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Appendix A

CHILD WELFARE PROCEEDINGS UNDER THE INDIAN CHILD WELFARE ACT

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Scope Note

The federal Indian Child Welfare Act (ICWA) establishes special procedures for children who are members or potential members of a federally recognized Native American tribe. Tribes are entitled to notice of proceedings involving Indian children. Higher standards of proof apply at temporary hearings and final adjudications, and in proceedings to terminate parental rights. Settlement agreements must also comply with ICWA requirements. Please note that the name of the Department of Social Services (DSS) was changed to the Department of Children and Families (DCF) in 2008. Both designations may appear in this chapter; they are interchangeable.

A. INTRODUCTION

The Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901--1963, was enacted by Congress in 1978 in response to the large number of Native American children nationwide removed from their birth families and placed in non--Native American homes. *See* 25 U.S.C. § 1901; *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *Adoption of Arnold*, 50 Mass. App. Ct. 743, 747--48 (2001); *see also* B.J. Jones, "The Indian Child Welfare Act: The Need for a Separate Law" (available at http://?www?.abanet?.org/?genpractice/? compleat/?f95child?.html). Studies conducted in the 1960s and 1970s showed that 25 to 35 percent of Native American children had been separated from their families and placed in foster care, institutions, or adoptive homes. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. at 32--33. Among Native American children placed for adoption during that time, approximately 90 percent were placed in non--Native American homes. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. at 33. This massive removal of Native American children from their homes caused harm to the children and parents, but also negatively impacted Native American tribes. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. at 34--36.

In enacting ICWA, Congress sought to: (1) protect the rights of Native American children to maintain ties to their family and tribe; (2) protect the rights of Native American parents to the custody of their children; and (3) protect the integrity and future of Native American tribes. *See* 25 U.S.C. § 1902; *Adoption of Arnold*, 50 Mass. App. Ct. 743, 748 (2001).

The Indian Child Welfare Act creates unique rights for eligible children, parents, and tribes that significantly alter state and federal requirements for placing children in foster care and terminating parental rights. *See* 25 U.S.C. §§ 1901--1963. For example, ICWA requires a higher standard of proof for removing children from their families and terminating parental rights. 25 U.S.C. § 1912. If a child must be removed, ICWA requires that preference be given to placement with a Native American family or other placement approved by the child's tribe. 25 U.S.C. § 1915.

The Indian Child Welfare Act applies to all care and protection, 23(C), and termination of parental rights proceedings under G.L. c. 119, §§ 23(C), 24, 26; G.L. c. 210, § 3. *See* 25 U.S.C. § 1903(1). The Indian Child Welfare Act also must be followed before removing custody from a parent in a CHINS case. *See* 25 U.S.C. § 1903(1).

The Indian Child Welfare Act only applies to tribes that are officially recognized by the federal government. Some Native American children involved in the child welfare system will have a connection to a tribe that is not federally recognized. In those cases, counsel should look to DSS regulation 110 C.M.R. § 107, which requires that "decisions affecting Native Americans shall respect the unique values of Indian culture, whether or not the Indian child or family in question is a member of an Indian tribe as defined [under ICWA]."

B. WHO IS AN "INDIAN CHILD" UNDER ICWA?

The Indian Child Welfare Act applies if the child meets the definition of an "Indian child." An "Indian child" is one who either (a) is a member of a federally-recognized Indian tribe or (b) is eligible for membership and is the biological child of a member. *See* 25 U.S.C. §§ 1903(4), (8). There are two federally-recognized tribes in Massachusetts, the Wampanoag Tribe of Gay Head (also known as the "Aquinnah Wampanoag") and the Mashpee Wampanoag Tribe. A child living in Massachusetts may be a member of, or be eligible for membership in, a tribe in another state. It is up to the tribe to decide whether the child is a member of the tribe or is eligible for membership. *See* Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) (hereinafter ICWA Guidelines). To determine whether a child's tribe is federally recognized, counsel may consult the U.S. Bureau of Indian Affairs Web site at http://?www?.doi?.gov/? bureau-indian-affairs.html. The Web site also contains the names and contact information for each tribe to whom notice of legal proceedings involving the child must be provided.

