



ICWA on Appeal

New Challenges and New Approaches

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Dependency and neglect cases are governed by complex legal systems. In Colorado, for example, these cases are brought under the Colorado Children's Code.¹ But they are also subject to a significant piece of federal legislation: the Indian Child Welfare Act of 1978 (ICWA).² These two statutory schemes generally live in harmony. But ICWA's mandates pose substantive and procedural challenges to state dependency and neglect cases that involve or may involve children who are members of or are eligible for membership in an Indian tribe, known under ICWA as "Indian children." This is no less true on appeal.

This article addresses ICWA's significance, its unique attributes, and its interplay with state

statutes. It then discusses two approaches the Colorado Court of Appeals has taken to improve ICWA compliance in dependency and neglect cases: (1) revising the appellate rule governing dependency and neglect cases to require a statement of ICWA compliance in all appellate briefs, and (2) implementing a specialized ICWA division. Finally, the article provides practice pointers for practitioners and judicial officers for ensuring greater ICWA compliance.

ICWA's Significance, Attributes, and Interplay with State Statutes

ICWA was born of rising concern over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of

large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.³ ICWA's provisions aim to protect and preserve Indian tribes and their resources and to protect Indian children.⁴

ICWA recognizes that Indian tribes have a separate interest in Indian children equivalent to, but distinct from, parental interests.⁵ To protect this interest, it establishes federal standards for child custody proceedings involving Indian children.⁶ A child custody proceeding encompasses any action that results in the foster care placement of an Indian child or termination of parental rights to an Indian child.⁷

Jurisdictional Components

Central to ICWA are its provisions governing jurisdiction over state child custody proceedings involving Indian children.⁸ ICWA creates a "dual jurisdictional scheme" for Indian child custody proceedings.⁹ In certain circumstances, ICWA provides for exclusive tribal jurisdiction over Indian children.¹⁰ In other circumstances, ICWA creates concurrent subject matter jurisdiction in state and tribal courts.¹¹ In this sense, ICWA is a jurisdictional statute.¹²

Other Components

Beyond its jurisdictional provisions, ICWA sets forth procedural and substantive standards that apply when child custody proceedings concerning Indian children occur in state courts.¹³ Among other things, ICWA grants an Indian child's tribe the right to intervene at any stage in a state court proceeding for foster care placement of or termination of parental rights to the child.¹⁴ As a result, ICWA's procedural standards require that the applicable tribe or tribes receive notice of the foster care placement or termination proceeding and of their right to intervene.¹⁵

ICWA also imposes procedural standards for Indian children that are not required in other dependency and neglect cases. Any party seeking to effect a foster care placement of or termination of parental rights to an Indian child under state law must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs

designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.¹⁶ And a court may not order foster care placement absent a determination by clear and convincing evidence, including testimony of qualified expert witnesses, that the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.¹⁷ If the state seeks to terminate parental rights, the court must make this same determination by proof beyond a reasonable doubt.¹⁸

Preemption

The Supremacy Clause invalidates state laws that interfere with or are contrary to federal laws.¹⁹ Where Indian affairs are concerned, a broad test of preemption must be applied.²⁰ The U.S. Supreme Court has emphasized the special sense in which the preemption doctrine must be applied to state laws that affect tribal interests.²¹ The Court explained that "[t]he unique historical origins of tribal sovereignty and the federal commitment to tribal self-sufficiency and self-determination make it treacherous to import . . . notions of preemption that are applied in other contexts."²² Thus, state jurisdiction over an issue is preempted by federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.²³

ICWA's Remedy for Noncompliance

Congress has created a unique remedy when state courts do not follow ICWA's mandates. ICWA authorizes an Indian child, parent, or tribe to petition any court of competent jurisdiction to invalidate a termination judgment upon a showing that such action violated certain of its provisions.²⁴ A court of competent jurisdiction includes an appeals court.²⁵

New Federal Regulations

When enacting ICWA, Congress authorized the Bureau of Indian Affairs (BIA) to develop rules and regulations for carrying out ICWA's provisions.²⁶ The BIA's original regulations primarily addressed funding and administration of Indian child and family service programs; they

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gave only minimal guidance on ICWA's notice procedures.²⁷ These regulations remained in effect until 2016.

