Section 9 SPECIAL ISSUES

LAWS CONCERNING PLACEMENTS

A CPS attorney should be familiar with legal restrictions impacting a child's placement in order to identify issues in a timely manner so that CPS, the court and all parties can work cooperatively to minimize disruptions in a child's placement and expedite permanency.

The Interstate Compact on the Placement of Children

The Interstate Compact on the Placement of Children (ICPC) is a compact enacted into state law by each state to regulate child placements across state lines.[1] The ICPC requires the agency in the state that is placing the child (sending agency) to notify and receive approval from the state where the proposed placement is located (receiving state.)[2]. The Compact also makes the sending state responsible for any placement expenses not otherwise covered and mandates that the sending agency accept the child back into care if the placement breaks down. Federal regulations binding on the states have been adopted pursuant to the Compact.[3]

In order to expedite ICPC placements, federal law now requires that states complete home assessments requested under the ICPC within 60 days of receipt of a request as a condition of federal funding.[4]

TIP:
Efforts are underway to have all the states enact a new Interstate Compact for the Placement of Children. Texas has not yet enacted the new ICPC, nor have most states as of summer 2009. For updated information about the status of the new ICPC, consult the website of the Association of Administrators of the Interstate Compact on the Placement of Children at www.icpc.aphsa.org.

Role of CPS Attorney

The CPS attorney should be aware of the general application of the ICPC and alert the court and other parties to the requirements of the process if an out-of-state placement is proposed.

How Does It Work?

When an out-of-state placement is proposed for a child in CPS conservatorship, the caseworker completes an ICPC 100-A form and submits it to state office for forwarding

[1] TEX. FAM. CODE CH. 162, SUBCHAPTER B.
[2] TEX. FAM. CODE §162.102, Art. III.
[3] See Practice Guide, SECTION 11 TOOLS, ICPC.
[4] 42 U.S.C. §671(a)(25), (26).

to the receiving state to begin the approval process.[5] The receiving state must evaluate the proposed placement by conducting a home assessment.

When Does the ICPC Apply?

The ICPC generally applies when CPS places any child in conservatorship in another state, except:

- Placement with a non-custodial parent, as long as the Texas court does not have or seek evidence that the parent is unfit and does not retain jurisdiction over the child after the placement;[6]
- Placement *by a child's parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or guardian if the placement is with such relative or non-agency guardian*, as long as the person responsible for the placement already had the legal right to plan for the child and such right had not been terminated or otherwise limited;[7]
- Placement of a mentally ill or developmentally disabled child in a facility for acute short-term treatment for stabilization in an emergency situation.[8]

Unfortunately, the current ICPC does not address all issues and does not offer clear guidance on a number of common practice issues. In these instances, the best practice is to resolve any ambiguity in favor of the result which gives the child in question the best opportunity for both safety and permanency.

Ways to Expedite ICPC

Despite the new federal 60 day time limit for home assessments by the receiving state, waiting for ICPC approval continues to be a major source of frustration in child welfare litigation. While ultimately every approval for placement under the ICPC depends on the conduct of the receiving state, the reality is that the sending state (Texas CPS in these situations) has more to gain by pushing for quick home assessments. The CPS attorney can encourage the caseworker to take the following steps to minimize delay in an ICPC case:

1. Obtain the complete names, addresses, social security numbers and fingerprints of the proposed out-of-state placement up front and request criminal history and child abuse and neglect histories as soon as possible upfront. This will eliminate any placement that is ruled out based on a criminal or abuse/neglect background before time is invested in a full study;
2. Verify that the CPS Form 2260 (also known as ICPC 100-A) and all supporting documents are promptly submitted to the central ICPC office in Austin;[9]

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[5] CPS HB Section 9200.
[6] TEX. FAM. CODE §162.102, Art. VIII; Regulation No. 3, 6 (b).
[7] TEX. FAM. CODE §162.102, Art. VIII; Regulation No. 3, 6(a).
[8] Regulation No. 4, 2 (a); placements of mentally ill or developmentally disabled children in a facility for treatment and care of chronic conditions, including in a residential treatment center, are subject to the ICPC Regulation No. 4, 2 (b)-(d).
[9] Forms are available on the DFPS Intranet or from the regional ICPC coordinator.

3. Anticipate, document and be prepared to explain:
    - Who will provide any monthly payments and/or medical assistance; and
    - Who will provide any specialized services or support the family may need.

Particularly if a child or sibling set has high level medical, educational or psychological treatment needs, planning ahead to address these needs is essential.

ICPC Regulation 7 Motion & Order for PRIORITY HANDLING in Certain Cases

In limited circumstances, the attorney for CPS can file a motion asking that the Texas court designate the ICPC request for priority handling by the receiving state. This is only an option if the court can make the following findings:

- A completed DFPS Form 2260 (ICPC 100-A form) with supporting documentation has been pending with the receiving state for more than 30 business days and no notice approving or denying the placement has been received;
- The proposed placement is a relative with whom the child could be placed under Article VIII(a) by another such relative without ICPC approval; *and* one of the following:
    - The child is under age two;
    - The child is in an emergency shelter; or
    - The court finds the child has spent a substantial amount of time in the home of the proposed placement.[10]

If the court makes the above findings, the court may grant a Regulation 7 order as long as the child is not being placed in licensed foster care or for adoption; and the child is not already in the receiving state.[11]

A Regulation 7 order should be sent to the Texas case worker for the child within two (2) business days after the judge signs it. A priority ICPC packet should also include CPS Form 2276 (ICPC Form 101).

If the Receiving State Does Not Approve the Placement

If the receiving state does not approve the placement, CPS may not recommend the placement to the court.[12] Placement in violation of ICPC is a violation of law.[13] If the child is ordered to be placed in a placement that is not approved, the receiving state is not obligated to and generally will refuse to monitor the placement.

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[10] Regulation No. 7, 6 (a).
[11] Regulation No. 7, 2.
[12] CPS HB 9220.
[13] TEX. FAM. CODE §162.102, Article IV

Contact Information for ICPC

The mailing address for the Texas Interstate Compact Office (TICO) is:

TDFPS
Texas Interstate Compact Office
Attn: Deputy Compact Administrator
P.O. Box 149030 MC W-223
Austin, TX 78714-9030

Express mail can be sent to:

Texas Interstate Compact Office
Attn: Deputy Compact Administrator
701 W. 51st St. MC W-223
Austin, TX 78751

Gina Gelnett
Deputy Compact Administrator
(512) 438-5141

Restrictions on the Use of Race, Ethnicity & National Origin

Both federal and state laws limit the use of a child's race, ethnicity or national origin, or that of a prospective foster or adoptive parent, in the placement process.

Federal Law

Federal law, the Multiethnic Placement Act, as amended by the Interethnic Adoption Provisions ("MEPA-IEP")[14] prohibits a state from using race, color or national origin to deny a prospective foster or adoptive parent the opportunity to foster or adopt a child of any race, color, or national origin *or* from delaying or denying a child's foster or adoptive placement on this basis. A violation of MEPA-IEP is deemed to be a violation of Title VI of the Civil Rights Act and can result in loss of federal funds, injunctive relief and possible monetary damages.[15]

Federal policy interpreting MEPA-IEP makes clear that consideration of race, color or national origin in the placement process must be extremely limited, based on well-

[14] 42 U.S.C. §1996b. The law applies to "any state or other entity that receives funds from the federal government and is involved in some aspect of adoptive or foster care placements," *A Guide to the Multiethnic Placement Act of 1994 as amended by the Interethnic Adoption Provisions of 1996*, ("MEPA-IEP Guide"), American Bar Association Center on Children and the Law (1998) p. 9 (footnote omitted).
[15] MEPA-IEP Guide, at p. 16.

documented, narrowly tailored circumstances.[16] Cases subject to the Indian Child Welfare Act are, however, specifically exempt from MEPA-IEP.

State Law

Texas law governing use of race or ethnicity in CPS placements for foster care and adoption is more restrictive than federal law, providing:

- CPS may not deny, delay, or prohibit a foster or adoptive placement of a child in foster care because the department is attempting to locate the family of a particular race or ethnicity *unless an independent psychological evaluation specific to the child indicates that placement of the child with a family of a particular race or ethnicity would be detrimental to the child*;
- CPS may not remove a child from a foster family that is of a race or ethnicity different from that of the child *unless an independent psychological evaluation specific to the child indicates that continued living with a family of a particular race or ethnicity would be detrimental to the child;*
- CPS may not remove a child from foster care with a family that is *o*f a race or ethnicity different from that of the child for the sole reason that continued foster care with that family may strengthen the emotional ties between the child and the family or increase the potential of the family's desire to adopt the child; and
- A state employee violating these provisions is subject to immediate dismissal.[17]

CPS policy provides for limited exceptions to ensure, for example, that a child in a transracial placement subjected to abuse or neglect may be removed, even though the required psychological evaluation is not available because the reason for the removal is unrelated to race.[18]

[16] "The 1997 and 1998 HHS Guidance indicate that in exceptional, non-routine circumstances, a child's best interests may warrant some consideration of need based on race or ethnicity. The use of these factors in exceptional circumstances as part of an individualized assessment of a child's best interest would not violate the "strict scrutiny" test found in the relevant constitutional and Title VI case law." MEPA-IEP Guide, *supra*, at p. 9-10 (footnotes omitted).

[17] TEX. FAM. CODE §264.108 [foster care placement]; TEX. FAM. CODE §162.308 [adoptive placement].

[18] CPS HB 6314 and Appendices 6311, 6311-A, 6311-B and 6311-C.

BABY MOSES

What is the Baby Moses Law?

The statutes referred to as the Baby Moses law were enacted in 1999 to encourage parents to abandon infants in a safe environment.[19] The nickname comes from the ancient tale of baby Moses, who was placed in a wicker basket in the Nile River by his mother to save him from certain death. This statutory scheme serves as an exception to the law that permits CPS intervention in response to child abandonment.

Authority

TEXAS FAMILY CODE §161.001
TEXAS FAMILY CODE, CHAPTER 262, Subchapter D
TEXAS FAMILY CODE §263.407
PENAL CODE §22.041
CPS Handbook Sections 2361-2363.3

When Does the Baby Moses Law Apply?

The general law against child abandonment that requires a full investigation and an attempt to identify the parents[20] does not apply if the terms of the Baby Moses statute are met. An abandoned infant meets the criteria for a Baby Moses case if the infant:

A DEIC provider is:

- an emergency medical services provider;
- a hospital; and
- a child-placing agency licensed by DPFS that:
    - agrees to act as a DEIC provider, and
    - has on staff a licensed registered nurse or licensed emergency services provider.[21]

CPS defines a harmed infant as one that:

- appears to have been abused or neglected; or
- has a positive toxicology screen, and other factors (such as the condition of the child) indicate that harm resulted from exposure to alcohol, drugs, poisons, or other substances.[22]

The law does not specifically require that an infant be delivered to a *person* at a DEIC. However, if an infant is abandoned at a DEIC provider in a manner that causes harm to

[19] TEX. FAM. CODE Chapter 262, Subchapter D.
[20] TEXAS PENAL CODE, §22.401(h)
[21] TEX. FAM. CODE §262.301
[22] CPS Handbook, Section 2361.1.

the infant or exposes the infant to serious risk of harm, that may impact whether the case is treated as a Baby Moses case. This is consistent with the goal of the legislation, which is to promote safe delivery of a child that might otherwise be abandoned in an unsafe manner.

EXAMPLE

If a newborn were found swaddled in a blanket in a basket left just steps away from a DEIC's main door, the case would be handled as a Baby Moses case, assuming all other criteria were met. If that same newborn were instead left on a bench more than 50 feet from and not visible from the DEIC entrance with only a diaper on at 2 a.m. on a night when temperatures dipped to 40 degrees, the case would probably be investigated as a standard child abuse case .