Under ICWA, Indian and non-Indian parents are equally entitled to all of the federal protections of ICWA provided their child is an "Indian child" as defined by the statute. *See* 25 U.S.C. § 1903(9). However, an unwed father who has not acknowledged or established paternity is not treated as a parent under ICWA. 25 U.S.C. § 1903(9).

Once DSS "learns or suspects that a child in or about to enter the care or custody of DSS is or may be of Indian origin," the social worker must take active steps to investigate the child's background as soon as possible. *See* DSS Policy #88-001(R), Policy and Procedures re: Indian Child Welfare Act. The ICWA Coordinator in the Central Office of DSS is responsible for contacting the tribe to determine if the child is a member or eligible for membership. The ICWA Coordinator is also responsible for providing the tribe with any legal notices required under the statute. DSS Policy #88-001(R), Policy and

Procedures re: Indian Child Welfare Act. At the outset of the case, counsel for parents and children should determine whether or not the child may be of Indian origin.

C. RIGHT TO NOTICE AND INTERVENTION; JURISDICTIONAL REQUIREMENTS

As soon as the court or DSS knows or has reason to know that the child is an Indian child, DSS must give notice of the proceeding to the tribe, including notice of its right to intervene. 25 U.S.C. § 1912(a); *see* ICWA Guidelines, § B.5. Notice also must be given to the child's parents and to the Indian custodian, if there is one. 25 U.S.C. § 1912(a); *see* ICWA Guidelines, § B.5. An Indian custodian is defined as an Indian person who has custody of the child under law, tribal custom, or with the parent's consent. *See* 25 U.S.C. § 1903(6). Federal regulators require that the notice contain the following information:

- the child's name, birth date, and birthplace;
- the name of the Indian tribe(s) in which the child is enrolled or may be eligible for enrollment;
- all names known and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married, and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers; and other identifying information;
- a copy of the petition, complaint, or other document by which the proceeding was initiated;
- a statement of the absolute right of the biological Indian parent(s), the child's Indian custodian(s), and the child's tribe to intervene in the proceedings;
- a statement that if the parent(s) or Indian custodian(s) is (are) unable to afford counsel, and a state court determines indigency, counsel will be appointed to represent the parent(s) or Indian custodian(s);
- a statement of the right of the parent(s), Indian custodian(s), and child's tribe to be granted, upon request, up to twenty additional days to prepare for the proceedings;
- the location, mailing address, and telephone number of the court and all parties notified of the proceeding;
- a statement of the right of the parent(s), Indian custodian(s), and child's tribe to petition the court for transfer of the proceeding to the child's tribal court pursuant to 25 U.S.C. § 1911, absent objection by either parent, provided that the tribal court may decline jurisdiction; and
- a statement of the potential legal consequences of the proceedings on the future custodial and parental rights of the parent(s) or Indian custodian(s).

See 25 C.F.R. § 23.11.

Under ICWA, no hearing may be held regarding the child's placement in foster care or the termination of parental rights until at least ten days after the tribe and the parent or Indian custodian have received the required notice of the proceeding. *See* 25 U.S.C. § 1912(a). The parent or tribe may request an additional twenty days to prepare for the hearing. 25 U.S.C. § 1912(a). However, another section of the statute provides that if state law provides greater protections to parents' rights than ICWA, then the state law controls. *See* 25 U.S.C. § 1921. Thus, if the court gives emergency custody to DSS under G.L. c. 119, § 23(a)(3) or § 24, the parent of an Indian child should still have the right to a hearing within seventy-two hours, notwithstanding the ten-day waiting period. Presumably, the tribe could then request that the hearing be reopened so that it could exercise its right under ICWA to participate in the proceeding.