In 2016, the BIA issued a rule to "promote[] the uniform application of [f]ederal law designed to protect Indian children, their parents, and Indian [t]ribes."²⁸ It updated definitions and notice provisions in the existing regulations.²⁹ And, of particular significance, it added a new subpart to address ICWA implementation by state courts to "promote[] nationwide unity and provide[] clarity to the minimum [f]ederal standards established by the statute."³⁰ The new regulations interpret many of ICWA's provisions. For example, they

- define terms such as "active efforts" and "continued custody";
- mandate that courts ask all participants in a child custody proceeding on the record whether they know or have reason to know that the child is an Indian child, and if there is a reason to know, treat the child as an Indian child unless and until the court determines otherwise;
- impose criteria for determining whether there is good cause to deny transfer of a proceeding to tribal court;
- establish standards for who may serve as a qualified expert witness; and
- further clarify how to apply ICWA's placement preferences.³¹

In addition to the regulations, the BIA has promulgated three sets of guidelines to implement ICWA—in 1979, 2015, and 2016. In 2015, the BIA observed that although much had changed in the 35 years since publication of the original guidelines, many of the problems that led to ICWA's enactment persisted.³² The current guidelines, published in 2016, encourage greater uniformity in ICWA's application by providing examples of best practices for its implementation.³³ Though not binding, the guidelines historically have been cited as persuasive authority by Colorado appellate courts.³⁴

New Approaches to Ensuring ICWA Compliance on Appeal

Against this backdrop, the Colorado Court of Appeals has faced an ever-increasing challenge to effectively address ICWA compliance in dependency and neglect appeals. To meet this challenge, the court employed three main approaches. First, members of the court recommended changes to C.A.R. 3.4, the appellate rule governing dependency and neglect cases, to require every party submitting an appellate brief in a dependency and neglect proceeding to address whether the juvenile court record demonstrated compliance with ICWA. Second, the court formed a specialized division to address issues regarding compliance with ICWA's inquiry and notice provisions. Third, the court continued to resolve issues regarding compliance with ICWA's notice and substantive

provisions through published opinions. This article addresses the first and second approaches.

Requiring All Parties to Address ICWA Compliance in Appellate Briefs

The State Court Administrator established a Respondent Parents' Counsel (RPC) Work Group in 2014 to analyze the current RPC program and recommend improvements.³⁵ This included—among other things—evaluating the appellate process and C.A.R. 3.4.³⁶

The Work Group recommended significant revisions to C.A.R. 3.4, including adding the requirement that the opening and answer briefs include a statement of ICWA compliance separate from the parties' statements of the issues presented for review. The Colorado Supreme Court adopted the proposed revisions to C.A.R. 3.4 in May 2016.³⁷

The ICWA compliance statement in the appellant's opening brief must include citations to the record and must identify

- each date when the court made an inquiry to determine whether the child is or could be an Indian child, and a statement of any identified or potential tribe(s);
- copies of ICWA notices and other communications intended to provide such notice;
- postal return receipts for Indian child welfare notices;
- responses to such notices;
- any additional notices that were sent to non-responding tribes; and
- date(s) of any ruling as to whether the child is or is not an Indian child.³⁸

The appellee's answer brief must contain a statement of whether the appellee agrees with the appellant's statement concerning ICWA compliance, and if not, why not.³⁹ The ICWA compliance statement relates to the entire case—it is not limited to any one party's perspective, and it must be included whether or not the party raises ICWA noncompliance as an issue on appeal. The previous rule did not require a statement of ICWA compliance.⁴⁰

Specialized ICWA Division

The court also created a specialized ICWA division, which primarily operated from May 2017 to August 2019. The ICWA division was

a dedicated division of three judges and two alternates that worked in conjunction with five to six specialized juvenile law staff attorneys. The division screened cases for compliance with ICWA and Colorado's ICWA implementing legislation, CRS § 19-1-126, before a decision on the merits of an appeal. The goal was to prevent overall delay in permanency for children by ensuring that a child's Indian status was properly determined before deciding the substantive issues raised on appeal.

