of the proceeding should last no longer than necessary to prevent imminent physical damage or harm to the child and not beyond 30 days. The emergency proceeding may only extend beyond 30 days if the court finds that:[459]

1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian tribe; and
3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2 of the BIA Regulations. (In juvenile court, a "child custody proceeding" is a proceeding commenced by a CHIPS Petition or a Permanency Petition with the

458 *Id*.
459 BIA Reg. § 23.113(e).

requisite notice given to the Indian child's tribe, parents or Indian custodian; legal counsel made available to the parents and Indian custodian; etc.)

The Right of the Indian Child's Tribe to Intervene as a Party.

Tribes have an inherent sovereign right to protect and oversee the health, safety, and welfare of their children, not only for the benefit of the child and their family, but for the benefit of the tribe as a whole. The United States Congress has expressed that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[460]

ICWA specifically recognizes this right and authorizes an Indian child's tribe to intervene in any state court proceeding governed by ICWA at any point in the proceeding.[461] Regardless of when a tribe receives notice, the tribe can choose when or if it becomes actively involved.

The Right of the Child's Indian Custodian to Intervene as a Party.

Indian custodians, defined as Indian persons having legal custody of an Indian child 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 the child,[462] similarly have the right to intervene as a party at any point in the proceeding.[463]

Appointment of Legal Counsel for the Parent or Indian Custodian if Indigent.

In any child custody proceeding governed by ICWA, parents *and* Indian custodians have the right to court-appointed legal counsel if the court determines that the parent or Indian custodian does not have the ability to pay for legal counsel.[464]

Where state law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses.[465]

Appointment of Legal Counsel for the Indian child if it is in the Child's Best Interests.

460 ICWA § 1901(3).
461 ICWA § 1911(d).
462 ICWA § 1903(6); MIFPA § 260.755, subd. 10.
463 ICWA § 1911(c).
464 ICWA § 1912(b).
465 *Id*.

The court has the discretion to separately appoint legal counsel for the Indian child if the court's finds that such appointment is in the child's best interests.[466]

Where state law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses.[467]

Determining State or Tribal Court Jurisdiction.

Determining jurisdiction means deciding which court (state court or tribal court) will have the right to hear a case, apply its laws, and make legal decisions about an Indian child and that child's family. "At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings."[468]

An Indian tribe has exclusive jurisdiction 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); or
- Is a ward of a tribal court (regardless of where the child lives or is domiciled).[469]

For children not domiciled on the reservation and not wards of tribal court, ICWA creates concurrent, but presumptively tribal jurisdiction.[470]

This means, that any time an Indian child is a ward of tribal court or is domiciled on a reservation not subject to Public Law 280, the child custody proceeding involving that child must be transferred to tribal court or dismissed from state court. If the Indian child is not domiciled on the reservation and is not a ward of tribal court, both Minnesota courts and the tribe have concurrent (joint) jurisdiction, however, jurisdiction presumptively lies with the tribe.

It may be argued that Public Law 280 – a federal law, grants Minnesota state courts concurrent jurisdiction over certain child custody proceedings even when the Indian child is living or domiciled on a Minnesota reservation (but is not a ward of tribal court).[471] Public Law 280, however, does not apply to the Red Lake Nation (which was never subject to Public Law 280) or to the

Bois Forte Band of Chippewa (following Public Law 280 jurisdiction retrocession).

466 *Id*.
467 *Id*.
468 *Holyfield*, 490 U.S. at 36.
469 ICWA § 1911(a).
470 *Holyfield*, 490 U.S. at 36.
471 *Holyfield*, 490 U.S. at n.16; TSA Part 1, C.1.

PRACTICE CONSIDERATION: If a GAL has questions about whether a child may be a ward of tribal court or whether the state court has jurisdiction or concurrent jurisdiction, consult with your ICWA coordinator or manager or seek a consult with the ICWA Division staff attorney.

Ascertaining Whether a Child is a Ward of Tribal Court.

In any child custody proceeding governed by ICWA, the state court must determine if the child is a ward of tribal court. A child may be a tribal court ward regardless of where child resides or is domiciled.