The tribe has an absolute right to intervene in the state court proceeding. *See* 25 U.S.C. §§ 1912(a), 1911(c). If the child "resides or is domiciled" on an Indian reservation or is a ward of the tribal court, then the tribe has exclusive jurisdiction over the custody proceeding. *See* 25 U.S.C. § 1911(a). For children not living on a reservation, the court must transfer jurisdiction of the case to the tribal court if requested by the parent or tribe, unless the state court finds there is good cause for retaining jurisdiction. The parents may also object to a transfer of the case, or the tribal court may decline jurisdiction. *See* 25 U.S.C. § 1911(b). A parent or tribe must request the transfer promptly after receiving notice of the proceeding. *See* ICWA Guidelines, § C.1. Some situations where the Juvenile Court might find "good cause" to retain jurisdiction include: (1) the child is over twelve and objects to the transfer; (2) notice was given, but the transfer request was not made promptly, and the case is at an advanced stage; or (3) it would be an undue hardship to the parties or witnesses to have the matter heard by the tribal court. *See* ICWA Guidelines, § C.3.

Practice Note

The Wampanoag Tribe of Gay Head currently does not have a tribal court. Pursuant to an agreement between the tribe and DSS, Massachusetts has exclusive jurisdiction over child custody proceedings involving this tribe, whether or not the child resides or is domiciled on the reservation, until such time as the tribe decides to assume jurisdiction under ICWA.

D. RIGHT TO COUNSEL

The Indian Child Welfare Act requires that the court appoint counsel for indigent parents and Indian custodians. *See* 25 U.S.C. § 1912(b). This right to counsel is broader than state law in that it requires appointment of counsel for an "Indian custodian" who may not be the child's legal guardian under state law, but who has custody of the child pursuant to tribal custom or law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child with the parent's consent. *See* 25 U.S.C. § 1903(6).

E. EMERGENCY REMOVAL

The Indian Child Welfare Act permits an Indian child to be removed from his or her parents' custody on an emergency basis where necessary "to prevent imminent physical damage or harm to the child." 25 U.S.C. § 1922; *see also* ICWA Guidelines, § B.7.

F. STANDARD OF PROOF AT THE TEMPORARY CUSTODY HEARING

The Indian Child Welfare Act requires a higher standard of proof before granting custody to DSS at a seventy-two--hour hearing under G.L. c. 119, § 23(a)(3) or § 24, or at a nonemergency, temporary custody hearing under G.L. c. 119, § 25. First, the court must find by *clear and convincing evidence* that continued custody by the parent is likely to result in serious emotional or physical damage to the child. *See* 25 U.S.C. § 1912(e). This is higher than the preponderance of evidence standard required under state law. *See Care and Protection of Robert*, 408 Mass. 52, 58 (1990). Second, the evidence must be supported by the testimony of one or more qualified expert witnesses. *See* 25 U.S.C. § 1912(e). A qualified expert witness includes:

- a member of the child's tribe who is recognized by the tribe as knowledgeable about tribal customs relating to family organization and childrearing;
- an expert witness with substantial experience in social services for Indian families and extensive knowledge about the social and cultural standards and childrearing practices of the Indian child's tribe; or
- "a professional person having substantial education and experience in the areas of his or her specialty."

See ICWA Guidelines, § D.4. The finding of clear and convincing evidence must be made within ninety days of the child's emergency removal from home. ICWA Guidelines, § B.7.

Finally, before the court can grant temporary custody to DSS, the Department must demonstrate 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." 25 U.S.C. § 1912(d). Active efforts "shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe." *See* ICWA Guidelines, § D.1. In making active efforts, DSS must use the resources available from "the extended family, the tribe, Indian social service agencies and individual Indian care givers." ICWA Guidelines, § D.1.