When a child is abandoned immediately after being born in a medical facility, CPS will consider the case a Baby Moses case if:

- the case meets the general criteria;[23]
- the mother indicates in some direct manner that she is unwilling to parent the baby; and
- there is no presumed father.[24]

If the criteria for a Baby Moses case are not met, DFPS handles the case as it would any other abandonment case by reporting the matter to law enforcement, doing a thorough investigation, including diligent search efforts to locate parents and relatives of the child.[25]

Removal

When a child is delivered to a DEIC provider, the provider has no legal duty to detain or pursue the parent and may not do so unless the child appears to be abused or neglected.[26] The DEIC provider has no legal duty to ascertain the parent's identity and the parent may remain anonymous; however, the parent may be given a form for voluntary disclosure of the child's medical history.[27]

After a DEIC provider has possession of the child, the provider must notify DFPS no later than the close of the first business day after taking possession of a child under this provision.[28] DFPS then takes custody of the child.[29] Once DFPS assumes custody of the

[23] With a newborn in the same hospital where child was delivered, the baby's age is not an issue, so the primary issues are the mother's intent, whether the child has been harmed (such as by prenatal drug exposure) and whether there is a presumed father identified in the hospital record.
[24] CPS Handbook, Section 2361.
[25] *Id.*
[26] TEX. FAM. CODE §263.302(b).
[27] *Id.*
[28] TEX. FAM. CODE §262.303(a).
[29] TEX. FAM. CODE §262.303(b).

child, DFPS must take action as required by §262.105, and file a petition for an emergency removal.[30]

Rebuttable Presumptions

Several rebuttable presumptions apply if DFPS takes custody of a child under the Baby Moses law, including:

- a person who delivers a child to a DEIC provider pursuant to Subchapter D, Chapter 262, is the child's biological parent;
- the parent intends to relinquish parental rights and consents to the termination of parental rights with regard to the child; and
- the parent intends to waive the right to notice of the suit terminating the parent-child relationship.[31]

A party can seek to rebut any of the above presumptions at any time prior to the parent-child relationship being terminated.[32]

If a person claims to be the parent of the child before a final order terminating parental rights, the court shall order genetic testing for parentage determination unless parentage has previously been established.[33]

It is also important to note that in a Baby Moses case DFPS is not required to conduct a search for the relatives of the child.[34]

Confidentiality

There are several confidentiality laws that apply specifically to Baby Moses cases:

- all identifying information, documentation or other records regarding a person who voluntarily delivers a child to a DEIC provider is confidential and not subject to release to any individual or entity with the one exception listed next;
- any pleadings or other documents file with a court are not public information for purposes of the Public Information Act and may not be released to a person other than to a party in a suit regarding the child, the party's attorney, or an attorney ad litem or guardian ad litem appointed in the suit; and
- the court shall close the hearing to the public unless the court finds that the interests of the child or the public would be better served by opening the hearing to the public.[35]

Termination

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[30] TEX. FAM. CODE §262.304.
[31] TEX. FAM. CODE §263.407(a).
[32] TEX. FAM. CODE §263.407(a-1).
[33] TEX. FAM. CODE §263.407(b).
[34] TEX. FAM. CODE §262.309.
[35] TEX. FAM. CODE §262.308.

If a person appears and claims to be a parent and the court orders genetic testing for parentage, the court shall order the petition for termination in abeyance for a period not to exceed 60 days pending the results of the genetic testing.[36]

There are two requirements that have to be met prior to the court rendering a termination order in a Baby Moses case. DFPS must show the court that DFPS has:

- verified with the National Crime Information Center and state and local law enforcement agencies that the child is not a missing child; and
- obtained a certificate of the search of the paternity registry not earlier than the date DFPS estimates to be the 30th day after the child's date of birth.[37]

Usually it is the mother who delivers an infant to a DEIC provider. For the parent who delivers a child to the DEIC provider, there is a specific ground to terminate found in §161.001(S) that states the court may terminate if the court finds that the parent voluntarily delivered the child to a DEIC provider under Section 262.302 without expressing an intent to return for the child.

For the father of the child, the termination ground will probably be found in §161.002, Termination of the Rights of an Alleged Biological Father. In all likelihood, his identity and location will be unknown; therefore, his rights could be terminated based on his failure to register with the paternity registry.

[36] TEX. FAM. CODE §263.407(b).
[37] TEX. FAM. CODE §263.407(c).

CITIZENSHIP & IMMIGRATION STATUS

If a child in DFPS conservatorship is not a U.S. citizen, there are several legal issues that may need to be addressed. Many resources exist to aid in resolving issues related to a child's citizenship or immigration status. The primary challenge is to identify those cases where these issues may arise and to be aware of the resources available so that all appropriate legal steps can be taken. In each region, a Regional Attorney is designated as responsible for immigration issues. It is important, however, that all attorneys for the agency are aware of the importance of verifying child's citizenship and immigration status in every case. Identifying a child as needing immigration assistance can make a huge difference in a child's future.

What is a child's citizenship or immigration status?

The vast majority of children in DFPS care are citizens by virtue of birth in the U.S., a status that is easily confirmed with a birth certificate. For the relatively small number of children in foster care who are not U.S. citizens, it is critical to determine what the child's immigration status is.[38] The DFPS Regional Attorney responsible for immigration issues can assist in making this determination. The most important thing to remember is that if a child in DFPS foster care is not either a U.S. citizen or a permanent resident (holder of a "green card"), that is an issue that should be identified and monitored on an ongoing basis as the case progresses.

TIP:
Information reported from family members or friends about a child's citizenship or immigration status is always helpful, but a child's status cannot be confirmed without the appropriate documents. Similarly, it is not safe to assume every child born to a U.S. citizen overseas is a U.S. citizen. While many such children are entitled to U.S. citizenship, assuming that a child is a citizen can mean that critical legal work will be overlooked.

Why does a child's citizenship or immigration status matter?

Children and families are entitled to child welfare services without regard to citizenship or immigration status.[39] Access to most other government benefits (including federal foster care funding), however, is restricted based on a child's citizenship and immigration status.[40]

[38] For a description of the most common citizenship and immigration status categories, See Practice Guide, SECTION 11 TOOLS, Citizenship & Immigration, Who's Who.
[39] 8 U.S.C. §1611(b) (1) (D); TEX. FAM. CODE §264.004(c).
[40] 8 U.S.C. §1611(a).

Most important, the agency must determine every child's immigration status in order to identify children who need to apply for Special Immigrant Juvenile Status (SIJS).[41] This is a special law which allows most undocumented children in foster care who cannot be reunified with a parent to become lawful permanent residents by first obtaining SIJS.[42] It is critical that *every* child in DFPS care who may be SIJS eligible be identified, because most undocumented children have no other way to get permanent resident status and, once a child leaves foster care, the opportunity for SIJS is lost.

Why is getting Special Immigrant Juvenile Status (SIJS) important?

Whether a child will be adopted or will age out of care as an independent youth, having permanent resident status will improve a child's options immeasurably. Permanent resident status enables a child to work, to live without the threat of removal (deportation), to access some government benefits and eventually, to apply for U.S. citizenship.

If an undocumented child will be adopted, obtaining permanent resident status while in DFPS care will usually enable a child to obtain U.S. citizenship *immediately* at the time of consummation of the adoption.[43] Otherwise, an adoptive family must file an immediate relative petition and apply for permanent resident status for a child, and the child won't be eligible for U.S. citizenship until the child is both 18 years old and has been a permanent resident for five years.

Similarly, if a child will age out of foster care, the sooner the child obtains permanent resident status, the sooner he or she will be eligible to apply for U.S. citizenship. At age 18 an otherwise eligible youth who has been a permanent resident for at least five years can apply to become a naturalized citizen.[44] Whether a child will be adopted or will live independently after leaving foster care, U.S. citizenship gives a child the best access to government benefits. Particularly for children and youth with disabilities, obtaining U.S. citizenship can be critical to ensure access to essential benefits.

How does a foster child apply for SIJS?

Effective March 23, 2009, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("WWTVPR") made some changes to the SIJS law.[45] Traditionally, DFPS could not apply for SIJS for a child until the family court determined that reunification was no longer viable, which required that CPS show that reunification was not viable with either parent. As amended, a child is SIJS eligible if:

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[41] A SIJS guide, "Special Immigrant Juvenile Status For Children Under Juvenile Court Jurisdiction," is available from the Immigrant Legal Resource Center, www.ilrc.org.
[42] 8 U.S.C. §1101(A) (27) (J).
[43] Child Citizenship Act of 2000, P.L. 106-395.
[44] See 8 U.S.C. §1427.
[45] P.L. 110-457 enacted December 23, 2008. SIJS regulations, at 8 C.F.R. §204.11 will likely be revised to conform in the near future.

- The child is declared a dependent of the court or is placed in the custody of a state agency;[46]
- The court finds reunification with *one or both parents* is not viable due to abuse, neglect or abandonment or a similar basis under state law; and
- The court has finds it is not the child's best interest to be returned to the child or parent's country of nationality or last habitual residence.

At the earliest moment that CPS can assert that reunification with one or both parents is not viable, the attorney for DFPS can make a motion in the family court seeking the specific findings listed above that are a prerequisite to applying to the U.S. Citizenship & Immigration Services ("USCIS") for SIJS.[47] This family court order must be filed with the SIJS petition.

The caseworker and regional attorney generally handle preparation and filing of the SIJS petition and application for obtain permanent resident status. The process should be started as soon as possible after a child becomes eligible. Getting SIJS as quickly as possible will avoid any delay in permanency resulting from a child's undocumented status, get the child on track for U.S. citizenship if that is desired and increase the child's access to government benefits once permanent resident status is obtained. The caseworker can minimize the delay by requesting a birth record as soon as possible for any undocumented child who doesn't have one. The WWTVPR now requires that immigration authorities adjudicate SIJS cases in 180 days, so once this new requirement is implemented, that will alleviate one source of delay in many cases.

Some youth with certain delinquency or criminal records, substance abuse or serious mental health issues may be ineligible for SIJS, although the WWTVPR did expand the grounds of inadmissibility that do not apply to SIJS applicants. [48] Regardless of any potential basis for inadmissibility, *every* undocumented foster child should be assessed for SIJS eligibility to ensure no eligible child misses this extraordinary opportunity to obtain permanent resident status. Regional attorneys designated to handle immigration issues are trained on SIJS and consult with experienced immigration practitioners as needed when complex issues of inadmissibility arise.

[46] As amended, the law also includes a child in the custody of a private individual or entity, but the focus of this article is on children in CPS conservatorship. See WWTVPR §235(d)(1)(A).
[47] See Practice Guide, SECTION 11 TOOLS, Citizenship & Immigration, SIJS Motion and Order.
[48] WWTVPR §235(d) (3).

TIP:
Every effort should be made to file for SIJS at the earliest possible moment, as unresolved immigration issues can stall permanency efforts and delay access to essential benefits. However, the problem of youth aging out of care before completing the SIJS process should become a much more rare occurrence. Now that a child can apply earlier (when reunification with only one parent is not viable, as opposed to both parents), the SIJS process can be started much earlier. In addition, new provisions for extending court jurisdiction over a youth in certain circumstances should make the SIJS process more secure for older youth with a SIJS case pending.[49] Last but not least, DFPS has new resources to devote to this population.[50]

What does the child, the caseworker, the child's attorney or GAL need to know about the SIJS process?

A document entitled Understanding the Risks and Benefits of Applying for Special Immigrant Juvenile Status is available, in English and Spanish, in the CPS Handbook, Appendix 6585. A publication of the Immigrant Legal Resource Center, *Living in the United States, A Guide for Immigrant Youth* is also a good resource for information about SIJS and related issues. [51]

When is notice to the foreign consul necessary?