If the child is already a ward of tribal court, the state court may exercise only emergency jurisdiction over the child custody proceeding and must then dismiss the proceeding if the emergency is over or transfer the case to tribal court. Before dismissing or transferring the case, the state court must notify the tribal court of the pending dismissal or transfer and ensure the tribal court is provided all information regarding the proceeding including, but not limited to, the pleadings and any court record.[472]

When an Indian child is not a ward of tribal court, and is not domiciled or living on the reservation, the tribal court does not have exclusive jurisdiction, and a state court may exercise concurrent jurisdiction over the proceeding.[473]

PRACTICE CONSIDERATION: It is important for the GAL to inquire whether the child might be a ward of tribal court and share that information with the assigned social worker and the court. A child may be a ward of tribal court if the child or the child's family was ever subject to, or involved in, a proceeding in tribal court. The inquiry should be broad as the types of proceedings over which a tribal court may identify a child as a ward of the court might include education related matters, probate or guardianship matters, conservatorship matters, adoptions, child welfare matters, or other custody matters. Moreover, a family may never have actually appeared in tribal court even though a judicial or administrative proceeding may have been initiated or taken place.

While the actual wording or designation of a child as a ward may be included in a tribal order, judgment or decree, wardship may also be 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.[474]

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472 ICWA §§ 1911(a) & 1922; BIA Regs § 23.110; MIFPA § 260.771, subd. 1.

473 ICWA § 1911(a)

474 *See* generally https://narf.org/nill/documents/icwa/faq/jurisdiction.

Full Faith and Credit Given to Tribal Court Orders.

Minnesota courts are required to give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that Minnesota gives full faith and credit to the public acts, records, and judicial proceedings of any other entity.[475]

Transfers to Tribal Courts Pursuant to ICWA When State Courts Have Concurrent Jurisdiction.

For Indian children who are not wards of tribal court and not domiciled on the reservation, ICWA creates concurrent (meaning both tribal court and state court have the legal authority to decide the case), but presumptively tribal jurisdiction.[476] If a child custody proceeding involving an Indian child is in state court, and a request is made to transfer the case to tribal court, the state court must transfer the case unless:

- A parent (Indian or non-Indian), objects to the transfer;
- The state court finds good cause not to transfer; or
- The tribal court declines to accept the case.[477]

Who is permitted to request a transfer to Tribal Court?

- A parent (Indian or non-Indian);
- An Indian custodian; or
- The Indian child's tribe. [478]

PRACTICE CONSIDERATION: GALs are not included in the statutory list of persons or entities having the right to request a transfer to tribal court.

How can a request to transfer be made?

A request to transfer to tribal court can be made orally on the record or writing.[479]

When can a request to transfer be made?

475 ICWA § 1911(d); MINN. R. GEN. PRACT. 10.
476 *Holyfield*, 490 U.S. at 36.
477 MIFPA § 260.771, subd. 3(a); ICWA § 1911(b).
478 *Id*.
479 BIA Reg. § 23. 115(a).

A request to transfer a case from state court to tribal court can be made at any stage of the proceedings.[480]

Who has the right to object to a transfer from state court to tribal court?

Any parent (Indian or non-Indian), or any party, may object to a request to transfer.[481] A parent, however, has veto power over a transfer. A parent's objection can be submitted in writing or it can be stated on the record. If a parent objects, no hearing is necessary, and the court is required to issue an order denying the transfer request.[482]

If a party other than a parent objects to the transfer, that party must serve and file a written notice of motion and motion providing a written explanation of the reason for their opposition and must demonstrate good cause as to why the court should deny the transfer.[483]

What constitutes "Good Cause" to deny a transfer to tribal court?

A determination of good cause is fact-specific and must be determined by the court on a case-by-case basis. If any party, other than the parent, objects to transfer to tribal court, that party has the burden to prove by clear and convincing evidence that good cause exists.[484]

In considering whether good cause exists, the state court must not consider any of the following factors:

- Socioeconomic conditions of the tribal community.[485]
- Perceived adequacy or inadequacy of tribal social services.[486]
- Perceived adequacy or inadequacy of tribal court.[487]
- Whether the proceeding is at an advanced stage if the Indian child's parent, custodian or tribe did not receive notice until an advanced stage.[488]
- Whether there have been prior proceedings involving the child for which no petition to transfer was filed.[489]
- Whether transfer could affect the placement of the child[490]
- The Indian child's cultural connections with the tribe or its reservation.[491]

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480 BIA Reg. § 23.115(b); *see also* MIFPA § 260.771, subd. 3 which places no time constraints on transferring a case.
481 BIA Reg. § 23.118.
482 ICWA § 1911(b); MIFPA § 260.771, subd. 3.
483 MINN. R. JUV. PROT. P. 31.01.
484 MIFPA § 260.771, subd. 3a(a).
485 *Id*.
486 *Id*.
487 MIFPA § 260.771 subd. 3(a).
488 BIA Reg. § 23.118.
489 *Id*.
490 *Id*.
491 *Id*.