Unlike the "reasonable efforts" determination required by G.L. c. 119, § 29C and federal law, a finding of active efforts is a prerequisite to granting custody to DSS. 25 U.S.C. § 1912(d). If DSS has not made active efforts with respect to an Indian child, the child must be returned home. State courts are divided on
whether "active efforts" is a higher standard than "reasonable efforts." *Compare E.M. v. State Dep't of Health & Soc. Servs.*, 959 P.2d 766, 768 (Alaska 1998) (active efforts is a more stringent requirement than reasonable efforts); *with In re S.B.*, 30 Cal. Rptr. 3d 726, 736--37 (Cal. Ct. Appeals 2005) (active efforts and reasonable efforts are "essentially undifferentiable").

If at the seventy-two--hour hearing the parent stipulates to temporary DSS custody, allowing the child to be placed in foster care, ICWA requires that the consent be in writing. *See* 25 U.S.C. § 1913(a). In addition, the judge must certify that the terms and consequences of the stipulation were fully explained to and fully understood by the parent. 25 U.S.C. § 1913(a). Significantly, the parent may subsequently withdraw his or her consent to temporary custody, even if in writing and certified by the court, and the child shall be returned to that parent's custody. *See* 25 U.S.C. § 1913(b).

Practice Note

Presumably, if DSS believed a return of custody to the parent at that juncture would place the child in imminent physical danger or harm, DSS could request an emergency order of custody and a seventy-two--hour hearing would need to be scheduled. At that hearing, DSS would be required to meet the heightened burden of proof (i.e., clear and convincing evidence) under ICWA.

G. PLACEMENT PREFERENCES

If the child cannot return home, ICWA mandates that the child be placed in the least restrictive, most family-like setting possible to meet the child's needs. *See* 25 U.S.C. § 1915(b). In addition, the child must be placed within reasonable proximity to his or her home. 25 U.S.C. § 1915(b). Unless there is good cause to the contrary, preference must be given in the following order to a placement with:

- the child's extended family (including non-Indian family);
- a foster home approved by the tribe;
- an Indian foster home approved by a non-Indian authority; or
- a residential program approved by the tribe or operated by an Indian organization.

25 U.S.C. § 1915(b). The tribe may establish a different order of preference. *See* 25 U.S.C. § 1915(c). Good cause not to follow the placement preference may be shown by one of the following: (1) the parent or mature child requests a different placement; (2) a qualified expert testifies that the child's extraordinary physical or emotional needs require a different placement; or (3) no suitable placement can be found after a diligent search. *See* ICWA Guidelines, § F.3. At a minimum, a diligent search requires contact with the tribe's social service program, a search of all available Indian homes in the state, and contact with national Indian placement resources. ICWA Guidelines, § F.3.

The Indian Child Welfare Act also requires that in selecting an adoptive placement, preference must be given, in the following order, to extended family, members of the child's tribe, or other Indian families. *See* 25 U.S.C. § 1915(a).

H. STANDARD OF PROOF TO ADJUDICATE A CHILD IN NEED OF CARE AND PROTECTION AND TO TERMINATE PARENTAL RIGHTS

The same standard discussed above for the temporary custody hearing applies at the hearing to adjudicate a child in need of care and protection. Thus, DSS must prove by clear and convincing evidence, including the testimony of qualified expert witnesses, that continued custody by the parent "is likely to result in serious emotional or physical damage to the child." *See* 25 U.S.C. § 1912(e). Moreover, it is not enough to prove that the parents are unfit; rather, DSS must show that it would be dangerous for the child to return to the parent's custody. *See* ICWA Guidelines, § D.3, Commentary. In addition, DSS must prove 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." *See* 25 U.S.C. § 1912(d).

The Indian Child Welfare Act imposes a higher evidentiary burden for terminating parental rights. The Department of Social Services must prove *beyond a reasonable doubt* that continued custody is likely to result in serious emotional or physical damage to the child. *See* 25 U.S.C. § 1912(f).