When a child who is not a U.S. citizen comes into DFPS custody, the Vienna Convention on Consular Relations requires that notice be given to the foreign consul.[52] This duty applies regardless of the child's immigration status in the U.S., unless child is a dual citizen and in that case, no notice is required. In all other cases, whether a foreign citizen child is undocumented or has permanent resident or some other status, DFPS must give notice to the foreign consul when we take custody of a child.

With a form letter for consular notification[53] and the contact information for foreign consulates, the mechanics of giving notice is simple. For cases involving Mexico, consult the list of the Consulates of Mexico in Texas and for all other countries, the U.S.

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[49] TEX. FAM. CODE §263.602, as amended by H.B. 704, 81st Reg. Sess., effective May 23, 2009.

[50] Three new positions designed to support the SIJS process were approved during the 81st legislative session.

[51] See www.ilrc.org to download (English or Spanish version).

[52] Article 37 of the Vienna Convention on Consular Relations (entered into force for the United States December 24, 1969; Art. 37, 21 U.S.T. 77) requires:

> *If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty..... (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments.*

[53] See Practice Guide, SECTION 11 TOOLS, Citizenship & Immigration, Letter to Foreign Consulates, or in the CPS intranet forms, Form 2650.

State Department website lists contact information for foreign consular offices in the U.S..[54]

Giving notice to the consul does not confer substantive rights on the consul, although the consul may seek standing from the family court. In addition to fulfilling the legal obligation, giving notice often enables DFPS to tap into valuable resources in a child's home country. A consular office may be able to assist in obtaining birth records, locate family members or arrange for a home study in the home country.

For questions about consular notification, contact the Office of General Counsel.

What if repatriation is the best option?

If a child who is a foreign citizen comes into foster care, there is always a possibility that the best permanent placement may be in the child's home country. As described above, as soon as CPS becomes aware that a child in substitute care is foreign-born, notice should be sent to the foreign consul. Whether CPS also initiates efforts to explore potential placements in the child's home country generally depends on many factors including the viability of reunification with one or more parents in the U.S., the child's ties to the home country, language ability, and similar considerations.[55] In weighing the option of a foreign placement, the following legal issues should be considered:

- Unless the child is a U.S. citizen, leaving the U.S. may adversely impact the child's immigration status in the U.S.; in particular, a child with permanent resident status may lose that status by taking up residence in another country;
- Leaving the U.S. voluntarily is not the equivalent of a removal or deportation under immigration law; and
- The jurisdiction of a Texas state court ends once a child is placed in another country; consequently DFPS, the court and all parties must be prepared to dismiss the legal case and rely on that country's child welfare protections laws and policies to address any continuing needs the child may have.

There are a number of possible resources for home studies or information about potential placements in a child's home country. For potential placements in Mexico, CPS Border Liaison staff work closely with counterparts within the Desarollo Integral de la Familia ("DIF"), the Mexican governmental agency responsible for child welfare functions.[56] For other countries, DFPS typically relies on a governmental agency within the foreign country or obtains a study through the International Social Services (ISS).[57]

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[54] See Practice Guide, SECTION 11 TOOLS, Citizenship & Immigration, Consulates of Mexico in Texas; Contact information for consular officials of other countries is available on the U.S. State Department website at: www.state.gov (See Index: Consular Offices in the U.S., Foreign).

[55] CPS Handbook 6583.

[56] To locate a DFPS Border Liaison, contact the DFPS Regional Attorney or call the DFPS Office of General Counsel at (512) 438-3121.

[57] See International Social Service www.iss-usa.org/.

Before recommending a placement in a foreign country, CPS must obtain a favorable home study, inform the court and all parties and request court approval.[58] In addition, a court must render an order approving any international travel before a foster child can leave the U.S.[59]

[58] CPS Handbook 6583.1.
[59] TEX. FAM. CODE §264.122.

INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act of 1978 (ICWA)[60] is a federal law that imposes special standards and requirements when a child welfare agency seeks to intervene to protect an "Indian child," as defined by statute.[61] The law was enacted to protect not only Indian children, but their families and tribes.[62] To this end, the ICWA affords important rights to both families and tribes, including the right to petition a court with competent jurisdiction to invalidate any action for foster care placement or termination of parental rights if key provisions of the Act are violated.[63]

Authority

Indian Child Welfare Act of 1978, 25 U.SC. §§ 1901-63
25 C.F.R. Part 23.
Department of the Interior, Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings.[64]
A summary of relevant case law follows this article.

Jurisdiction

Whether the family court or tribal court has jurisdiction over a case involving an Indian child depends on where the child resides, whether transfer to the tribal court is requested, and whether an exception to the mandatory transfer provision applies. If a case involves an Indian child, however, the state court proceedings must comply with the ICWA, whether or not the tribe intervenes or the case is transferred to a tribal court.

Exclusive Jurisdiction on the Reservation

If the child's residence or domicile is on the reservation, or if the child has been made a ward of the tribal court, the tribal court has exclusive jurisdiction, except when jurisdiction is otherwise vested in the state.[65]

Emergency Exception

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[60] 25 U.S.C. §1901 et seq. The ICWA applies to any child custody proceeding in which a non-Indian may obtain custody, but for purposes of this article, the focus is strictly on the impact of the law on child welfare decisions.
[61] 25 U.S.C. §1903(4).
[62] 25 U.S.C. §1902.
[63] 25 U.S.C. §1914.
[64] See Practice Guide, SECTION 11, TOOLS, Indian Child Welfare Act, for a copy of the Guidelines. The Guidelines are not legislative and are thus not binding, but they represent a significant interpretation of ICWA. *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 164 (Tex. App. —Houston [14th Dist.] 1995, orig. proceeding [leave denied].
[65] 25 U.S.C. § 1911(a).

When an Indian child who resides on a reservation is temporarily off the reservation and emergency removal or placement is necessary "to prevent imminent physical damage or harm to the child," the state child welfare agency may act despite the fact that the tribal court otherwise has exclusive jurisdiction.[66] In such circumstances, the state child welfare agency must act promptly to: (1) end the removal or placement as soon as it is no longer necessary to prevent imminent physical damage or harm to the child; and (2) move to transfer the case to the jurisiction of the tribe or return the child to the parents, as appropriate.

Concurrent Jurisdiction Off the Reservation

If the child's residence or domicile is not on the reservation, the tribal and state court have concurrent jurisdiction.[67] Even in this circumstance, however, there is a presumption of tribal jurisdiction in cases involving an Indian child.[68]

Mandatory Transfer to Tribal Court

On motion by a child's parent, Indian custodian[69] or tribe, transfer of a state court child custody case involving an Indian child to the jurisdiction of the child's tribe is mandatory, unless either parent objects, good cause is shown or the tribe declines to accept the case.[70]

Parental Veto of Transfer

A parent's objection (including a non-Indian parent's veto) is an absolute bar to transfer.[71]

Good Cause

The Guidelines suggest that there may be good cause to deny transfer to the tribal court if: the request is untimely; an Indian child over age 12 objects; necessary evidence could not be presented in tribal court without undue hardship; the parents of a child over age five are not available and the child has had little or no contact with the tribe or tribal members. The tribal socio-economic conditions or perceived adequacy of the tribal social services or judicial systems may not be considered in determining whether there is good cause to deny transfer to a tribal court. The burden of proving good cause is on the party opposing transfer.[72] The case law is not consistent in construing how "good cause"

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[66] 25 U.S.C. §1922.
[67] See 25 U.S.C. §1911(b).
[68] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).
[69] "Indian custodian" is defined in the ICWA as "any 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 such child." 25 U.S.C. §1903(6).
[70] 25 U.S.C. §1911 (b).
[71] 25 U.S.C. §1911(b).
[72] See BIA Guidelines, Rule C.3., *Determination of Good Cause to the Contrary*; *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d at 163.

should be analyzed. The only Texas case addressing what constitutes "good cause" rejects the use of a "best interest" analysis for this purpose because doing so defeats the purpose of ICWA by allowing Anglo cultural bias into the analysis and because best interest is relevant to placement, not to jurisdiction.[73]

When Does the ICWA Apply?

The ICWA applies to any "child custody proceeding" involving an "Indian child," if the court "knows or has reason to know that an Indian child is involved."[74]

Child Custody Proceedings

For foster care placement, termination of parental rights, pre-adoptive and adoptive placements are subject to ICWA. ICWA does not apply to most juvenile delinquency actions; nor does it apply to custody actions in divorce or separation proceedings (unless custody may be awarded to a non-parent).[75]

Indian Child

An Indian child is an unmarried person under age 18 who is either a member of an Indian tribe or eligible for membership and the biological child of a member.[76] There are more than 500 federally recognized tribes, but tribes from Mexico and Canada, as well as some U.S. tribes, are excluded.[77]

Reason to Know Indian child Involved

ICWA does not assign responsibility for discovering a child's Indian status to a specific party,[78] but a proactive approach to identifying these cases minimizes the risk of a final judgment being subject to attack for failure to adhere to ICWA requirements.[79]

How Are Possible Indian Children Identified?

In every case, the question should be asked: could this child be an Indian child? A number of CPS forms are designed to get information from family members about a

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[73] *Yavapai-Apache Tribe v. Mejia* 906 S.W.2d at 169.
[74] See 25 U.S.C. §1912(a).
[75] See 25 U.S.C. §1903(1); BIA Guidelines, Rule B.3. *Determination That Placement Is Covered by the Act*, *and* B.3. *Commentary*.
[76] 25 U.S.C. §1903(4).
[77] See 25 U.S.C. §1903(8*)* ["Indian tribe" defined]*; In re* A.J., 733 A.2d 36 (Vt. 1999). For a current list of federally recognized tribes, See Bureau of Indian Affairs website, http://www.doi.gov/bia/ (select tribal directory) or other resources listed in Practice Guide, SECTION 11, Child Welfare Contacts, Indian Child Welfare Act.
[78] BIA Guidelines, B.5. *Commentary*, states that "[t]his section [on Notice Requirements] recommends that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian."
[79] The remedy for violation of key ICWA provisions is a petition to invalidate. 25 U.S.C. §1914.

child's possible Indian heritage.[80] To the extent that missing parents or other family members are found as a case progresses, the issue needs to be raised again, in order to avoid discovering that a case is subject to the ICWA too late in the proceedings.

If there is information that a child may be an Indian child, the best practice is to give the required ICWA notice, as detailed below, How to Give Notice. This satisfies the legal notice requirement if the child is an Indian child. The fact that a child has only a small amount of Indian blood, that a child's Indian relative is a distant one, or that a parent or grandparent was never enrolled as a tribal member does not resolve the question of whether an Indian child is involved. Only the tribe can make a membership determination.

When the ICWA notice is sent, you can also send a letter asking the tribe to confirm or deny the child's membership or eligibility for membership status.[81] This is not legally required, but may facilitate getting the necessary membership information more quickly. By giving a tribe as much information as possible about a child's family history and tribal connection and an opportunity to research the child's tribal status, CPS will have the best protection against any challenge based on failure to comply with ICWA.

The reliability of the information concerning a child's potential status as an Indian child, the tribe's response and the court's interpretation of the ICWA all play a role in determining whether the ICWA applies in a given case.[82]

Tribe Confirms Membership

Tribes have differing methods of establishing membership, and enrollment is not always required but a tribe's determination regarding the child's membership status is conclusive. [83]

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[80] Child Placement Resources Form (Form 2625); Family Information Form (Form 2626); Indian Child and Family Questionnaire (Form 1705); Indian Child Welfare Act Checklist (Form 1706) (all of these forms are available on the CPS intranet site; See also Practice Guide, SECTION 11, TOOLS, ICWA, for copies of the Child and Family Questionnaire and the Indian Child Welfare Act Checklist.

[81] See Practice Guide, SECTION 11, TOOLS, ICWA, Sample Membership Query Letter to Tribe.