Minnesota law articulates only two circumstances under which the court may find good cause to deny a transfer to tribal court: [492]

1) The Indian child's tribe does not have a tribal court or other administrative body vested with authority of child custody proceedings; or

2) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses and the tribal court is unable to mitigate the hardship by means permitted in the tribal court's rules. Without evidence of undue hardship, travel distance alone is not a basis for denying a transfer.

PRACTICE CONSIDERATION: The same respect afforded to any state or federal court should be afforded to tribal courts. If a GAL has questions about transferring a case to tribal court, the GAL should communicate with his or her ICWA coordinator or manager.

Before a GAL objects to a transfer to tribal court, the GAL shall consult with his or her ICWA coordinator or manager.

Transfers to Tribal Court Pursuant to Minn. Stat. § 518A.80.

New legislation, separate from ICWA or MIFPA, went into effect in Minnesota on May 26, 2021 providing another avenue for certain post-judgment family court proceedings to be transferred to tribal court. Under this new statute, post-judgment child support, custody, and parenting time proceedings may be transferred to tribal court upon motion of a party or a Tribal IV-D Child Support Agency.[493] Minnesota Stat. § 518A.80 does not apply to child protection actions or dissolution of marriage actions involving a child.[494]

If a motion to transfer to tribal court is made, transfer is required when:

1) The district court and tribal court have concurrent jurisdiction;
2) A case participant/party is receiving services from the Tribal IV-D agency; and
3) No party or Tribal IV-D agency serves and files a timely objection to transfer.[495]

Any objection to a request to transfer must be made in writing by motion and served upon all parties within 30 days of the original motion to transfer. The statute sets forth various considerations and findings the court must make when an objection is made.

492 MIFPA § 260.771 subd. 3(b).
493 MINN. STAT. §§ 518A.80, subd. 2, 3.
494 MINN. STAT. § 518A.80, subd. 2
495 MINN. STAT. § 518A.80, subd. 4.

Notwithstanding any objection, if a motion is brought by a party or the Tribal IV-D agency to transfer a post-judgment case to the Red Lake Nation Tribal Court, the case must be transferred, if the case participants and child resided within the boundaries of the Red Lake reservation for six months preceding the motion to transfer the proceeding.[496]

Petitioner's Burden of Proof in Custody Proceedings.

Except in a temporary, emergency situation, before custody of an Indian child may be awarded to a non-parent in a proceeding governed by ICWA or MIFPA, the petitioner seeking custody bears the burden of proving, by clear and convincing evidence, that:

1) Active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts were unsuccessful.[497]
2) Continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage.[498]
3) Qualified Expert Witness testimony, presented by the petitioner, supports a finding that continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage.[499]
4) The petitioner meets the placement preferences set forth in ICWA or proves good cause to deviate from those placement preferences;[500] and
5) An award of custody to a non-parent is in the best interests of the child as an Indian child.[501]

Active Efforts Requirement.

The plain language of ICWA states that:

"Any party seeking to effect a foster care placement [third-party custody constitutes a foster care placement] of…an Indian child under state law, shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break up of the Indian family and that these efforts have proved unsuccessful."[502]

MIFPA's definition of active efforts primarily addresses efforts to be provided by the responsible local social services agency if the agency is involved. The BIA Regulations address active efforts more broadly. These binding Regulations

496 MINN. STAT. § 518A.80, subd. 8.
497 ICWA § 1912(d).
498 ICWA § 1912(e).
499 *Id*.
500 ICWA § 1915(b).
501 MIFPA § 260.755, Subd. 2a.
502 ICWA § 1912(d) (emphasis added).

define active efforts as "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family."[503]

To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians and tribe.[504]

Qualified Expert Witness Testimony (QEW) Requirement.