The division was further committed to providing guidance to the district courts, city/county attorneys, guardians ad litem, and respondent parents' counsel on how to satisfy ICWA and Colorado's ICWA-implementing legislation to prevent later delays or disruption in permanency for families and children in Colorado.

The Division's Key Principles. To resolve ICWA compliance in a thorough and efficient manner, the division embraced several key principles:

1. Collaboration. The division employed a highly collaborative approach for handling cases. Staff attorneys thoroughly reviewed the briefs, ICWA compliance statements, and record in each case to identify whether the juvenile court and the department of human services had complied with ICWA's inquiry requirements and provided notice to all relevant tribes. If a staff attorney believed there was a deficiency in ICWA compliance, the attorney presented the case to the ICWA division with key discussion points, a recommended disposition, and viable alternatives. The division and staff attorneys met weekly to address compliance issues in specific cases, develop uniform court policy with regard to ICWA compliance, and create resources for juvenile courts and practitioners.

2. Expertise. The division used and fostered in-depth expertise regarding ICWA's requirements. As a group, these judges and staff attorneys reviewed nearly every ICWA issue that came before the court in the course of two years.

3. Expediency. The division issued orders of limited remand to resolve ICWA compli-

ance problems in an expedited fashion. Recall, ICWA authorizes an Indian child, parent, or tribe to seek to invalidate a termination judgment entered in violation of certain of its provisions *at any time*, regardless of adoption or other proceedings that may have taken place subsequent to termination.⁴¹ Thus, thorough compliance and timely identification of Indian children are imperative to avoid disruption and ensure permanency for children.

The division considered a number of approaches to address a termination judgment entered without proper inquiry or notice. While reversal is a viable option that other divisions have begun to apply, the ICWA division chose to issue limited remands in most cases. Limited remands offer several advantages:

- They separate questions regarding ICWA inquiry and notice from substantive appellate issues.
- They allow juvenile courts to make reliable determinations of children's Indian status before the appellate court addresses other substantive issues.
- They promote stability for children by maintaining the status quo while the juvenile court resolves the issues on remand.
- They limit appellate issues to those already briefed, plus any issues the parties wish to raise with regard to the ICWA determination on remand.

4. Consistency. The division provided consistent guidance to juvenile courts and practitioners by (1) establishing set criteria to determine when a limited remand was appropriate; and (2) employing uniform remand language to set clear expectations for juvenile courts and practitioners.

5. Guidance. The division published six orders of limited remand to provide statewide guidance regarding the contours of ICWA's notice and inquiry requirements. Topics included: when, how, and whom to ask about a child's Indian status; whom to notify that a child may be an Indian child; what constitutes sufficient notice; and the application of ICWA to proceedings other than termination of parental rights.⁴²

The Division's Effectiveness. In its two-year window of operation, the ICWA division reviewed approximately 100 cases and issued 75 orders of limited remand. The division also issued eight orders for counsel to show cause or submit supplemental briefing to address ICWA compliance. In some cases, the ICWA division deferred an issue to the division assigned to decide the substantive issues in the appeal. At least two such divisions also issued limited remands during this time.

Additionally, the division and juvenile law staff attorneys presented educational programs on ICWA compliance at conferences and training events across Colorado. They also produced practice materials to support juvenile courts and practitioners, such as checklists, a bench card, and a webinar.

The resulting improvement in compliance throughout Colorado is apparent from current cases on appeal. First, more robust inquiry and notice practices have led to fewer appellate issues—so much so that the ICWA division was able to effectively disband. Staff attorneys have also observed the following improvements:

- Appellate briefs include ICWA compliance statements that more reliably indicate the presence or absence of compliance.
- Transcripts of hearings reveal thorough inquiry by juvenile courts and a more comprehensive understanding of ICWA's requirements by practitioners and judicial officers.