[82] Compare divergent approaches taken by Texas courts to some evidence of a tribal affiliation without confirmation from the tribe. *In re R.R.*, 2209 Tex App LEXIS 2038 (Tex. App. — Fort Worth, March 19, 2009, no pet.) (evidence that grandmother was enrolled member and that tribe requested more information to determine children's status gave trial court reason to know child's Indian status and duty to ensure strict compliance with notice requirements before determining whether the ICWA applied); *In re R.M.W.,* 188 S.W.3d 831 (Tex. App.— Texarkana 2006) (no reason to know Indian children where DFPS gave notice to tribe but there was no evidence of children's tribal membership or eligibility); *Doty-Jabbaar v. Dallas County Child Protective Services*, 19 S.W. 3d 870, 874 (Tex. App.— Dallas 2000, pet. denied) (where caseworker previously notified tribe of proceedings to terminate appellant's parental rights, the agency acknowledged the child's status as an Indian child.)

[83] See BIA Guidelines, Rule B.1. *Determination That Child Is an Indian*. "The best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria." BIA Guidelines, B.1. *Commentary.*

Tribe Denies Indian Child status

If the tribe responds that a child is neither a member nor eligible for membership, this evidence can be submitted to the court with a request that the court find that the ICWA does not apply.

No Tribal Response

If the tribe does not respond to formal notice under ICWA, it is good practice to follow up with a telephone call to find out whether the tribe needs additional information or intends to respond. Even if the tribe does not respond to an inquiry about a child's Indian status, or responds without seeking to transfer the case or to intervene in the state court proceedings, the state court must follow ICWA if there is "reason to believe" that an Indian child is involved.

Scant, Unreliable Information

If information about a child's Indian heritage is scant or unreliable, it may be appropriate to ask that the trial court find that there is insufficient evidence to show that a child is an Indian child, and, thus ICWA does not apply. This strategy should only be used after verifying that the tribe has all available information about the family's possible tribal connection and has received the required ICWA notice. The decision to ask the court to find that ICWA does not apply should only be made after due consideration is given to the potential for an action to invalidate under 25 U.S.C. §1914 if an order is entered in violation of key ICWA provisions.

Existing Indian Family Doctrine

This is a judicially created exception to the ICWA based on the premise that if a child's parent does not have a social, cultural or political connection with an Indian tribe or the child has never lived in an Indian environment, ICWA should not apply. Although Texas courts have not addressed the issue, an increasing number of courts have rejected the existing Indian family doctrine[84] as contrary to the ICWA. Moreover, the tenor of ICWA decisions from Texas courts suggests this doctrine is not likely to be well-received in this state. "When, as here, an ICWA proceeding takes place in state court, rather than a tribal forum, the trial court should take great precautions to ensure the prerequisites of the ICWA have been satisfied."[85]

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[84] The Kansas Supreme Court provides a thorough analysis of the positions of various state courts, the statutory scheme and U.S. Supreme Court precedent in this decision rejecting the Indian family law doctrine. *In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

[85] *Doty-Jabbaar v. Dallas County Child Protective Services*, 19 S.W. 3d 870, 877 (Tex. App. — Dallas 2000, pet. denied).

TIP:
Additional resources:
Indian Child Welfare Act Checklists, National Council of Juvenile and Family Court Judges, www.ncjfcj.org

The Indian Child Welfare Handbook—A Legal Guide to the Custody and Adoption of Native American Children, B.J. Jones, et al. (2d Ed 2008).

How to Give Notice

Giving notice under ICWA requires close attention to specific requirements governing the type of notice, the proper persons and entities who must be served, the type of service required and how compliance is demonstrated by filing proof of service with the court.[86]

The Notice of Pending Custody Proceeding Involving Indian Child must be sent to:[87]

- Every known parent(s);
- Indian custodian;
- Any identified tribe;
- The Secretary of the Interior; and
- The Bureau of Indian Affairs (BIA), Area Director. [88]

In addition**,** if the identity or location of a parent or Indian custodian is not known or the identity of the tribe cannot be determined, the Notice to Bureau of Indian Affairs: Parent, Custodian or Tribe of Child Cannot be Located or Determined[89] must be sent to:

- the Secretary of Interior; and
- the Bureau of Indian Affairs, Area Director.[90]

Parent

A non-Indian parent of an Indian child has the same rights as an Indian parent. An alleged father, however, must acknowledge paternity or be legally determined to be the father before being recognized as a parent for purposes of ICWA. [91]

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[86] *In re R.R.*, 2209 Tex App LEXIS 2038 (Tex. App. — Fort Worth, March 19, 2009, no pet.).
[87] See Practice Guide, SECTION 11, TOOLS, Indian Child Welfare Act, Notice of Pending Custody Proceeding Involving Indian Child.
[88] 25 U.S.C. §1912(a); 25 C.F.R. § 23.11(a).
[89] See Practice Guide, SECTION 11, TOOLS, ICWA, Notice to Bureau of Indian Affairs: Parent, Custodian or Tribe of Child Cannot Be Located or Determined.
[90] 25 U.S.C. §1912(a); 25 C.F.R. §23.11(b).
[91] 25 C.F.R. §23.2, "Parent means the biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. The term does not include the unwed father where paternity has not been acknowledged or established."

Indian Custodian

"Indian custodian" is broadly defined as "any 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 such child." [92]

More Than One Tribe

If the child has ties to more than one tribe, notice should be given to each tribe identified. Either the tribes or the court, but not CPS, can determine which tribe has the closer connection to the child.

Provide Family Information

With either ICWA Notice, attach a copy of the petition, the Indian Child and Family Questionnaire, or a family history or genogram with as much information as possible to aid the tribe in researching a child's status with a tribe. A child's family history is often key to a tribe's ability to confirm or deny a child's status as an Indian child.

Mailing

Notice must be sent either by registered or certified mail, and must include a request for a return receipt.[93]

Proof of Service

File the proof of service with the court and, unless a tribe opts out of the proceedings in writing, add the tribe (as well as the BIA Area Director and the Secretary of Interior) to the proof of service for all hearings notices, pleadings and other purposes for the remainder of the litigation.

Timing (10 + 20 days)

No "foster care placement or termination of parental rights" hearing can be held until at least ten (10) days after notice is received (subject to an additional 20 days if the parent/custodian/tribe requests additional time for preparation).[94] Notice of each subsequent hearing should be given, unless or until the tribe gives written notice that it no longer intends to be a party in the case.

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[92] 25 U.S.C. §1903(6).

[93] The statute requires notice by registered mail but the regulations permit certified mail. 25 U.S.C. §1912(a); 25 C.F.R. §23.11 (a) and (d). In either case, a return receipt must be requested. *In re T.M.,* 628 N.W. 2d 570 (Mich. App. 2001).

[94] 25 U.S.C. §1912(a).

To avoid a delay and potential challenge to the court's jurisdiction, experts recommend setting the initial hearing at least 30 days after notice is given (in effect, this assumes that a 20-day continuance is requested and granted).

Does the ICWA Notice Requirement Prevent an Emergency Removal?

No. The ICWA notice requirement does not prevent CPS an emergency removal if necessary "to prevent imminent physical damage or harm to [an Indian] child."[95] Although the statutory emergency provision refers to children domiciled or residing on the reservation, the authority for emergency removals of an Indian child is implicit and buttressed by the legislative history.[96]

Special Removal Affidavit

If the child's Indian status is discovered at the time of removal, an ICWA compliant affidavit should be filed at the earliest possible time (either at the emergency removal or at the 14 day adversary hearing).[97]

Special Setting Following Emergency Hearing

As soon as possible after a removal hearing for an Indian child, the agency must request that another hearing be set that meets all ICWA requirements for notice, standards and burden of proof for a foster care placement.[98] While the Guidelines permit temporary emergency orders for a maximum of 90 days (unless there are extraordinary circumstances),[99] the best practice is to get the child's tribe involved and set a hearing at the earliest possible date that accommodates the required 20-30 day notice period. At that hearing, the court must make the necessary findings to warrant a "foster care placement.[100] See **Conservatorship or Termination of Parental Rights of an Indian Child**, below**.**

Rights of the Parents, Indian Custodian and Tribe

The parents or an Indian custodian of an Indian child and the child's tribe have specific rights under the ICWA.

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[95] 25 U.S.C. § 1922.
[96] See 25 U.S.C. § 1922; Oregon v. Multnomah County, 688 P.2d 1354 (Ore. App. 1984).
[97] See Practice Guide, SECTION 11 TOOLS, Indian Child Welfare Act, Requirements for Emergency Removal of Indian Child; Sample Emergency Removal Affidavit.
[98] 25 U.S.C. §1912.
[99] BIA Guidelines, Rule B.7.(d).
[100] *In re S.M.H.*, 103 P.3d 976 (Kan. App. 2005) (following a temporary custody hearing on June 17, 2003, a hearing in compliance with ICWA should have been conducted by approximately September 17, 2003).

Appointment of Counsel

Appointment of counsel for indigent parents or Indian custodians is mandatory under the ICWA, whether the action is for removal and placement in foster care or for termination of parental rights.[101] Appointment of counsel for a child is discretionary, but state law requires appointment of an attorney *ad litem* for a child if DFPS seeks conservatorship or termination.[102]

Right to Review Records

In a proceeding for foster care or termination of parental rights, each party (including the child's tribe and custodian) has the right to review all reports and records filed with the court.[103] Even before a tribe intervenes or in the event a tribe elects not to intervene, it is good practice to share these records with the child's tribe if requested. Unless prohibited by confidentiality rules, sharing this information is often key to getting the most effective assistance from a tribe, in terms of locating resources, experts or vital family history information.

Right to Intervene

The tribe and the Indian custodian have an absolute right to intervene in the state court action *at any time* in the proceedings.[104] Either may intervene without the other. Intervention may be accomplished informally, by oral statement or formally.

Full Faith and Credit The ICWA requires that all courts give full faith and credit to the "public acts, records, and judicial proceedings" of any federally recognized Indian tribe regarding Indian child custody proceedings.[105]

Statutory Placement Preferences for Indian Child

Unless the tribe modifies the order of preference as permitted by law or the good cause exception applies, the ICWA mandates the following placements in order of preference**:**

Foster care or pre-adoptive placement:

- A member of the child's extended family;
- A foster home licensed, approved, or specified by child's tribe;
- An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- An institution for children approved by the tribe or operated by an Indian organization which has a program suitable to meet the child's needs.[106]

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[101] 25 U.S.C. §1912(b).
[102] TEX. FAM. CODE §107.012.
[103] 25 U.S.C. §1912(c).
[104] 25 U.S.C. §1911(c).
[105] 25 U.S.C. §1911(d).
[106] 25 U.S.C. §1915(b); BIA Guidelines, Rule F.2.

For an adoptive placement:

- A member of the child's extended family:
- Other members of the child's tribe: or
- Other Indian families.[107]

Tribe Can Modify

The tribe can by resolution alter the order of preferences for foster care, pre-adoptive, and adoptive placements. [108] The tribe's preference should then be followed as long as it is still the least restrictive setting appropriate to the needs of the child.[109]

Good Cause Exception

Good cause not to follow the statutory placement preferences may include the request of the biological parents or the child when the child is of sufficient age, the extraordinary physical or emotional needs of the child as established by expert testimony, or after diligent search, the unavailability of suitable families meeting the preference criteria.[110]

Conservatorship or Termination of Parental Rights of Indian Child

The ICWA differs significantly from the Texas Family Code in the required findings and procedures for both placement in foster care and termination of parental rights. The ICWA requires that an order that permits a child to be placed in foster care (in essence, a conservatorship order) be based on clear and convincing evidence rather than the state standard of preponderance of the evidence. The ICWA requires that an order for termination of parental rights be based on the standard of beyond a reasonable doubt. Under the ICWA in both circumstances there must be "qualified expert testimony" to support a finding that continued custody by the parent or Indian custodian is "likely to result in serious emotional or physical damage to the child" and that "active efforts" were made to provide remedial services and rehabilitative programs but were unsuccessful in preventing the breakup of the family.