Except for temporary, emergency orders, Qualified Expert Witness testimony (QEW) is required as a matter of law before custody of an Indian child may be awarded to a non-parent.[505] MIFPA requires the party presenting QEW testimony to make diligent efforts to locate and present testimony of a QEW designated by the Indian child's tribe.[506] Qualifications of the QEW designated by the tribe are not subject to challenge.[507] If a tribally designated QEW is not available, there are provisions in MIFPA for lesser qualified experts that require court approval.[508]

Under ICWA's BIA Regulations, a QEW must have specific knowledge of the Indian child's tribe's culture and customs,[509] and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.[510] The court or any party may request assistance of the Indian child's tribe or Regional BIA Office in locating persons qualified to serve as expert witnesses.[511]

If QEW testimony is not provided, or QEW testimony does not support a finding that "continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage," custody cannot be awarded to a non-parent.

Who is Required to Present QEW Testimony?

The petitioner bears the burden of proof and is required to present QEW testimony. Other parties, however, may present QEW testimony as well. Pursuant to the requirements of MIFPA, the party presenting QEW testimony is required to first make diligent efforts to locate and present testimony of a QEW designated by the Indian child's tribe.[512] MIFPA outlines the steps parties must take if they are unable to secure QEW from the Indian child's tribe.

503 BIA Reg. § 23.2.
504 *Id*.
505 ICWA § 1912(e).
506 MIFPA § 260.771, subd. 6(b).
507 MIFPA § 260.771, subd. 6(b).
508 MIFPA § 260.771, subd. 6.
509 MIFPA § 260.755, subd. 17a.
510 BIA Reg. § 23.122(a).
511 BIA Reg. § 23.122(b).
512 *Id*.

What if the Tribe does not provide QEW?

If the petitioner (or another party) is unable to obtain testimony from a tribally designated QEW, the petitioner cannot simply identify an alternate QEW. Rather, the petitioner must first present clear and convincing evidence to the court of the diligent efforts made to obtain a tribally designated qualified expert witness.[513]

If clear and convincing evidence establishes that diligent efforts were unsuccessful in producing QEW testimony from the Indian child's tribe, the petitioner must demonstrate to the court that the petitioner's proposed QEW is, in descending order of preference:[514]

(1) A member of the child's tribe who is recognized by the Indian child's tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; or

(2) An Indian person from an Indian community who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and contemporary and traditional child-rearing practices of the Indian child's tribe.[515]

When use of a tribally designated QEW is not possible, the TSA indicates that consideration should be given to identifying a QEW who demonstrates knowledge and understanding of the following criteria:[516]

(1) Knowledge and understanding of the meaning of membership in the child's tribe.
(2) Knowledge and understanding of the meaning of clan relationship and extended family relationship in the child's tribe.
(3) Knowledge and understanding of traditional disciplinary measures used within the child's tribe.
(4) Knowledge and understanding of ceremonial and religious practices and cultural traditions within the child's tribe.
(5) Knowledge and understanding of medicine and traditional healing of the child's tribe.
(6) Knowledge and understanding of the effect of acculturation or assimilation with the child's tribe.

If clear and convincing evidence establishes that diligent efforts were still unsuccessful in producing a QEW, a party may use an expert witness, as defined by Rule 702 of the Minnesota Rules of Evidence, who has substantial experience in providing services to Indian families and

513 MIFPA § 260.771, subd. 6(c).
514 MIFPA § 260.771, subd. 6(d).
515 *Id*.
516 TSA Part 1, E.33.

who has substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community.[517]

The court or any party may also request the assistance of the BIA agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.[518]

PRACTICE CONSIDERATION: As the best interests of the Indian child are met through the application of and compliance with ICWA and MIFPA, the GAL should be aware of the QEW requirements and timelines in which QEW testimony should be provided in each case. Notwithstanding this, it is the policy of the GAL Program that GALs should not serve as QEWs.

What if the GAL Disagrees with the Tribe's QEW?

If the GAL disagrees with the tribe's QEW or wishes to present QEW testimony for another reason, (for example in a case where QEW is required, but no QEW has been provided), the GAL must consult with their ICWA coordinator or manager.

Requirement to follow Placement Preferences.

In addition to the requirements of active efforts and QEW testimony, an award of custody to a non-parent must follow ICWA's placement preferences.

Any Indian child placed into, or awarded to, the custody of a non-parent shall be placed in the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child.[519]

Unless the Indian child's tribe has established a different order of preference by resolution, preference shall be given, in the following descending order to: [520]

- a member of the Indian child's extended family;
- a foster home licensed, approved, or specified by the Indian child's tribe;
- an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- an 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.