Proof beyond a reasonable doubt

is a term often used, probably pretty well understood, but not easily defined.... For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty

that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

Adoption of Arnold, 50 Mass. App. Ct. 743, 754--55 (2001) (quoting *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (1850)). In addition, in order to terminate parental rights, the evidence of serious emotional or physical damage to the child must be supported by the testimony of one or more qualified expert witnesses. *See* 25 U.S.C. § 1912(f). Finally, DSS must demonstrate that it made active efforts to prevent the breakup of the family. *See* 25 U.S.C. § 1912(d).

I. INVALIDATION OF STATE COURT ACTION

The parent, child, or tribe may file a motion to invalidate a court order transferring custody of an Indian child to DSS if any of the provisions of Sections 1911, 1912, or 1913 have been violated. *See* 25 U.S.C. § 1914. For example, if DSS knew or had reason to know that the child was an "Indian child" but failed to provide the tribe notice of the proceeding, the parent, child, or tribe could request that the court invalidate the temporary custody order. Similarly, if "active efforts" were not made by DSS prior to removal of the child from the home as required by 25 U.S.C. § 1912(d), or if the burden of proof required by 25 U.S.C. § 1912(e) is not established at the seventy-two--hour hearing, the custody order may be invalidated upon motion by any party. In addition, if the parent's consent to temporary custody did not satisfy the requirements of 25 U.S.C. § 1913(a), the stipulation is invalid and unenforceable. If the court invalidates the order, the child must be returned home unless DSS initiates a new request for emergency custody and meets the heightened burden of proof under ICWA.

J. SETTLEMENT AGREEMENTS UNDER THE INDIAN CHILD WELFARE ACT

Under ICWA, a parent's voluntary consent to his or her child's continued placement in foster care or to a judgment terminating parental rights must be in writing and be recorded before the judge. 25 U.S.C. § 1913(a). The judge must certify that the terms and consequences were fully explained to and fully understood by the parents. 25 U.S.C. § 1913(a). The judge must also certify either that the parent fully understood the explanation in English or that the explanation was interpreted into a language that the parent understands. 25 U.S.C. § 1913(a). If these requirements are not met, the child, the parent, or the tribe may file a petition to invalidate the agreement. 25 U.S.C. § 1914.

Further, a parent may withdraw his or her consent to the child's placement in foster care at any time, "and, upon such withdrawal, the child shall be returned to the parent...." 25 U.S.C. § 1913(b). Thus, a parent may withdraw his or her consent to an agreement adjudicating the child in need of care and protection and continuing the child in DSS custody. 25 U.S.C. § 1903(1)(i). The parent's right to withdraw his or her consent also applies to an agreement to place the child with a legal guardian. *See* 25 U.S.C. § 1903(1)(i). If DSS believed the child was at risk of serious harm, it would have to initiate a new proceeding. In addition, a parent's voluntary consent to terminate parental rights or to an adoption "may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent." 25 U.S.C. § 1913(c).

Counsel should be aware of two other provisions concerning adoptions. First, if the parent's consent to the child's adoption was obtained through fraud or duress, and the adoption has been final for less than two years, the parent may withdraw his or her consent and petition the court to vacate the adoption decree. 25 U.S.C. § 1913(d). Second, if the adoption of an Indian child is subsequently vacated or the adoptive parents' rights are terminated, the birth parent may petition for a return of custody. 25 U.S.C. § 1916(a). In that event, the court must return custody to the parent unless doing so would result in serious emotional or physical damage to the child. 25 U.S.C. § 1916(a); *see also* 25 U.S.C. §§ 1912(e), (f).

K. ACCESS TO ADOPTION INFORMATION

The Indian Child Welfare Act provides that an Indian child who has reached the age of eighteen and was the subject of an adoption may petition the court for information about his or her biological parent's tribal affiliation and any other information necessary to protect the youth's interest in his or her relationship with the tribe. 25 U.S.C. § 1917; *see also* DSS Policy #88-001(R), Policy and Procedures re: Indian Child Welfare Act.

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