In summary if the ICWA applies, the requirements are:

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[107] 25 U.S.C. §1915(a); BIA Guidelines, Rule F.1. and F.1. Commentary.
[108] 25 U.S.C. §1915(c) (tribe can alter placement preferences by resolution).
[109] 25 U.S.C. §1915(c).
[110] BIA Guidelines, Rule F.3. *Good Cause to Modify Preferences; In re Sara J.*, 123 P.3d 1017 (Alaska 2005).

Foster Care Placement

Clear and convincing evidence
Including qualified expert testimony that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and active efforts to provide remedial and rehabilitative services to prevent the breakup of the Indian family were made but proved unsuccessful.

Termination of Parental Rights

Evidence beyond a reasonable doubt:
Including qualified expert testimony that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and active efforts to provide remedial and rehabilitative services to prevent the breakup of the Indian family were made but proved unsuccessful.

25 U.S.C. §1912(d), (f).

Serious emotional or physical damage.

Evidence of poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior alone is not sufficient to show serious emotional or physical damage. There must be evidence of particular conditions in the home that are likely to result in serious emotional or physical damage to a specific child. Evidence of "the causal relationship between the conditions that exist and the damage that is likely to result" is essential. [111]

Active Efforts

There must be evidence of "active efforts" to alleviate the cause for removal, taking into account the prevailing social and cultural conditions and way of life of the Indian child's tribe.[112] "Active efforts" is not defined by ICWA, but requires more than the "reasonable efforts" required in a non-Indian case. When this standard applies, CPS staff should attempt to work with the tribe, the extended family, Indian social services, and individual Indian caregivers to tailor appropriate services for individual families.[113]

[111] BIA Guidelines, Rule D.3.(c).
[112] 25 U.S.C. §1912 (d); BIA Guidelines. Rule D. 2. *Efforts to Alleviate Need to Remove Child From Parents or Indian Custodians.*
[113] BIA Guidelines, Rule D.2. and D.2. *Commentary*.

TIP: PLEADINGS IN AN ICWA CASE

The 14th District Houston Court of Appeals reversed a termination decree in an ICWA case, holding that the trial court erred in failing to find 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" and in making findings of endangerment and best interest under the Texas Family Code. The court reasoned that because best interest under the Family Code ("an Anglo standard") conflicts with the ICWA (best interest in the context of the Indian culture), it was error to make findings on best interests and on the statutory grounds for termination. *In re W.D.H.,* 43 S.W.3d 30 (Tex. App. – Houston 2001, pet. denied). At least in this district, termination pleadings in an ICWA case should be limited to the statutory ICWA language, without parallel pleadings under the Texas Family Code.

In the remaining jurisdictions, it is probably equally risky *not* to plead and prove termination under the Family Code in addition to ICWA requirements. As the concurring opinion in *W.D.H.* points out, while the higher standard under the ICWA trumps, the Family Code and the ICWA should be applied concurrently, as other states have done. *See In re New York City Dept. Social Services v. Oscar C.,* 192 A.D.2d 280 (N.Y. App. 1993). One strategy for reconciling the two is to tailor findings under the Family Code to reflect that termination is in the best interest of the *Indian* child. This approach undercuts the conflict between the two statutory schemes perceived by the court in *W.D.H.*

Who is a Qualified Expert Witness?

The Guidelines suggest that a qualified expert will most likely be:

- A member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs relating to the family and childrearing practices;
- A lay expert with substantial experience in delivery of child and family services to Indians and extensive knowledge of the social, cultural, and childrearing standards within the child's tribe;
- A professional person with substantial education and experience in his or her specialty. [114]

Although the statute is silent as to the qualifications required of expert witnesses, in a majority of jurisdictions, courts do not interpret the law to require an expert with tribal cultural or child-rearing expertise where the grounds for removal or termination are not susceptible to cultural interpretation (fractured bones, sexual assault).[115] In Texas, the *Doty-Jabbaar* case found that a caseworker with nine and a half years' experience with the agency was not "any more qualified than any other social worker to testify in this

[114] BIA Guidelines, Rule D.4. *Qualified Expert Witnesses; See* Practice Guide, Section 11, Tools, Sample Questions to Qualify Expert Witness under ICWA.

[115] *In re L.G.*, 14 P.3d 946, 952-53 (Alaska 2000) (purpose of expert testimony is to avoid social workers with neither professional expertise nor familiarity with tribal culture sufficient to distinguish between different child-rearing practices and abuse or neglect; virtually all courts have concluded that if termination proceedings do not implicate cultural bias, expert need not have familiarity with cultural standards).

proceeding," and did not qualify as an expert under ICWA. [116] Significantly, *Doty-Jabbaar* involved an infant removed due to parents' substance abuse issues. While the court did not make this distinction, it is at least arguable that expertise in tribal cultural and family traditions is more relevant in this type of case than, for example, in a case of shaken baby syndrome or sexual abuse. The best strategy is to offer an expert who is familiar with the tribe's culture and parenting practices whenever possible, but always in a case where the basis for removal or termination is susceptible to cultural bias.[117]

Voluntary Relinquishment of Parental Rights

The ICWA imposes significantly different requirements for a valid voluntary relinquishment of parental rights, or "consent to termination of parental rights," as ICWA denotes the process, when an Indian child is involved than the Texas Family Code does.[118] The most significant difference is that a valid relinquishment to terminate parental rights must be in writing and be taken on the record before a judge.[119] In addition, the judge must attach a certificate that indicates that the terms and consequences of the consent were fully explained and that the parent or Indian custodian fully understood the explanation whether provided in English or by an interpreter. Consent to voluntary relinquishment of parental rights cannot be given until the eleventh day after birth of the child and must contain the child's name, birth date, the name of the child's tribe, any tribal affiliation and membership, name and address of the consenting parent or Indian custodian, and the name and address of the person or entity that arranged any adoptive or preadoptive placement. Unlike a relinquishment made to CPS under the Texas Family Code, a parent of an Indian child may withdraw consent for any reason at any time prior to entry of a final decree of termination or adoption. If consent is obtained by fraud or duress, a parent may withdraw consent and the court shall invalidate a decree of adoption up to two years after entry of the decree (or beyond the two years if otherwise permitted under state law).

Failure to Comply with the ICWA

Despite the best efforts of all parties, sometimes a child's Indian heritage and tribal status will not be discovered until long after a child is taken into CPS custody. When this happens, the only remedy is to give all parties proper notice immediately and conduct all future hearings and proceedings in conformance with the ICWA. Unless there was reason to know the child was an Indian child, orders entered prior to that time cannot be invalidated for noncompliance with the ICWA.[120]

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[116] *Doty-Jabbaar v. Dallas County Child Protective Services*, 19 S.W.3d 870, 877 (Tex. App. — Dallas 2000, pet. denied).

[117] See Practice Guide, SECTION 12 RESOURCES, Indian Child Welfare Act, for assistance in locating an expert witness, or contact the Office of General Counsel.

[118] 25 U.S.C. §1913(a).

[119] See Practice Guide, SECTION 11 TOOLS, Indian Child Welfare Act, Sample Consent to Relinquish Parental Rights.

[120] See *Oregon v. Tucker*, 710 P.2d 793 (Or. Ct. App. 1985).

If a child is not identified as an Indian child, it is virtually inevitable that key provisions of the ICWA will be violated. As a result, unless the evidence of a child's status was not accessible despite diligent efforts, any resulting judgment may be subject to an action to invalidate.[121] Consequently, it is essential that every effort be made to identify all cases subject to the ICWA at the earliest possible juncture.

Case Notes

U.S. Supreme Court

→ *JURISDICTION*
Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (Denial of tribe's motion to vacate adoption decree reversed on appeal, where both parents were members of the tribe and resided on the reservation, left the reservation prior to twins' birth and signed consent to adoption. Where children neither reside nor are domiciled on reservation, 25 U.S.C. § 1911(b) creates concurrent but presumptive tribal jurisdiction that requires the state court to transfer jurisdiction unless good cause is shown or tribe declines).

Texas Courts

→ *INDIAN CHILD STATUS*
In re R.R., 2209 Tex App LEXIS 2038 (Tex. App. — Fort Worth, March 19, 2009, no pet.) (Failure to give proper notice to tribes and Bureau of Indian Affairs precludes trial court from determining children's tribal status, where evidence that grandmother was enrolled member and tribe requested more information gave trial court reason to know of child's status).

In re R.M.W., 188 S.W. 3d 831 (Tex. App. — Texarkana 2006, no pet.) (Assertion of Indian heritage or blood without evidence of membership or eligibility for membership in an Indian tribe is insufficient to put court on notice of Indian child. Distinguishing *Doty-Jabbaar*, court notes DFPS did not admit child was Indian, and court made no finding that any children were tribal members).

Doty-Jabbaar v. Dallas County Child Protective Services, 19 S.W.3d 870 (Tex. App.— Dallas 2000, pet. denied) ("Although the record indicates the tribe failed to intervene in this case, the trial court was nonetheless bound to apply the provisions of ICWA when faced with evidence the mother was a member of an Indian tribe.").

→NOTICE
In re R.R., 2209 Tex App LEXIS 2038 (Tex. App. — Fort Worth, March 19, 2009, no pet.) (Strict compliance with specific ICWA notice requirements necessary to avoid exposing a termination decree to a petition to invalidate at some future date).

[121] 25 U.S.C. §1914.

→*ICWA APPLICATION*
Comanche Nation v. Fox. 128 S.W.3d 745 (Tex. App.–Austin 2004) (ICWA does not apply to proceeding to modify child conservatorship where no public or private agency is attempting to remove a child from an Indian family).

→ PLEADINGS
In re W.D.H., 43 S.W.3d 30 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). (Termination order reversed, citing failure to make requisite ICWA findings and error in making findings on best interests ("an Anglo standard") and statutory grounds for termination under the Texas Family Code. Father's whereabouts and status as a member of the Cheyenne-Arapaho tribe of Oklahoma were unknown when child was removed at birth and only after reunification was in progress and father was convicted of burglary did he advise the agency he was one-fourth Indian).

→*REASON TO KNOW INDIAN CHILD & QUALIFICATIONS OF EXPERT WITNESS*
Doty-Jabbaar v. Dallas County Child Protective Services, 19 S.W. 3d 870 (Tex. App. — Dallas, 2000, pet. denied) (Default termination judgment reversed for failure to adhere to ICWA requirements. Court rejected agency argument that the lack of evidence of child's Indian status precludes application of ICWA, citing the fact that the caseworker notified the tribe in a prior proceeding for termination of parental rights and again in this case, concluding "it is apparent [the agency] acknowledged the child's status as an Indian child … ." Without reference to the particular grounds for removal (cocaine exposed infant), court also found social worker's nine and a half year's experience insufficient qualification as ICWA expert, citing the lack of evidence of social worker's education and familiarity with Indian culture and childrearing practices).

→*JURISDICTION*
Yavapai-Apache v. Mejia, 906 S.W.2d 152 (Tex. App. Houston [14th Dist.] 1995, orig. proceeding [leave denied]). (Error to use "best interests of the child" and the children's lack of contact with the tribe to determine good cause to deny transfer of case to tribal court, Court approves use of a modified forum non conveniens doctrine, citing location of evidence and witnesses, to assess good cause and affirms denial of transfer. The court observes "when a state court keeps a case in a concurrent setting, it is still required to apply the relevant sections of the ICWA. In other words, avoiding tribal court jurisdiction does not render the ICWA inapplicable.").

Other State Courts

→*JURISDICTION*
In re C.L.J., 946 So.2d 880 (Ala. Civ. App.2006) (Order transferring case to tribal court reversed and remanded with directions to trial court to take evidence regarding knowledge or potential witnesses, hardship of travel, and to balance interests of witnesses, parent, child and the Chickasaw Nation before deciding whether to retain or transfer jurisdiction).