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517 MIFPA § 260.771, subd.6(d)(2).
518 BIA Reg. § 23.122(b); MIFPA § 260.771, subd. 6.
519 ICWA § 1915(b).
520 *Id*.

Good Cause to Deviate from the Placement Preferences.

Any party seeking to deviate from the placement preferences must establish by clear and convincing evidence that good cause exists to deviate.[521] A court's determination of good cause must be made on the record or in writing.[522]

Good Cause to Deviate from Placement Preferences Pursuant to MIFPA.

Pursuant to Minnesota statutes, an Indian child may only be placed outside the order of placement preferences if the court makes a good cause determination based upon:[523]

1) The reasonable request of the Indian child's parents, if one or both parents attest that they have reviewed the placement options that comply with the order of placement preferences.

2) The reasonable request of the Indian child if the child is able to understand and comprehend the decision that is being made.

3) The testimony of a qualified expert designated by the child's tribe and, if necessary, testimony from an Indian person from an Indian community who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and contemporary and tradition al child-rearing practices of the Indian child's tribe, that supports placement outside the order of placement preferences due to extraordinary physical or emotional needs of the child that require highly specialized services; or

4) The testimony by the local social services agency that a diligent search has been conducted that did not locate any available, suitable families for the chil d that meet the placement preference criteria.

   In determining the suitability of a proposed placement of an Indian child, the standards to be applied must be the prevailing social and cultural standards of the Indian child's community, and the agency shall defer to the tribal judgment as to suitability of a particular home when the tribe has intervened pursuant to ICWA.[524]

Active Efforts for Extended Family Members : A good cause finding under this subdivision must consider whether active efforts were provided to extended family members who are

[521] MIFPA § 260.771, subd. 7(d). *See also* BIA Reg. § 23.132(b) (stating that the standard of proof "should" be clear and convincing evidence).
[522] BIA Reg. § 23.132(c).
[523] MIFPA § 260.771, subd. 7.
[524] MINN. STAT. § 260C.215, subd. 6(b).

considered the primary placement option to assist them in becoming a placement option for the child as required by section 260.762.[525]

Bonding and Attachment to Foster Family: Testimony of the child's bonding or attachment to a foster family alone, without the existence of at least one of the factors set forth above, shall not be considered good cause to keep an Indian child in a lower preference or non-preference placement.[526]

When a child is placed outside the order of placement preferences, good cause to continue this non-preferred placement must be determined at every stage of the proceedings.[527]

Good Cause to Deviate from Placement Preferences Pursuant to ICWA's BIA Regulations.

Pursuant to the BIA Regulations, good cause to deviate from ICWA's placement preferences should be based on one or more of the following considerations:[528]

1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference.

2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made.

3) The presence of a sibling attachment that can be maintained only through a particular placement.

4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.

5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.[529]

Deviation from the placement preferences may not be based upon the socioeconomic status of

525 MIFPA § 260.771, subd. 7(f).
526 MIFPA § 260.771, subd. 7(c).
527 MIFPA § 260.771, subd. 7(g).
528 BIA Reg. § 23.132(c).
529 ICWA § 1915(d); BIA Reg. § 23.132(c)(5).

one placement relative to another placement[530] or solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement made in violation of ICWA.[531]

What Steps Should be Taken if the GAL does not Support the Tribe's Designated Custodial Placement for the Indian Child?

The GAL shall engage in a consult with their ICWA coordinator or manager.

PRACTICE CONSIDERATION: GALs must carefully consider whether the fact that an Indian child has developed a relationship with a non-preferred placement outweighs the long-term best interests to a child that arise from maintaining connections to family, culture and the child's tribal community. Where a child is in a non-preferred placement, moving the child to a preferred placement is required by law unless the court makes a good cause determination. Best practice also supports the child being placed in a preferred placement. Until that is possible, it is best practice to facilitate connections between the Indian child and extended family and other potential preferred placements.

Best Interests of an Indian Child.

Minnesota law includes different definitions of "best interests" depending upon whether a child is subject to a marriage dissolution action, third-party custody action, CHIPS action, permanency action, adoption action, etc. In addition to these various best interests standards, or sometimes in place of these standards, the best interests of Indian children must be determined in accordance with the standards set forth in ICWA and MIFPA.

