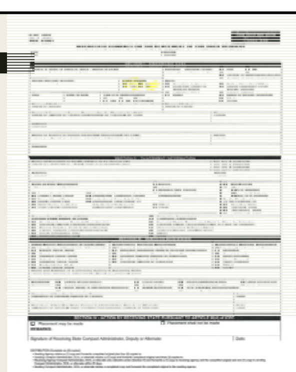

# Interstate Compact for Placement of Children and the Indian Child Welfare Act



## Section 1: IDENTIFYING DATA

- Fill out one form per child to be placed. Enter the full legal name, Social Security Number, ICWA (Indian Child Welfare Act) eligibility*, sex, date of birth, IV-E eligibility determination, and ethnic group of the child for whom this placement is proposed.

## *CHEROKEE NATION V. NOMURA*, 160 P.3D 967 (OKLAHOMA 2007)

160 P.3d at 969: "This case . . . involves the interaction of the Oklahoma Indian Child Welfare Act, the federal Indian Child Welfare Act, and the Oklahoma Interstate Compact on the Placement of Children. We consider the right of an Indian mother to place her child voluntarily for adoption without consideration of the placement preferences of the [ICWA], . . . The dispositive issue in this adoption proceeding is whether the Oklahoma [ICWA] must be applied to every adoption of Indian children born to an Oklahoma Indian parent, even if the Indian parent chooses out of state non-Indian adoptive parents. We hold that it must.

160 P.3d at 975-76: "[Adoption] Agency contends the Oklahoma [ICWA's] requirement of notice to the Tribe in 'voluntary' adoptions is unconstitutional . . . . [We are persuaded] that compliance with the Federal [ICWA] is required in voluntary and involuntary 'child custody proceedings.'"

160 P.3d at 977: "The trial court's declaratory judgment correctly states that the [ICWA] and the Oklahoma [ICWA] apply to the adoption proceeding, that the Tribe is entitled to notice, and that the placement preferences under 25 U.S.C. §1915 [and Oklahoma ICWA] apply to voluntary and involuntary child custody proceedings.

160 P.3d at 977: "Nomura, in his official capacity as Administrator of the Interstate Compact Act, has a duty to see that there is compliance with the placement preferences of the Oklahoma and Federal [ICWAs] prior to approving the adoption under the Interstate Compact Act."

160 F.3d at 977: “The withdrawal of the Form 100A by Nomura effectively prevented jurisdiction from being lost in Oklahoma. . . . We hold that adoptions of Oklahoma Indian children require notice to the Tribe and compliance with the Oklahoma [ICWA], whether the child custody proceedings are voluntary or involuntary. The Administrator has a duty to question whether compliance has been made before signing the Form 100A which facilitates sending the adoption to another state to complete.”

Kentucky Interstate Compact, KRS 615.030, Art. I, Purpose: “(8) Provide for the promulgation of guidelines, in collaboration with Indian tribes, for interstate cases involving Indian children as is or may be permitted by federal law.”

Kentucky ICPC, Art. IV, Jurisdiction, (4)(f): “In accordance with its own laws, the court in the sending state shall have authority to terminate its jurisdiction if: (f) An Indian tribe has petitioned for and received jurisdiction from the court in the sending state.”

Kentucky ICPC, Art. VII, Placing Agency Responsibility, (8): “ The public placing agency in the sending state shall oversee compliance with the provisions of the Indian Child Welfare Act, 25 U.S.C. sec. 1901 et seq., for placements subject to the provisions of this compact, prior to placement.”

Kentucky ICPC, Art XVIII: “Notwithstanding any other provision in this Compact, the Interstate Commission may promulgate guidelines to permit Indian tribes to utilize the compact to achieve any and all of the purposes of the compact as specified in Article I. The Interstate Commission shall make reasonable efforts to consult with Indian tribes in promulgating guidelines to reflect the diverse circumstances of the various Indian tribes.”

Washington ICPC - WRC 26.34: Children’s Administration ICPC Policy, 5600, ICPC Out-of-State, 5601, §1.a.i.B: “An ICPC request and approval is required prior to . . . Sending an Indian child out-of-state if Children’s Administration (CA) has jurisdiction or the Tribe has jurisdiction and would like to request an ICPC. The Tribe must agree to follow the content of the ICPC and the receiving state/Tribe agrees to complete the ICPC process as a courtesy.”

ASFA, 42 U.S.C. §622(b): "Each plan for child welfare services under this subpart shall . . . (10) contain assurances that the State shall make effective use of cross-jurisdictional resources (including through contracts for the purchase of services), and shall eliminate legal barriers, to facilitate timely adoptive or permanent placements for waiting children;"

**1. ICPC applies to sending children between States. Under ICPC, Sending agency retains jurisdiction over a child sent to a receiving state. Under ICWA, 25 U.S.C. §1911(b), an Indian tribe can obtain transfer of jurisdiction of an Indian child from a state court, and when the tribe has accepted jurisdiction, the state case is dismissed.**

**2. Receiving State must do an evaluation of the proposed placement and approve it. Indian tribe has approved the placement of an Indian child in a home that meets the placement preferences of the ICWA, and then state worker in the receiving state disapproves the placement.**

**3. State social worker doing evaluation of home in receiving state vs. tribal social worker doing evaluation of proposed Indian preference placement.**

**4. When child is sent between states under the ICPC, Sending agency retains financial responsibility for services and payments. When Indian tribe accepts transfer of jurisdiction, responsibility for payments and services ends. In-state and out-of-state placements. Title IV-E contracts.**

The Indian Child Welfare Act became law on November 8, 1978, Pub.L.No. 95-608, 92 Stat. 3069, and became effective on May 7, 1979.