Navajo Nation v. Norris, 331 F.3d 1041 (9th Cir. 2003) (Denial of tribe's challenge to adoption of Indian child based on state court's lack of jurisdiction affirmed, based on finding that Indian parents were not domiciliaries of the reservation at the time of the child's birth and as such, state court had concurrent jurisdiction).

Willock Owens v. Willock, 690 So.2d 948 (La. App. 1997) (Tribe's exclusive jurisdiction requires full faith and credit be given to tribal order denying adoptive parents' request to resume custody of a child after previous adoptive mother revoked consent to subsequent adoption).

→ *PROOF OF INDIAN STATUS & NOTICE*

In re E.H., 46 Cal. Rptr. 3d 787 (Ct. App. 2006) (Mother's failure to repond to trial court's repeated exhortations that she disclose Indian heritage or to challenge social worker's report stating ICWA did not apply prompts court to observe "this is the most cynical and specious ICWA claim we have encountered." It is also worth noting that even on appeal, the mother did not assert that the children were subject to ICWA, but merely that the case should be reversed because the state agency and the court had made insufficient inquires about whether ICWA applied to these children).

In re Gerardo A., 14 Cal. Rptr. 3d 798 (Ct. App. 2004) (Error to find ICWA did not apply where child welfare department failed to share additional Indian heritage information with all proper tribes. Without available Indian family history information, neither the tribe nor the Bureau of Indian Affairs can investigate and determine if child is an "Indian child").

In re A.L.W., 32 P.3d 297 (Wash. App. 2001) (Tribal determination of membership is conclusive and it is error to make a finding contrary to letters from tribe documenting membership).

In re T.M., 628 N.W.2d 570 (Mich. App. 2001) (Substantial compliance with notice requirement is sufficient where agency prepared genealogy chart, gave written notice to all three Cherokee tribes, and not being aware of all federally recognized Apache tribes, gave notice to the BIA, which forwarded notice to BIA offices with Apache tribes in their jurisdiction. ICWA requires that the BIA be notified when a tribe is unknown, but does not require proof of response from tribes so notified).

In re O.K., 130 Cal. Rapt. 2d 276 (Ct. App. 2003) (Court does not have reason to believe child is an Indian child where the only evidence is paternal grandmother's vague and speculative statement that child's father "may have Indian in him.")

In re N.E.G.P., 626 N.W.2d 921 (Mich. Ct. App. 2001) (Where child's Indian heritage first known to trial court during termination trial, error to proceed without giving notice to tribe).

FAILURE TO COMPLY WITH ICWA

In the Matter of Erin G., 140 P.3d 886 (Alaska 2006), 127 S.Ct. 591 (2006, cert. denied) (Although ICWA contains no statute of limitations for a petition to invalidate , state law limiting challenge of adoption decree not based on fraud or duress to one year applied in the absence of explicit congresional intent to impose no time limit on such actions).

In re S.M.H., 103 P. 3d 976 (2005) (Order finding children in need of foster care reversed where notice to one tribe was forwarded to Cherokee Nation, but findings did not comply with ICWA).

In re Jonathan S. , 28 Cal. Rptr. 3d 495 (Ct. App. 2005) (Petition to invalidate termination order granted based on failure to give ICWA notice following father's statement that he is of Black Foot Indian heritage because notice to the tribe could result in a determination that child is an Indian child).

In re Enrique P., 709 N.W.2d 676 (Neb. App. 2006) (Failure to articulate ICWA standard on placing children into foster care subject to harmless error in face of evidence of mother's drug and alcohol abuse, mental health diagnoses, failure to complete outpatient substance abuse treatment, or parenting classes, to address domestic violence issues or to submit to drug testing).

→*ACTIVE EFFORTS TO REUNIFY*

A. A. v. Alaska, 982 P2d 256 (Sup. Ct. Ala. 1999) (By offering incarcerated parent classes state met "active efforts" to reunify standard).

In re Leticia V., 97 Cal. Rptr.2d 303 (Ct. App. 2000) (Active efforts does not require duplicative reunification services or the performance of idle acts; where parent failed to respond to substantial but unsuccessful efforts to address drug problem in one child's case, repeating those efforts for the same parent in another child's case is not required).

N.A. v. Alaska, 19 P.3d 597 (Alaska 2001) (Citing long list of efforts by child welfare agency as well as Dept. of Corrections to address parent's substance abuse and reunify family, court concludes state's effort were not only active, but exemplary).

→ *EXPERT WITNESS QUALIFICATIONS*

In re Sara J., 123 P.3d 1017 (Alaska 2005) (Experts with specialized knowledge of Native culture needed when social workers without expertise are unable to distinguish between the prevailing standards of the Indian community and actual abuse and neglect, but where issues of cultural bias are not implicated, expert need not have training in the cultural standards of the Indian community).

→ *PLACEMENT PREFERENCES*

In re Sara J., 123 P.3d 1017 (Alaska 2005) (Tribe's challenge to judgment finding good cause to permit adoption of three sibling Native children by non-native denied based on conclusion that "prevailing social and cultural standards of the Indian community" applies to the good cause determination only when a preferred placement's suitability is at issue but is not dispositive in determining whether there is good cause for deviating from preferences under 25 U.S.C. § 1915(d).

HEALTH CARE

Introduction

A heightened awareness of the need for children in foster care to have the benefit of an informed and consistent decision-maker for health care issues has resulted in a comprehensive statutory scheme governing medical consent for children in foster care. Legal and policy directives also provide guidance on complex and controversial issues impacting foster children including psychotropic medications, abortion, do not resuscitate orders and organ donation.

Court Designated Medical Consenter

Who Makes Medical Decisions for a Foster Child?

When a child is in foster care, with few exceptions, decisions about the child's medical care must be made by a "medical consenter" authorized by the court.[122] At the initial hearing where temporary orders are requested, DFPS requests that the court designate a medical consenter, most often the agency. The court may choose to appoint:

- DFPS; or
- an individual, such as a relative, foster parent or parent whose parental rights have not been terminated, if the court determines that doing so is in the best interest of the child.[123]

In the interim between removal by DFPS and the first court hearing, the caseworker, or a person designated by the caseworker may give medical consent for necessary medical care in most cases. Either a professional staff member at an emergency shelter or the live-in caretaker the child is placed with may be designated by the caseworker for this purpose.[124] DFPS cannot give consent during this interim period, however, if the reason for intervention is a family's objection to the medical care at issue. Whether a parent's objection is based on religious beliefs or adherence to non-traditional medicine, or some other basis, if DFPS seeks court intervention to obtain a blood transfusion, chemotherapy or other medical treatment, no treatment can be authorized without court approval.

In addition to the ongoing authority of the medical consenter, DFPS, the medical consenter, a parent whose rights have not been terminated, a guardian or attorney ad litem or foster care provider may petition the court at any time for an order related to the child's medical care.[125] This option may be used when there is disagreement or uncertainty about the appropriate medical decision for a child's care. A treating physician is also specifically authorized to file a letter with the court regarding any

[122] TEX. FAM. CODE §266.004(a).
[123] TEX. FAM. CODE §266.004(b).
[124] CPS HB Section 6521.
[125] TEX. FAM. CODE §266.004(e).

concerns about a child's medical care.[126] In addition, a child is entitled at any hearing under Chapter 263 to express to the court the child's views of the medical care being provided.[127]

Scope of Law and Exceptions

In the context of medical consent for a foster child, medical care is defined to mean all health care and related services provided by Medicaid. [128] This includes physical, dental, behavioral and allied health care (such as physical therapy, occupational therapy, speech therapy dietetic services). CPS provides caseworkers with extensive policy guidance on issues related to medical consent. [129]

The authority of a medical consenter does not include:

- Abortion (See **Abortion** below);
- Voluntary admission to an in-patient psychiatric hospital without the child's consent[130]
- Withholding or withdrawing life support (See **Do Not Resuscitate Orders** below); or
- Diagnostic tests and services for school age children with possible disabilities (*See* **Special Services for Children with Disabilities** below).

Emergency care: In the event a foster child needs emergency medical care and the medical consenter is unavailable care may be authorized by a physician.[131] This exception covers medical care necessary to prevent the "imminent probability of death or substantial bodily harm to the child or others," but does not apply to administration of psychotropic medication to a foster child at least age 16 who has been committed by a court to an in-patient mental health facility. Emergency medical consent in that situation is addressed in other law.[132]

DFPS Responsibilities if Designated as Medical Consenter

If DFPS is authorized by the court to serve as medical consenter, the agency must:

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[126] TEX. FAM. CODE §266.004(f).
[127] TEX. FAM. CODE §266.007(c).
[128] TEX. FAM. CODE §266.001(5); HUM. RES. CODE §32.003(4).
[129] CPS HB 6521:
- In General: 6521;
- Court Authorizes DFPS to Consent: 6521.1--6521.19;
- Responsibilities of Medical Consenter: 6521.2--6521.23;
- Court Authorizes Someone Other Than DFPS: 6521.3;
- Medical Consent by Youth: 6521.4--6521.45; and
- Emergency Medical Care 6521.5.

[130] TEX. HEALTH AND SAFETY CODE §572.001(c).
[131] TEX. FAM. CODE §266.009(a).
[132] TEX. HEALTH AND SAFETY CODE §574.101.

- **Designate a Medical Consenter and a Backup Medical Consenter**

Within 5 business days after DFPS is authorized by the court, the agency must notify the court, all parties and their attorneys of the name of the specific person designated to provide consent.[133] The child's caseworker files the designee form.[134] DFPS may designate as the medical consenter a DFPS employee; the child's foster parent; a relative serving as the placement for the child; the pre-consummated adoptive parent or the child's parent, if parental rights have not been terminated; or other individual. DFPS generally selects a person who is a live-in care provider for the child. For a child in an institution staffed only by shift staff, DFPS designates either the caseworker or another person with an appropriate on-going relationship with the child such as a relative or parent whose parental rights have not been terminated. House parents may be designated for a child in a cottage placement. In an emergency shelter, a professional staff member may be designated. DFPS also designates a backup medical consenter to be used if the named medical consenter is unavailable.[135]

- **Train Medical Consenter**

All medical consenters except parents must complete the DFPS approved medical consent training before serving as medical consenter. A parent may be ordered by the court to complete medical consent training, if the court deems it appropriate.[136]

- **Notify Parent of Significant Medical Conditions**

DFPS must make a reasonable effort to notify a parent who is not a medical consenter and whose parental rights have not been terminated about significant medical conditions of the child within 24 hours. "Significant medical conditions" are defined as an injury or illness that is life-threatening or has potentially long-term health consequences including hospitalization for surgery or other procedures except for minor emergency care. DFPS is not required to give notice if the parent has failed to provide current locating information and cannot be located, has signed an affidavit of relinquishment, has had parental rights terminated or has otherwise had rights to medical information restricted by a court.[137] For notice requirements concerning **Abortion,** *see* below.

- **Provide Medical Summary to Court**

At each hearing under Chapter 263 or more frequently if ordered by the court, the court reviews a summary of the medical care provided to the child since the last hearing. The caseworker is responsible for gathering specific detailed information in the medical care section of the appropriate court report that is submitted to the court and provided to all parties. The caseworker files this report with the court and sends a

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[133] TEX. FAM. CODE §266.004 (c).
[134] CPS Form 2096 Notification Regarding Consent for Medical Care (*See* CPS Intranet Forms/DFPS Forms/CPS/Child Placement/Medical Consent)
[135] See chart, CPS HB Section 6521.11.
[136] TEX. FAM. CODE §266.004(h)and CPS HB Section 6521.12.
[137] TEX. FAM. CODE §266.005 and CPS HB 6521.18.

copy to all parties at least ten (10) days before a scheduled hearing or at the hearing.[138] Note: While this statute allows the medical information to be submitted at the time of the hearing, many courts will expect the medical information to be provided in the court report at the time it is submitted to the necessary parties. It is recommended that only very new medical information be provided at the time of the hearing.