ICWA imposes a federal standard on all states which decrees that the best interests of Indian children are served by protecting "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."[532]

ICWA was enacted "specifically to address the problems that arose out of the application of subjective value judgments about what is "best" for an Indian child. Congress found that the unfettered subjective application of the "best interests" standard often failed to take into consideration tribal cultural practices and often failed to recognize the long-term advantages to children of remaining with their families and Tribes."[533] "By providing courts with objective

530 BIA Reg. § 23.132(d).
531 BIA Reg. § 23.132(e).
532 H.R. REP. NO. 95-1386 at 23.
533 BIA Guidelines § M.1 (citing H.R. REP. NO. 95-1386 at 19).

rules that operate above the emotions of individual cases, Congress was facilitating better State court practice on these issues and the protection of Indian children, families, and Tribes."[534]

MIFPA defines the best interests of an Indian child" as:

> Compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act to preserve and maintain an Indian child's family. The best interests of an Indian child support the child's sense of belonging to family, extended family, and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe.[535]

This means that a best interest analysis necessarily requires an analysis of the best interests of the Indian child's tribe, not just the Indian child. It also requires an analysis of how any proposed custodial arrangement will preserve and maintain an Indian child's family and sense of belonging to family, extended family and tribe.

What if the Requirements of ICWA or MIFPA have not been Followed?

If an Indian child was improperly removed or withheld from his parent or Indian Custodian, or if certain provisions of ICWA have been violated, the court may be required to immediately return the Indian child and the entire proceeding may be subject to invalidation.

Improper Removal or Retention of an Indian Child.

If, during the course of the proceeding, any party asserts, or the court has reason to believe, that the Indian child may have been improperly removed from the custody of a parent or Indian custodian or improperly retained after a visit or other temporary placement or relinquishment, the court must expeditiously determine whether there was improper removal or retention.[536]

If the court finds there was improper removal or retention, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.[537]

Invalidation of the Proceeding for ICWA Violations.

If certain provisions of ICWA are violated, the following persons or entities may petition the court to invalidate a custody action where it is alleged that sections 1911 (pertaining to

534 BIA Guidelines § M.1.
535 MIFPA § 260.755, subd. 2a.
536 ICWA § 1920; BIA Reg. § 23.114(b).
537 *Id*.

jurisdiction and intervention by the child's tribe), 1912 (pertaining to notice, appointment of legal counsel, active efforts and QEW), or 1913 (pertaining to voluntary foster care placements, TPRs and adoptions) of ICWA were violated:[538]

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;
(2) A parent or Indian custodian from whose custody the child was removed; and
(3) The Indian child's tribe.

To petition for invalidation, there is no requirement that the petitioner's rights be violated, rather, a petitioner may challenge the action based on any violations of sections 1911, 1912, or 1913 during the course of the proceeding.[539] This means that an Indian child's tribe or an Indian child may seek invalidation for violations of an Indian parent's rights or an Indian child or a parent may seek invalidation for violation of a tribe's rights.

ICWA does not articulate what remedies are available to the court if a petition for invalidation is granted. One possible remedy is dismissal of the action, although invalidation is separate from dismissal and does not necessarily require dismissal.

538 ICWA § 1914.
539 ICWA § 1914, BIA Reg. § 23.137(c).

CHAPTER 10 PRACTICAL CONSIDERATIONS / BEST PRACTICES

10.1 Communication with the Child, Parents, Relatives and Tribe.

Federal law requires GALs to "obtain first-hand, a clear understanding of the situation and needs of the child" and "make recommendations to the court concerning the best interests of the child."[540]

Minnesota law requires GALs to conduct an independent investigation that includes reviewing relevant documents; meeting with and observing the child in the home; and interviewing parents, caregivers, and others with knowledge relevant to the case.[541]

Communication with the child, child's parents, extended family and tribe(s) is critically important to the GAL's exercise of statutory duties.

Communication with the child.

Best practice is for the GAL to conduct an in-person visit with each child assigned to the GAL at least one time per month explaining the role of the GAL to the child in an age-appropriate manner, developing a professional relationship with the child, and understanding the child's wishes and needs.

It is generally recommended that the first visit occur wherever the child is currently placed. If a child moves placements, attempts should be made to visit the child in his or her new placement within the first few weeks. If the GAL visits the child at school; the visit should be pre-arranged with the appropriate staff (often the school social worker) and the child's preference about being visited in their school setting should be taken into consideration.

Communication with parents.