**1979 BIA Guidelines: Introduction**

"Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislative for them with respect to Indian child custody matters."

BIA Guidelines for State Courts; Indian Child Custody Proceedings, 44 Federal Register 67584 (Nov. 26, 1979).

BIA Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Federal Register 10146 (Feb. 25, 2015) (withdrawn).

BIA ICWA Regulations, 25 C.F.R. Part 23, §§ 23.2, 23.11, 23.101 – 23.144, 81 Federal Register 38,864 (June 14, 2016).

BIA Revised Guidelines for Implementing the Indian Child Welfare Act, December 12, 2016.

https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf

25 U.S.C. § 1912(a): “ Knows or Has reason to know that an Indian child is involved.” *In the Matter of L.D.*, Montana Supreme Court, March 27, 2018, 2018 MT 60: “Because ICWA imposes different standards depending on whether a child is an ‘Indian child,’ district courts must first verify the Indian or non-Indian status of a child prior to proceeding whenever the court has ‘reason to believe’ that the child is an Indian child as defined by ICWA.”

*Matter of L.D.*: "[T]he Department passively relied on the inaction of the Tribe and the assertions or beliefs of the parents that L.D. was not eligible for tribal membership. . . . this passive reliance was insufficient to satisfy the Department's ICWA burden to actively investigate further and ultimately to make formal inquiry with the Tribe for a conclusive determination of [child's] membership eligibility."

*Matter of L.D.*: "Like the Department's passive reliance on the parents' statements, the Court's reliance on Mother's stipulation or acquiescence that ICWA did not apply was insufficient as a matter of law to satisfy the Court's threshold duty to obtain a conclusive determination from an Indian tribe of tribal eligibility prior to proceeding . . .  when a reason exists to believe that the child may be an Indian child. . . . Only an Indian tribe can determine whether a child is a member or eligible for membership  when, as here, a reason exists to believe that the child may be an Indian child."

25 C.F.R. § 23.107 **How should a state court determine if there is reason to know the child is an Indian child.**

(a) State court must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether that participant know or has reason to know the child is an Indian child. Inquiry is at the beginning of any proceeding, and on the record. Parties must inform the court if they subsequently receive information that provides reason to know the child may be an Indian child.

25 C.F.R. §23.107(b): If there is reason to believe the child may be an Indian child, but not enough evidence, the court (1) must direct the agency or other party to work with the tribe or tribes in which the child may be a member or eligible for membership to verify whether the child is an Indian child; and (2) treat the child as an Indian child until it is determined on the record that the child is not an Indian child as defined by ICWA.

25 C.F.R. §23.107(c): Reasons to know a child may be an Indian child:

(1) Any party, the Tribe or agencies inform the court that the child is an Indian child;
(2) Any participant informs the court that it has discovered information indicating the child may be an Indian child;
(3) The child gives the court reason to believe he or she may be an Indian child.;
(4) The court is informed that the child's or parent's residence or domicile is on an Indian reservation or Native Alaskan 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 the child or either parent possesses tribal identification.

"Indian child" is defined at 25 U.S.C. §1903(4) as an unmarried person under 18 who 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.

Tribe has exclusive authority to determine whether a child is a member of or eligible for membership in that tribe.

Notice – 25 U.S.C. § 1912(a) technically required only in involuntary foster care and termination proceedings

Notice is likely required also in voluntary proceedings for several reasons, *see* 25 C.F.R. §23.124:

(1) Parties must state on the record in voluntary proceeding whether an Indian child is involved;
(2) Child's status as an Indian child must be verified on the record, which requires contact with the Tribe to verify (If parent requests anonymity, the Tribe must keep relevant documents and information confidential, but must still be contacted);

(3) The State court must ensure that the placement preferences of the ICWA, 25 U.S.C. §1915, are being followed, which likely involves contact tribe to see if preferential homes are available, and if tribe has modified placement preferences;

The Oklahoma Supreme Court in *Nomura* ruled that the notice in voluntary adoptions required under the State ICWA is consistent with purposes of ICWA.

Many "voluntary" adoptions are only voluntary as to the consenting mother, and rights of birth father are being involuntarily terminated, so notice is required under 25 U.S.C. §1912(a), especially in states where termination and adoption is combined in one proceeding. *See In re Adoption of T.A.W.*, 383 P.3d 492 (Wash. 2016) (ICWA applies to step-parent adoption seeking to terminate parental rights of non-custodial non-Indian parent)

Definition of Parent – 25 U.S.C. §1903(9): includes unwed father who has acknowledged or established paternity. *In the Matter of Adoption of B.B.*, 2017 UT 59 (Utah Sup. Ct., Aug. 31, 2017) – Holdings:

1. consistent federal standard for terms under ICWA required;
2. "acknowledgment" and "establishment" to be interpreted according to federal law and intent of Congress, not state law;
3. restrictive state paternity statutes undermine intent and purpose of ICWA and are preempted; and
4. reasonable everyday interpretation of common terms is consistent with intent of ICWA.

*Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013): ICWA does not apply to a birth father who has never had physical or legal custody of a child.

*In re Adoption of T.A.W.*, 383 P.3d 492 (Wash. 2016): ICWA applies to step-parent adoption seeking to terminate parental rights of non-custodial, non-Indian parent. ICWA applies to both Indian and non-Indian parents.

ICWA based on political relationship, not on race.

*See Nomura* (rejecting constitutional challenges to State and Federal ICWAs.

*Morton v. Mancari,* 417 U.S. 535 (1974) (disparate treatment of Indians based on political relationship under U.S. Constitution, not on racial status).