- **As Needed, a Medical Consenter's Identity May Be Kept Confidential**

If the department's designee for medical consent is a foster parent or a pre-consummated adoptive parent and it is determined to be inappropriate to reveal the parent's identity, then the CPS attorney may request that the court keep the identity confidential.[139]

- **Change the Medical Consenter**

When a child changes placement or a medical consenter does not perform adequately, the consenter may be changed. If DFPS is the court authorized medical consenter, the department may change the designee and provide notice to the court and all of the parties.[140] If the court appointed an individual as medical consenter, then a petition must be filed for a court order to change the medical consenter.

When the Court Designates Someone Other Than DFPS as the Medical Consenter

In some circumstances, the court may choose to designate someone other than DFPS as medical consenter for a foster child. In this situation, DFPS is to monitor the designee's actions and ensure that information about the child's medical status is communicated, as appropriate. DFPS retains the responsibility for notifying parents of significant medical conditions[141] and for obtaining updated medical status information for court reports to the extent it is feasible.[142]

If DFPS determines that the designated consenter fails to complete medical consenter training (if required), has not performed adequately as a medical consenter or is not acting in the child's best interest, DFPS may file a petition with the court to change the medical consenter or to request that the court enter an order concerning medical care of the child.[143]

Special Services for Children with Disabilities

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[138] TEX. FAM. CODE §266.007 (this section specifies in details the medical information the court will review).
[139] TEX. FAM. CODE §266.004(j).
[140] CPS HB 6521.19.
[141] TEX. FAM. CODE §266.005.
[142] TEX. FAM. CODE §266.007.
[143] TEX. FAM. CODE §266.004.

An attorney representing DFPS should be aware of federal laws governing services for children with disabilities as it impacts the authority of the medical consenter appointed under state law. Although diagnostic and special educational services may be construed by some as medical decisions, federal law governing consent for these services (including Early Childhood Intervention (ECI) assessments and evaluations, psychological testing for educational purposes, and other services that may be medically related) trump state law provisions for medical consent for foster children[144].

Federal law requires that any child in the conservatorship of the state under the age of three who may have a disability be referred to the state's Early Childhood Intervention (ECI) program for diagnostic services.[145] In Texas, ECI is housed within the Department of Assistive and Rehabilitative Services (DARS). When CPS takes custody of a child under three years of age, a caseworker is required to make a referral to ECI. Once ECI receives the referral, someone must consent to the assessment and evaluation. Federal law prohibits DFPS employees or employees of an institution where a foster child resides (e.g. an employee of an emergency shelter or a residential treatment center) from providing this consent. The consent must be provided by a parent, foster parent, relative with whom the child lives, or surrogate parent.[146] CPS may bring in the foster parent or relative with whom the child lives to consent, but if not it is the duty of the local ECI program to appoint a surrogate parent without missing assessment and evaluation timeframes.

Federal law also requires states to provide a free education to all children regardless of disability.[147] If a parent is unavailable to make these decisions regarding special education services for an eligible foster child, the independent school district (ISD) must appoint a "surrogate parent" for this purpose. Again, federal law prohibits the ISD from selecting either a DFPS employee or an employee of an institution where a foster child resides as a surrogate parent. However, a foster parent may be appointed as the surrogate parent. The surrogate parent for educational purposes may be the same person as the medical consenter but that will not always be the case.

Youths with Capacity to Consent

DFPS must ensure that before age 16, every youth in foster care is educated about informed medical consent, medical care and the option to request court approval to authorize the youth to give consent for his or her medical care. If a youth elects to exercise this option, DFPS notifies the youth's attorney ad litem or requests that the court appoint an attorney ad litem. The court determines whether the youth has capacity to consent to some or all medical care issues at a review hearing, on the court's own motion or on motion by the youth's attorney ad litem. If a youth authorized to give consent later refuses medical treatment, DFPS can petition the court for an order for appropriate

[144] Also note that these services do not meet the definition of medical care as defined in TEX. FAM. CODE §266.001(5) because they are not Medicaid services.
[145] 20 U.S.C.A. §1434.
[146] 20 U.S.C.A. §1401(23).
[147] 20 U.S.C.A. §1401.

medical care. The court can override the youth's decision if there is clear and convincing evidence that the medical treatment is in the youth's best interest, and either (1) the youth lacks capacity, (2) the failure to provide medical care will result in observable and material impairment to the growth, development or functioning of the child, or (3) the child is at risk of substantial bodily harm or of inflicting substantial bodily harm to others.[148] A youth authorized under this section to consent to medical care is *not* authorized to consent to abortion. *See* **Abortion** below.

Psychotropic Medications

Concerns about psychotropic drugs administered to children in the general population have prompted additional controls regarding psychotropic drugs for foster children to mitigate the unique hazards caused by frequently changing placements, doctors and caseworkers. Mandatory judicial review of a child's medication regimen at review hearings is designed to encourage greater scrutiny and monitoring of medications. To facilitate this process, CPS has provided psychotropic drug reference resources with basic information about common drugs and their usual dosages.[149]

Attorneys for the agency should be familiar with these requirements and ensure the caseworker is prepared to respond to questions regarding these issues. In addition, to the caseworker, the attorney may consult with the CPS regional nurse about issues related to psychotropic medications.

Health Passport

To ensure that specific medical information regarding foster children is maintained in a central repository, the state procured a web-based system known as the "Health Passport".[150] The Health Passport is not a comprehensive medical record or "electronic health record" as that term is commonly understood in the medical community. It is a limited compilation, composed primarily of Medicaid claims data, on children in DFPS conservatorship.

For children who were in the Medicaid system prior to entry into DFPS conservatorship, the claims data includes up to two years of claims preceding the child's entry into foster care. However, providers have up to ninety days to submit claims and consequently the data is not available in real time. The data includes immunizations, prescriptions, lab results, and other data that may be uploaded manually.

The system is accessible to DFPS caseworkers and certain other DFPS staff, medical consenters (including youth designated to consent to their own medical care), and health

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[148] TEX. FAM. CODE §266.010.

[149] See Practice Guide, SECTION 11 TOOLS, Medical Issues, *Common Psychotropic Medications used with Children and Adolescents* and *Criteria Indicating Need for Further Review of a child's Clinical Status.*

[150] TEX. FAM. CODE §266.006; detailed information about the health passport is available at: http://www.hhs.state.tx.us/medicaid/FosterCare_FAQ.shtml.

care providers. Not all portions of a child's record are accessible by all users. For example, non-DFPS medical consenters are not authorized to view the quarterly progress notes on a child's behavioral health. Guardians or attorneys ad litem, CASA volunteers, judges and other interested parties have no direct access to the system. Paper copies of the Passport should be provided by the worker to those parties. Finally, DFPS is legally obligated to provide a copy of the Passport to a youth who is aging out of care.[151]

Participation in Drug Research Programs

In extremely rare situations, with court approval, it may be appropriate for a foster child to enroll in a drug research program. Except for a parent appointed by the court to give medical consent, a medical consenter may not consent to enrollment or participation in a drug research program without a specific court order. Before issuing such an order, the court must appoint an independent medical advocate and adhere to a detailed statutory protocol to determine whether participation is in the child's best interest.[152] In an emergency, the court may issue an order before appointing an independent medical advocate. This section does not apply to drug research studies based only on medical records, claims data or outcome data. Extensive CPS policy addresses procedures to be used in this situation.[153]

Abortion

TEX. FAM. CODE, CHAPTER 33 governs consent for a minor seeking an abortion. The medical consent provisions detailed above do not apply in this circumstance. An attorney representing CPS does not initiate any legal action concerning abortion, but may be required to advise CPS on the issue in two circumstances:

- When a child in conservatorship wants an abortion; and
- When CPS has been appointed as guardian ad litem for a pregnant child who is not in the agency's conservatorship.

Child in CPS Conservatorship

Neither the CPS nor the SAPCR court can consent to or issue an order permitting an abortion for a child in agency conservatorship. When the issue arises, CPS staff should be directed to review the extensive policy on this issue.[154] Salient points for the attorneys representing the agency to be aware of are:

- The medical consenter has no authority to consent to an abortion.
- A parent (if no managing conservator or guardian of a minor has been appointed), a managing conservator or guardian has authority to consent a pregnant minor

[151] TEX. FAM. CODE §§266.014; 266.006.
[152] TEX. FAM. CODE §266.0041.
[153] CPS PSA 08-125.
[154] CPS HB 6562-6562.3.

having an abortion.[155] However, CPS policy prohibits the agency from giving consent for a child in its conservatorship to have an abortion.[156]

- In appropriate circumstances the youth should be informed about the availability of a judicial bypass as an option in lieu of parental consent.[157]
- CPS must notify the pregnant child's parents of a planned abortion unless the pregnant child obtains a judicial bypass or there are safety issues that warrant an exception under the applicable policy.

- CPS must ensure that the child has information about all available options, including the possibility that if the pregnant child bears the infant to term, the infant can live with the mother in foster care.
- CPS has no funding to pay for an abortion.
- Special confidentiality policy applies to documenting information about abortion in the CPS record.

CPS as Guardian Ad Litem for a Pregnant Child Not in Conservatorship

If a pregnant minor seeks a judicial bypass to be allowed to have an abortion without her parents being notified, the court may appoint a guardian ad litem. The statute lists a DFPS employee as a possible appointee to serve as guardian ad litem.[158] In this circumstance, CPS staff should follow detailed policy guidance on how to carry out this special role. [159]

Do Not Resuscitate Orders

The issue of whether to withhold or withdraw life sustaining treatment may arise regarding a child that is in the temporary or permanent managing conservatorship of DFPS. Either of these actions is generically referred to as giving a doctor permission to issue a "do not resuscitate" order (DNR). The law governing issuance of a DNR is governed by HEALTH AND SAFETY CODE CHAPTER 166.

Who Has Authority to Consent?

For a child, the law provides that a decision to withhold or withdraw life support is made by a parent or legal guardian. [160] CPS policy provides that the parent makes the decision concerning a DNR, unless parental rights have been terminated or parents are deceased. If parental rights have been terminated or parents are deceased, CPS makes the DNR

[155] TEX. FAM, CODE §33.002.
[156] CPS HB 6562.
[157] TEX. FAM. CODE §33.003.
[158] TEX. FAM. CODE §33.003(f)(3).
[159] CPS HB Section 5500-5514.
[160] HEALTH AND SAFETY CODE §166.035.

decision on behalf of a foster child. A court appointed medical consenter who is not the child's parent or a DFPS employee cannot make a decision concerning a DNR.[161]

When Can a DNR Be Issued?

The statutory requirement necessary to issue a DNR is that the attending physician certify in writing that the patient (foster child) is a "qualified patient."[162] The law defines "qualified patient" as being a person suffering from either an irreversible condition or terminal condition.[163] If there are several doctors involved in the medical case, only the attending physician may issue the written statement.

What is the Process?

If a DNR is requested, DFPS must:

- obtain a written statement from the attending physician certifying that the child has a terminal or irreversible condition and that the physician recommends withholding or withdrawing life-sustaining treatment; and
- discuss the recommendation with the program director, regional director, regional attorney, attorney representing DFPS, and the child's attorney ad litem.[164]

The next step depends on whether or not parental rights have been terminated.

Parental Rights Not Terminated: If parental rights have not been terminated, DFPS does not consent to the DNR order. DFPS informs the parents that the attending physician is recommending that a DNR order be executed for the child and arranges for the parents to discuss the recommendation for a DNR order with the attending physician directly (by phone or in person). If the parents consent to a DNR order being issued, the parents sign the necessary documents. DFPS staff may not do so on their behalf. If the parents refuse to permit a DNR order to be issued, DFPS can take no alternative action. DFPS informs the attorney representing CPS, the child's attorney ad litem, and the regional attorney of the decision of the parents and whether a DNR has been executed.[165] If neither parent can be located, CPS notifies the CPS regional chain of command, regional attorney, child's attorney ad litem, and attorney representing CPS. The attorney representing CPS may request that the court appoint a guardian ad litem to explore the best interests of the child.