A child's parents typically hold the most information about a child and are important partners in understanding the situation and needs of the child. Best practice is that a GAL will respectfully communicate with the child's parents at least one time between each hearing, engaging the parents from a strengths-based perspective; listening and appreciating the family's story and recognizing and acknowledging the parents' expertise about their own family. Communication with parents about the child's history; social, medical, emotional and educational needs; important persons in the child's life; placement options; parent/child visits; sibling visits; and the parents' wishes for their child are examples of issues that may be important to discuss with a parent.

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540 2 U.S.C. § 5106a(b)(2)(B)(xiii).

541 MINN. STAT. § 260C.163, subd. 5(b); § 518.165, subd. 2a.

Communication/Collaboration with Tribes.

The best interests of the Indian child are interwoven with the best interests of the Indian child's tribe. Tribes "have some of the oldest and most positive traditions regarding the protection of children"[542] and should be looked to as experts in matters concerning their children. Best practice is to engage in respectful, cross-cultural communication and collaboration with the Indian child's tribe – early, often, and throughout the case; at least one time between each hearing.

Communication with the designated tribal representative is important for myriad reasons including:

- Gaining knowledge and understanding of the customs, culture and parenting practices of the Indian child's tribe.
- Fostering trust, collaboration and desirable outcomes for children and families.
- Understanding what culturally appropriate services, events, ceremonies, and ways of healing may be available to the child and/or the child's family through the tribe.
- Identifying relatives or tribal members who can be of support to the child.
- Identifying alternatives to out-of-home placement to reduce trauma to children and to promote healing and strengthening of the Indian child's family.
- Identifying relatives or other placement options within the placement preferences for the child.
- Understanding what permanency options may be available through the tribal court (e.g., customary adoption).
- Identifying and discussing concerns or differences that arise so each person can gain knowledge and a better understanding of the other's perspective.

Ways in which GALs can partner with tribes include conducting visits together with the tribal social worker or designated tribal representative and identifying ways to ensure the child's connection to family, tribe and culture are maintained.

GALs are independent parties or persons statutorily responsible for advocating for the Indian child's best interests. This may result in the GAL having a different perspective than the County social worker or designated tribal representative about how to best meets the needs and interests of an Indian child. If the GAL disagrees with a recommendation or position of the tribe, the GAL is encouraged to communicate with his or her ICWA coordinator or manager.

If the GAL disagrees with the recommendation or position of the tribe regarding:

- Active efforts
- Placement

[542] Cross *et. al.*, *supra* note 2 at 49.

- Reunification
- Permanency
- Disposition of a case
- Transfer to tribal court

The GAL shall consult with his or her ICWA coordinator or manager.

10.2 Cultural and Spiritual Considerations.

Spiritual practices and beliefs "are an integral part of Native culture, tradition and heritage, such practices forming the basis of Indian identity and value systems."[543] For generations, however, spiritual practices and sacred ceremonies were targeted and outlawed by federal and state laws. It was not until 1978 that Congress passed the American Indian Religious Freedom Act protecting and preserving American Indians' right to traditional beliefs, practices, and ceremonies.

As a court-appointed advocate representing the best interests of an Indian child, it is critically important to respect and advocate for the physical, emotional, spiritual and mental well-being of the child you are serving; and the family and tribal community of which the child is an integral member. Respectfully ask and learn about the family's beliefs and traditions.

Hair for example, is sacred and has significant spiritual importance for many American Indians. For some, hair symbolizes and embodies the knowledge a person acquires during a lifetime and may be cut only upon the death of a close relative.[544] For some, hair is braided to express the integration of mind, body and spirit. Uncut hair is not only an important practice in and of itself, but it may also be required to participate in certain spiritual rites and ceremonies.

GALs can protect and honor a child's spiritual well-being by ensuring that a child's hair is not cut by a foster care provider, institutional care provider, or relative without the consent of the parent or Indian custodian. Similarly, if a parent or relative objects to hair follicle testing because of the sacredness of their hair, respect and honor their belief. Try to assist in finding alternative ways the parent or relative can demonstrate non-use of chemicals.

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543 The American Indian Religious Freedom Act ("AIRFA"), Public Law No. 95-341 (Aug. 11, 1978); 42 U.S.C. § 1996. (Prior to AIRFA, many American Indian spiritual practices and ceremonies were outlawed. AIRFA was enacted to protect and preserve freedom of religion for American Indians, Eskimos, Aleuts, and Native Hawaiians. The rights protected include access to sacred sites and use and possession of sacred objects.)

