CHAPTER 13

NATIVE AMERICAN CHILDREN

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INDIAN CHILDREN

13.1. HISTORY AND PURPOSE

In 1978 Congress passed the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., a statute that recognizes the unique history and political standing of Native Americans as well as the systematic removal of Native American children from their homes. Congress reported back then, "The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today…. It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole."[1]

Congress, in 1978, additionally reported[2]:

> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
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> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

ICWA was passed in 1978 to promote the stability and security of Native American tribes and cultures as well as to protect the best interests of Indian children and families. ICWA establishes certain requirements of notice to tribal authorities, rights of tribal courts to assert jurisdiction over Indian children, and certain standards and procedures required of State courts when exercising jurisdiction over Indian children. ICWA does not treat Native American children differently because of their race or ethnic identity, but rather because of the unique political status of Indians as members of sovereign nations within the United States, a political status based on Art I, Sec 8 of the U.S. Constitution and treaties with the Federal government.

Despite the common stereotype, the majority of Native Americans in Michigan do not live on reservation lands or in northern Michigan. Rather the largest percentage of Michigan's Native Americans lives in our major cities and towns. Thus, the Department of Human Services (DHS) must inquire so as to identify children of Indian heritage in order to extend them the protections of the ICWA.

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[1]. House Report, H.R. REP. No. 1386, 95th Cong., 2d Sess. (1978), US CODE CONG. & AD. NEWS 7530
[2]. 25 USC 1901(4)&(5)

13.2. IDENTIFY NATIVE AMERICAN CHILDREN

In every investigation of alleged child abuse or neglect and in any other first contact situation with a child, such as a voluntary release of parental rights, the DHS worker is obliged to determine whether a child has Native American heritage.[3] If the worker receives any indication that a child may have Native American heritage, a child is to be considered an Indian child pending verification.[4] Where there is some indication that a child may be a Native American child, the DHS will contact the Appropriate Tribe(s) or the Bureau of Indian Affairs if tribal affiliation is not clear. DHS must contact the tribe, Indian organizations and, if necessary, the Bureau of Indian Affairs in the U.S. Department of the Interior to determine tribal membership or eligibility for tribal membership.[5]

An "Indian child" for purposes of the ICWA and Michigan law means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[6] Every tribe establishes its own eligibility guidelines. One tribe may require a ¼ Indian blood, another 1/8 and another listing of an ancestor on a historical document.

ICWA does not apply to Canadian tribes or unrecognized tribes. If the Secretary of the Interior does not recognize a tribe, none of its minor members can be deemed Indian children. In *In re Fried*, the Court of Appeals held because the Secretary of the Interior did not recognize the Lost Cherokee Nation, the Indian Child Welfare Act could not apply to the termination of a respondent's parental rights.[7]

13.3. NOTIFY TRIBE; TRANSFER TO TRIBAL COURT; TRIBAL INTERVENTION IN STATE COURT PROCEEDINGS

Upon initially petitioning a court for action, the petitioner is required to indicate whether a child is an Indian child, that is, a member or eligible for membership in any Indian tribe or band.[8] If the child is an Indian child, the tribal authorities are to be contacted by registered mail, return receipt requested, as follows[9]:

> (1) If the Indian child resides on a reservation or is under tribal court jurisdiction at the time of referral, the matter shall be transferred to the tribal court having jurisdiction.
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> (2) If the child does not reside on a reservation, the court shall ensure that the petitioner has given notice of the proceedings to the child's tribe and the

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[3]. MDHS CPS Manual, Item 716-1 p. 1
[4]. *Id*.
[5]. MDHS CPS Manual, Item 716-1, pp 1-2; *See also In re IEM*, 233 Mich.App. 438, 443 (1999)
[6]. 25 USC 1903(4); MCR 3.980
[7]. *In re Fried*, 266 Mich.App. 535 (2005)
[8]. MCR 3.965(B)(9)
[9]. *In re TM*, 245 Mich.App. 181 (2001); In *re NEGP*, 245 Mich.App. 126 (2001); *See also* 25 USC 1912(a)

> child's parents or Indian custodian and, if the tribe is unknown, to the Secretary of the Interior. Even notice must be received at least 10 days prior to any court proceeding.[10]
> (3) If the tribe exercises its right to appear in the proceeding and requests that the proceeding be transferred to tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.[11]

Although the tribe may elect to remove the case to tribal court, the tribe also has a right to intervene in the State court proceedings at any point.[12] In Michigan it is far more common for the tribe to intervene in the proceedings than it is for the case to be transferred to tribal court.

13.4. EMERGENCY REMOVAL OF AN INDIAN CHILD

A State court may order an Indian child who is domiciled on a reservation but temporarily located off the reservation to a place of safety in order to prevent "imminent physical harm to the child."[13]

The Federal statute sets forth the following[14]:

> The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Where the Indian child does not reside or is not domiciled on the reservation, the court may order temporary removal "if reasonable efforts have been made to prevent removal of the child, and continued placement with the parent or Indian custodian would be contrary to the welfare of the child."[15]

13.5. PLACEMENT

Placement of Native American children, except in emergency situations, requires clear and convincing evidence and demonstration of "active" not just reasonable efforts to prevent the breakup of the Indian family.[16]

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[10]. 25 USC 1912(a)
[11]. MCR 3.980(A); 25 USC 1911(b)
[12]. 25 USC 1911(c)
[13]. 25 USC 1922; MCR 3.980(B)
[14]. 25 USC 1922
[15]. MCR 3.980(B)(2)
[16]. 25 USC 1912(d)

The Michigan court rule [MCR 3.980 (C)(3)] says except in cases of emergency removal[17]:

> An Indian child must not be removed from a parent or Indian custodian without clear and convincing evidence, including testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe, that services designed to prevent the break up of the Indian family have been furnished to the family and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical injury to the child.

Any placement must be 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 must also be placed within reasonable proximity to his or her home, taking into account any special needs of the child.[17]

The party seeking foster care placement must satisfy the court that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the break up of the family and that those efforts proved unsuccessful.

In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, the order of preference for placement for a child of Native American heritage is found in both the Federal law and the Michigan court rule [MCR 3.980 (C)] [18]:

(5) The Indian child, if removed from his or her home, shall be placed, in descending order of preference, with:
(a) a member of the child's extended family,
(b) a foster home licensed, approved, or specified by the child's tribe,
(c) an Indian foster family licensed or approved by a non-Indian licensing authority,
(d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs. The court may order another placement for good cause shown.

13.6. TERMINATION OF PARENTAL RIGHTS OF INDIAN CHILDREN

> In addition to the required findings that one or more of the grounds in MCL 712a.19b (3) has been proven by clear and convincing evidence, the parental rights of an Indian child shall not be terminated unless there is evidence *beyond a reasonable doubt*, including testimony of qualified expert witnesses, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.[18]

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[17]. MCR 3.980(C)(3)
[18]. 25 USC 1912(f); MCR 3.980(D)

Any party seeking 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 break up of the family and that those efforts proved unsuccessful.