Records indicate a proactive approach to inquiry and notice by departments of human services, guardians ad litem, and respondent parents' counsel.

Practice Pointers

As discussed, ICWA imposes procedural and substantive standards that are not found in other child custody proceedings. At times, these requirements can be quite complex.⁴³ The following practice pointers can help to ensure ICWA compliance.

Inquiry

- Courts must ask each participant on the record at the start of every emergency and child custody proceeding whether the

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participant knows or has reason to know that the child is an Indian child.⁴⁴

- The need to inquire may arise more than once during a case because foster care placement proceedings and termination of parental rights proceedings are separate child custody proceedings under ICWA.⁴⁵
- A foster care placement includes a proceeding to allocate parental responsibilities to a guardian or nonparent.⁴⁶
- Inquiry is required if the proceeding *may* result in foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement, even if it ultimately does not.⁴⁷
- ICWA's application is not limited to the dependency and neglect context.⁴⁸ Domestic relations courts and probate courts may also need to comply with its inquiry provisions.

- It may be helpful to ask a child's parent or relative whether the child has any tribal affiliation the first time that person appears at any hearing. This provides a record in case the person does not appear at a later child custody proceeding.

Notice

- Appropriate notice to the potentially concerned tribe or tribes is required when the court knows or has reason to know that an Indian child is involved in a child custody proceeding. It must be provided by the party seeking the foster care placement or termination.⁴⁹
- 25 CFR § 23.107(c) identifies six factors for determining whether a court has reason to know a child is an Indian child.⁵⁰ The BIA encourages state courts and agencies to interpret these factors expansively.
- The notice must be sent to the tribe by registered mail with return receipt requested. The notice must include critical information about the child, and if known, his or her parents and lineal ancestors, information on the custody proceeding and hearing date, and various statements related to the tribe's rights.⁵¹
- When a parent or his or her relative identifies only a tribal ancestral group, notice must be sent to each of the tribes in that ancestral group to identify whether the parent or child is a member of any such tribe.⁵²
- The BIA publishes a list of recognized tribes and their agents in the Federal Register by historical tribal affiliation.⁵³
- Copies of all notices must also be sent to the BIA.
- Copies of all notices and tribal responses should promptly be filed with the court.

Treating the Child as an Indian Child

- When the court has reason to know that the child is an Indian child, but lacks sufficient evidence to determine whether the child is an Indian child, the court must treat the child as an Indian child, unless and until it is determined on the record that the child is not an Indian child.⁵⁴

This requires two things:

1. Active efforts. Any party seeking to effect a foster care placement or termination of parental rights must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.⁵⁵ A definition of active efforts, which are to be tailored to the facts and circumstances of the case, is found at 25 CFR § 23.2.

2. Evidence of damage to the child.

Before a court may place an Indian child in foster care, the court must determine by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.⁵⁶ For termination of parental rights, this determination must be supported by evidence beyond a reasonable doubt.⁵⁷

Conclusion

ICWA compliance has improved throughout Colorado. Much of this progress stems from new approaches the court has employed to meet the ever-increasing challenge of addressing ICWA's standards and the dedication of judicial officers and stakeholders in these cases. 