544 Nick Estes, *The U.S. Stole Generations of Indigenous Children to Open the West - Indian Boarding Schools held Native American Youth Hostage in Exchange for Land Cessions*. HIGH COUNTRY NEWS. Oct. 14, 2019, https://www.hcn.org/issues/51.17/indigenous-affairs-the-us-stole-generations-of-indigenous-children-to-open-the-west.

10.3 Parent/Child Visitation.

The primary purpose of the Indian Child Welfare Act is to prevent the break-up of an Indian family and to maintain the relationship between the Indian child and his or her family, culture and tribe. Visits between the child and his or her parents, siblings, relatives, and tribal community are a critical component of maintaining that relationship. Research indicates that increased visits results in the increased likelihood that the child will be able to safely reunify with their family.[545]

MIFPA recognizes this and states that active efforts require the local social services agency to arrange for visitation to occur, whenever possible, in the home of the Indian child's parent, Indian custodian, or other family member or in another noninstitutional setting, in order to keep the child in close contact with parents, siblings, and other relatives regardless of the child's age and to allow the child and those with whom the child visits to have natural, unsupervised interaction when consistent with protecting the child's safety.[546]

When supervised visitation is necessary for the child's safety, the local social services agency is required to consult with a tribal representative to determine and arrange for visitation in the most natural setting that also ensures the child's safety.[547]

The right to maintain relationships is an important right belonging to the child. Best practices and Minnesota law indicate that this right should be restricted only to the extent necessary to ensure the child's safety and not to induce certain behaviors or compliance by the parent or the child.[548]

10.4 Compliance with ICWA and MIFPA.

As an advocate for the best interests of the Indian child, GALs have a duty to ensure, to the best of their ability, that the Indian child's best interests are met. As articulated in Minnesota law, the best interests of an Indian child "means compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act…"[549] Regardless of whose duty it may be to take a specific action under ICWA or MIFPA, Indian children deserve, and the law requires, compliance with the Acts.

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545 CHILDREN'S BUREAU, SUPPORTING SUCCESSFUL REUNIFICATIONS, 5, (Oct. 2017) (citing Chambers, Brocato, Fatemi, & Rodriquez, 2016); https://www.childwelfare.gov/pubPDFs/supporting_reunification.pdf.

546 MIFPA § 260.762, subd. 3(6).

547 *Id*.

548 *See* MINN. STAT. § 260C.178, subd. 3 (which states that the agency has a duty to develop and implement a visitation unless the court finds that visitation "would endanger the child's physical or emotional well-being").

549 MIFPA § 260.755, subd. 2a.

If it appears that a non-compliance or a violation of ICWA or MIFPA has occurred by any person or the court at any point in the case, the GAL is directed to discuss this matter with his or her coordinator or manager to receive guidance on how to address it.

10.5 Recommended Case Load for ICWA GALs.

The recommended caseload for ICWA GALs is 25 to 35 cases, however, this is determined by the GAL's coordinator and is dependent upon many factors including the number of children involved in each case, the geographical distance of the district or location of the child or family, the case type, etc.

CHAPTER 11 FORMS / APPENDICES

11.1 Minnesota Tribal State Agreement https://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5022-ENG

11.2 Minnesota DHS Indian Children Welfare Manual https://www.dhs.state.mn.us/main/groups/county_access/documents/pub/dhs16_157701.pdf

11.3 The Indian Child Welfare Act. https://uscode.house.gov/view.xhtml?path=/prelim@title25/chapter21&edition=prelim

11.4 The Minnesota Indian Family Preservation Act. https://www.revisor.mn.gov/statutes/cite/260

11.5 The Bureau of Indian Affairs, Interior. Indian Child Welfare Act Proceedings. https://www.federalregister.gov/documents/2016/06/14/2016-13686/indian-child-welfare-act-proceedings

11.6 The Bureau of Indian Affairs, Interior. Guidelines for Implementing the Indian Child Welfare Act, December 2016. https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf

11.7 Landers AL, Danes SM, Ingalls-Maloney K, White Hawk S. American Indian and White Adoptees: Are There Mental Health Differences? Am Indian Alsk Native Ment Health Res. 2017;24(2):54-75. doi: 10.5820/aian.2402.2017.54. PMID: 28832888.
Download article here:
https://www.researchgate.net/publication/319257578_American_Indian_and_White_Adoptees_Are_There_Mental_Health_Differences