Parental Rights Terminated: If parental rights have been terminated or the parents are deceased, then CPS arranges for a review by an ethics committee, and an examination to be conducted, if a second medical opinion is necessary to ensure objectivity. At this point, DFPS ascertains the wishes of the court. If the court wishes to be involved in the

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[161] CPS HB 6522.
[162] HEALTH AND SAFETY CODE §166.031.
[163] HEALTH AND SAFETY CODE §166.002(9) and (13).
[164] CPS HB 6522.
[165] CPS HB, Section 6522

decision, DFPS presents the child's situation to the court, involves the attorney ad litem (if there is no attorney ad litem, DFPS recommends that the court appoint one) and complies with the court's directive. If the court does not wish to be involved in the decision, DFPS notifies the court of the final decision. After complying with this review process, CPS program staff sign the authorization for the attending physician to issue a DNR if that is the decision made.

Organ Donation

Authority

In the event that a child in CPS conservatorship dies, the hospital may request that the child's organs be donated.

If parental rights have not been terminated, the decision on whether to donate organs belongs to the child's parents. [166] CPS provides assistance in locating the parents and setting up meetings with the hospital staff so that parents may make an informed decision.

If parental rights have been terminated or parents are deceased, CPS as managing conservator may consider whether to approve organ donation based on considerations set forth in handbook policy. [167]

[166] TEX. HEALTH & SAFETY CODE §692.004.
[167] CPS HB 6523.

MEDIATION

The challenges of modern child welfare litigation require innovative solutions. While mediation is far from a new concept, child welfare professionals have not always embraced this tool for resolving child abuse and neglect cases. Evidence of successful CPS mediations in communities across Texas, however, underscores the value of mediation as an efficient and effective strategy for improving outcomes for children.

Can CPS cases be mediated?

Absolutely. The law encourages mediation, particularly for cases which involve the parent-child relationship and conservatorship, and any time a CPS case can be moved forward outside the adversary process, it is a benefit to the child, the parents and the agency.[168] Mediation is a solid fixture in CPS cases in many jurisdictions in Texas, and can be used to resolve discrete issues or entire cases informally while enabling courts to preserve resources for cases that must be litigated.

What's the difference between mediation, arbitration and family group conferencing?

Unlike an arbitrator, a mediator cannot make a unilateral decision that is binding on the parties. The mediator is a neutral party appointed to facilitate dispute resolution, and cannot compel or coerce the parties to enter into a settlement agreement.[169] Any mediated agreement represents the voluntary decision making of the parties. Although Family Group Decision Making (FGDM) and mediation both involve voluntary decision making and can be used to address the same issues, mediation is typically more closely linked to the litigation process and the need for a final order. FGDM, in turn, is more focused on the family's ability to create a cohesive plan to meet the child's needs. Depending on availability of FGDM and mediation in a given locale, these tools can be used for different kinds of cases or to complement each other at different stages of a case.

What rules apply to mediation?

The TEXAS CIVIL PRACTICE & REMEDIES CODE, CHAPTER 154. and TEXAS FAMILY CODE §153.0071(c)-(f) govern alternative dispute resolution, including mediation. Local rules may address mediation procedures, and individual mediators generally have a set of rules which the parties must agree to abide by as a condition of participation.

[168] TEX. CIV. PRAC. & REM. CODE §154.002.
[169] TEX. CIV. PRAC. & REM. CODE §154.053(a).

Why mediate?

Mediation can't solve every issue or offer a final resolution in every case, but it can offer:

- A less formal and intimidating environment that promotes cooperation, consensus and free exchange of information without the acrimony that the adversarial process can generate;
- An opportunity for the parents to get a firm understanding of the case, the perspectives of all of the parties, and exactly what must occur before the children can be safely returned to the home; and
- Time and money savings by reaching a case resolution without a trial, or by a streamlining the issues to be litigated.

How is a CPS case referred for mediation?

Mediation is generally triggered either by the request of the parties or the decision of the court to make a referral.[170] If a party files a written objection within ten days of the referral, the court cannot refer a matter to mediation if it finds a reasonable basis for the objection.[171]

What is the best time for mediation?

Opinions vary as to what the prime time is for mediation and to some extent, the best time depends on the goal of the mediation. The availability of mediators, as well as the philosophy of the local judiciary regarding mediation will impact how mediation is used in CPS cases.

Some consider the time between the 60 day hearing and the first permanency hearing to be the best time to mediate, while others prefer to conduct mediation closer to the trial date, when the parties can grapple with the facts that will likely determine the outcome if a trial is conducted. Faced with the evidence accrued up to that point, the options for a child's safety and permanency and an impending trial, the parties are often motivated to attempt to craft a mutually satisfactory solution that will better reflect the needs of the children and parties than a judgment imposed by a judge or jury.

Other mediation proponents prefer to use mediation as an ongoing problem solving mechanism, suitable for disputes ranging from the contents of a service plan to the final disposition of the legal case. Proponents of early mediation cite the advantage of getting the parents to focus on the reality of the circumstances that prompted CPS intervention at the outset of the case as a primary benefit.

What preparation is required for mediation?

[170] TEX. CIV. PRAC. & REM. CODE §154.021.
[171] TEX. CIV. PRAC. & REM. CODE §154.022.

Preparing for a mediation should closely parallel trial preparation. Without detailed information about the legal case, the child's placement, the parent's performance on the service plan, visitation, reports from therapists, physicians and other providers, the participants in a mediation will be at a great disadvantage. If parties and attorneys arrive with a firm grasp of the legal options, the evidence, the recommendations of knowledgeable professionals and the child's current needs, the likelihood of success is greatly enhanced.

Who should attend mediation?

Usually, mediators seek to have the parties, their attorneys and the guardian ad litems in attendance. If a parent is incarcerated, the judge can sign a bench warrant directing the sheriff of the county in which the case is pending to transport the incarcerated parent from a state or county jail to the mediation. This requires advance planning, as the bench warrant must be signed in enough time to allow the sheriff's office notice and opportunity to transport the parent. Federal prison officials may not honor a state bench warrant, but sometimes with sufficient notice some accommodation can be made to ensure an inmate's participation either telephonically or in person.

The court order referring a case to mediation may require that a CPS representative with authority to agree to a mediation agreement attend the mediation. Even if this is not court-ordered, at the very least a successful mediation requires that a decision-maker be available by phone. The title of the CPS decision-maker will vary by county. In some counties, supervisors are authorized to agree to increase visitation or agree to appointment of a managing conservator while in other counties, the decisions are made by the program director. The important thing is to confer in advance to be certain that the necessary individual will be present or at the very least available.

The downside of not having the decision-maker in attendance is that a carefully orchestrated agreement that reflects a full and complete discussion of the issues may be rejected, simply because the decision maker did not have the benefit of the discussion that preceded the proposal. While in rural areas it may be particularly difficult, whenever possible, the best practice is to have the CPS person with authority to resolve the case in the room throughout mediation.

Because mediation is intended "to encourage the peaceable resolution of disputes", the parties must carefully consider whether the presence of additional persons will impede resolution.[172] Also whether additional persons attend a mediation may depend on the preference of the mediator. Sometimes it is helpful to have the input from a caretaker, therapist or counselor but the best strategy may be to obtain a report or letter in lieu of adding more attendees. At times a child will attend all or part of a mediation, if the circumstances make this appropriate and proper accommodations are made.

[172] TEX. CIV. PRAC. & REM. CODE §154.002.

The issue of who should attend should always be part of the planning process for a mediation.

How is confidentiality protected in a mediation?

All communications made by a participant relating to the subject matter of the case are confidential and may not be used as evidence in court.[173] The mediator may not disclose to either party information that is given in confidence by another party and may not disclose the conduct of the parties or their counsel during the settlement process, even to the referring court, unless all parties agree otherwise.[174] Any record made at the mediation is also confidential and neither the participants nor the mediator can be compelled to testify regarding what happened at mediation unless the record is independently admissible.[175] One exception to the strict requirement of confidentiality is the duty to report abuse or neglect.[176]

Who pays for mediation?

Although some mediators accept pro bono cases, most are paid either by the county or DFPS. Questions regarding the availability of funding for mediation should be discussed either with local court administration personnel, regional CPS, or the Office of General Counsel.

Who can mediate a CPS case?

Mediators are not licensed in Texas, but to conduct a mediation in a CPS case, a person must have at least 40 classroom hours of approved training in dispute resolution and an additional 24 hours of training in family dynamics, child development and family law. [177] A court has discretion to appoint a mediator without these qualifications if the individual has legal or other professional training or experience in dispute resolution processes. [178] Ideally, mediators for CPS cases will be well versed in the laws and policies that govern agency practice.

What is a caucus style mediation?

In a caucus format, the parties and their attorneys are located in separate rooms and the mediator speaks with each privately. This approach is often used by mediators at different stages of a mediation, depending on the mediator's style and the needs of the

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[173] TEX. CIV. PRAC. & REM. CODE §154.073(a) (communications are confidential, not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding).
[174] TEX. CIV. PRAC. & REM. CODE §154.053(b), (c).
[175] TEX. CIV. PRAC. & REM. CODE §154.073(b),(c).
[176] TEX. CIV. PRAC. & REM. CODE §§154.053(d); 154.073(f).
[177] TEX. CIV. PRAC. & REM. CODE § 154.052.
[178] TEX. CIV. PRAC. & REM. CODE §154.052(c).

case. Communications between the mediator and each party in a caucus are confidential, unless the parties agree otherwise.

TIP:
If there is a history of violence between the parties, or one party refuses to be in the same room with another party, consider allowing the parties to arrive at separate times and/or via separate entrances to the building. Many mediation facilities are designed to accommodate this arrangement. The mediator can go back and forth to the separate rooms and facilitate a resolution without the parties meeting face to face.

Is a mediated settlement agreement binding?

A mediated settlement agreement memorializes the agreement reached by the parties and can be incorporated into a final decree and is enforceable as a written contract.[179] Generally, a mediated settlement agreement is binding on the parties if the agreement:

(1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;

(2) is signed by each party to the agreement; and

(3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.[180]

If a mediated settlement agreement meets the requirements of TEX. FAMILY CODE §153.0071(d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.[181]

When can the court refuse to enforce a mediated settlement agreement?

A court may decline to enter a judgment on a mediated settlement agreement if the court finds that:

- a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
- the agreement is not in the child's best interest.[182]

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[179] TEX. CIV. PRAC. & REM. CODE §154.071.

[180] TEX. FAM. CODE §§153.0071(d); 154.071; *In re A.G. C.*, 279 S.W. 3d 441(Tex. App.— Houston [14th Dist.] 2009, no pet.) (termination of parental rights based on relinquishment incorporated into mediated settlement agreement affirmed, case remanded for arbiter's resolution of terms of settlement agreement); *Wall v. Texas Dep't Family & Protective Servs.,* 2006 Tex. App. LEXIS 4744 (Tex. App. — Austin 2006,no pet.) (where pregnant mother is represented by counsel, the inherent pressures of mediation on the eve of trial where termination of parental rights could impact her unborn child does not make relinquishment involuntary); *Glover v. Brazoria County Children's Protective Servs. Unit*, 916 S.W. 2d. 19 (Tex. App. [1st Dist.] Houston 1995, no pet.)(termination based on settlement agreement reversed where there was no stipulation regarding the best interest of the children).

[181] TEX. FAM. CODE §153.0071(e).

[182] TEX. FAM. CODE §153.0071(e-1).