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NOTES

1. CRS §§ 19-1-101 to 19-7-204.
2. 25 USC §§ 1901-63.
3. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 642 (2013).
4. 25 USC § 1901(2), (3).
5. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989).
6. 25 USC § 1902.
7. 25 USC § 1903(1).
8. *Holyfield*, 490 U.S. at 36.
9. 25 USC § 1911; *Holyfield*, 490 U.S. at 36.
10. 25 USC § 1911(a); *Holyfield*, 490 U.S. at 36.
11. 25 USC § 1911(b); *Holyfield*, 490 U.S. at 36.
12. *People in Interest of M.V.*, 2018 COA 163, ¶ 11.
13. *Holyfield*, 490 U.S. at 36.
14. 25 USC § 1911(c).
15. 25 USC § 1912(a); *Holyfield*, 490 U.S. at 36.
16. 25 USC § 1912(d).
17. 25 USC § 1912(e).
18. 25 USC § 1912(f).
19. *Sapp v. El Paso Cty. Dep't of Human Servs.*, 181 P.3d 1179, 1184 (Colo.App. 2008).
20. *In re Adoption of Holloway*, 732 P.2d 962, 967 (Utah 1986).
21. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983).
22. *Id.* at 334 (quotation omitted).
23. *Id.* at 334.
24. 25 USC § 1914.
25. *People in Interest of D.B.*, 2017 COA 139, ¶ 8; *In re K.B.* 301 P.3d 836, 840 (Mont. 2013).
26. 25 USC § 1952.
27. 25 CFR § 23.1; Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,147 (Feb. 25, 2015) (recognizing that the 1979 regulations did not address ICWA's requirements for state court proceedings beyond the contents of the notice).
28. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,779 (June 14, 2016).
29. *Id.*
30. *Id.* See also 25 CFR § 23.101 (stating that the regulations in this subpart clarify the minimum federal standards governing ICWA implementation to ensure that ICWA is applied in all states consistent with its express language).
31. 25 CFR §§ 23.2, 23.107(a)-(b), 23.118, 23.122, 23.131-132. See also Overview of ICWA, *Am. Indian Law Deskbook* § 13:1 (2017).
32. 80 Fed. Reg. at 10,147.
33. 81 Fed. Reg. at 96,477.
34. See *B.H. v. People in the Interest of X.H.*, 138 P.3d 299, 302 n.2 (Colo. 2006); *People in Interest of L.L.*, 2017 COA 38, ¶ 16.
35. *Respondent Parents' Counsel Workgroup: Final Report to the State Court Administrator* (Sept. 30, 2014), https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Family%20Law%20Programs/RPC/

[RPC_Work_Group_Final_Report.pdf](#).

36. *Id.* at 33-34.

37. Furman et al., "Revisions to CAR 3.4 Encourage Improved Advocacy in Dependency and Neglect Appeals," 45 *Colo. Law.* 49 (Oct. 2016).

38. C.A.R. 3.4(f)(1)(E).

39. C.A.R. 3.4(g)(2).

40. Furman et al., *supra* note 37.

41. 25 USC § 1914.

42. See *People in Interest of Z.C.*, 2019 COA 71M; *People in Interest of I.B.-R.*, 2018 COA 75; *People in Interest of L.H.*, 2018 COA 27; *People in Interest of J.L.*, 2018 COA 11; *People in Interest of K.G.*, 2017 COA 153; *People in Interest of C.A.*, 2017 COA 135.

43. See Gaines-Stoner et al., *The Indian Child Welfare Act Handbook* (3d ed. 2018).

44. 25 CFR § 23.107(a); *People in Interest of L.L.*, ¶ 19.

45. *People in Interest of C.A.*, 2017 COA 135, ¶ 10.

46. See *People in Interest of K.G.*, 2017 COA 153, ¶¶ 16-18.

47. 25 CFR 23.2; 81 Fed. Reg. at 38,799.

48. See, e.g., *In re J.C.T.*, 176 P.3d 726, 727-28 (Colo. 2007).

49. 25 USC § 1912(a); CRS § 19-1-126(1)(b).

50. A court has reason to know a child is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of 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.

25 CFR § 23.107(c).

51. 25 CFR § 23.111(d)(1)-(6).

52. *People in Interest of L.H.*, 2018 COA 27, ¶ 8.

53. Designated Tribal Agents for Service of Notice, 84 Fed. Reg. 20,387, 20,424 (May. 20, 2019); <https://perma.cc/K3DD-KQR5>.

54. 25 CFR § 23.107(b)(2).

55. 25 USC § 1912(d).

56. 25 USC § 1912(e).

57. 25 USC § 1912(f).