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THE INDIAN CHILD WELFARE ACT'S APPLICATION TO CIVIL COMMITMENTS OF INDIAN CHILDREN IN STATE COURT PROCEEDING

Courtney Lewis

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THE INDIAN CHILD WELFARE ACT’S APPLICATION TO CIVIL COMMITMENTS OF INDIAN CHILDREN IN STATE COURT PROCEEDINGS

*By Courtney Lewis**

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* Courtney Lewis is an assistant public defender at the Alaska Public Defender Agency. Ms. Lewis has represented parents and children in child welfare cases since 2008 and has primarily focused on appeals since 2020. Ms. Lewis has also represented individuals facing involuntary civil commitment. Ms. Lewis is the first person to be certified in Alaska as a child welfare law specialist by the National Association of Counsel for Children. The author can be contacted at courtneyrlewis@gmail.com.

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INTRODUCTION

This Article argues that the Indian Child Welfare Act (ICWA) applies to civil commitments of Indian children in state court proceedings. Practitioners familiar with ICWA and practitioners who routinely address civil commitment proceedings do not necessarily overlap. Because these two practices are often siloed, Indian children,¹ their parents, and their tribes² face a loss of rights in the civil commitment proceedings that they are accorded through ICWA. This loss of rights can result in the wrong legal outcome: the unnecessary physical removal of an Indian child from their parents and tribe.

Part I of this Article discusses the history of ICWA and civil commitment proceedings. State jurisprudence will have some variations, but Part I provides state examples of the siloed nature of these two legal areas.

Part II highlights the current loss of rights experienced by Indian families and tribes. Without clear guidance that ICWA applies to state civil commitment proceedings, practitioners may erroneously separate an Indian child from their family and tribe.

Part III proposes a checklist for civil commitment practitioners. There are four initial duties when determining ICWA's application and ensuring ICWA's basic legal tenets are met. Then, depending on the Indian child's situation, two subsequent duties may arise to ensure that an Indian child is only removed from their parents as contemplated by ICWA. This checklist provides needed support for ensuring compliance with these two important areas of the law.

I. UNDERSTANDING TWO SILOED LEGAL PRACTICES: THE INDIAN CHILD WELFARE ACT AND STATE COURT CIVIL COMMITMENT PROCEEDINGS

Before engaging in any legal analysis of ICWA or civil commitment law, it must first be acknowledged that removing a child from their parents inherently causes trauma.³ Removal can result in long-term, serious health consequences for the child, including depression and a shorter life span.⁴ As Supreme Court Justice Thurgood Marshall cautioned, "What is the quality of your

¹ This Article contains the anachronistic term "Indian child" to comport with the legally defined term in the Indian Child Welfare Act. *See* 25 U.S.C. 1903(4) (2018). When the Article is not discussing the legally defined term found in ICWA, it uses the current terms Native American, Alaska Native, and/or indigenous.

² Instead of the current term indigenous nation, this Article contains the anachronistic term "tribe" to comport with the legally defined term in the Indian Child Welfare Act. *See* 25 U.S.C. 1903(5), (8) (2018).

³ American Bar Association, "Trauma Caused by Separation of Children from Parents: A Tool to Help Lawyers" (May 2019).

⁴ Sara Goydarzi, *Separating Families May Cause Lifelong Health Damage*, SCIENTIFIC AMERICAN (June 2018), <https://www.scientificamerican.com/article/separating-families-may-cause-lifelong-health-damage/> [<https://perma.cc/Z8MC-BK8Y>]. *See also* Marcia McNutt, *Statement on Harmful Consequences of Separating Families at the U.S. Border*, NATIONAL ACADEMIES OF SCIENCES ENGINEERING MEDICINE (June 20, 2018), http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=06202018&_ga=2.2927672.960183307.1530129958-713614449.1530129958 [<https://perma.cc/UG3D-RULC>]; Theo Liebmann, *What's Missing from Foster Care Reform?: The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 Hamline J. Pub. L. & Pol'y 141 (2006).

intent?”⁵ The trauma of removal must be given serious consideration because, regardless of whether the intent is to help, which is a key principle in both child welfare and adolescent mental health treatment, the removal will harm the child.⁶

To reduce harm, it is important to understand not just applicable laws and legal theories but also their histories.⁷ Section A starts with a brief overview of why Congress enacted ICWA, because the context is critical when considering ICWA’s application to legal cases involving Indian children. Next, Section A provides an outline of what ICWA is, when it applies, and what it does. Lastly, Section A addresses ICWA’s application in an emergency given that civil commitment proceedings often begin as emergencies. Section B addresses civil commitment proceedings, beginning with an abbreviated history of civil commitment. Since the minutiae of most civil commitment jurisprudence will vary by state, Section B highlights the minimum federal constitutional protective standards and provides two state examples of the siloed nature of ICWA and civil commitment.

A. ICWA

1. The Road to ICWA

A historical understanding of how the United States treated Native Americans and Alaska Natives is imperative to understand why Congress enacted ICWA, specifically when considering ICWA’s application to different types of state court cases involving Indian children. Starting in the late 1870s, the United States began sending Alaska Native and Native American children to boarding schools.⁸ This educational policy was an attempt to assimilate indigenous children into Western culture. Boarding schools needed to be far enough away to discourage families from easily visiting their children, since family members would only hinder and detract from the goals of assimilation.⁹

In addition to using distance as a tool to acculturate indigenous children, the United States also used force.¹⁰ Authorities frequently told parents that the children must be sent to boarding

⁵ PRESS RELEASE, THE UNITED STATES COMMISSION ON CIVIL RIGHTS, THE U.S. COMMISSION ON CIVIL RIGHTS COMMEMORATES JUSTICE THURGOOD MARSHALL’S 108TH BIRTHDAY (July 15, 2016), *available at* https://www.usccr.gov/press/2016/PR_StatementThurgoodMarshall_071516.pdf [<https://perma.cc/HM7X-4GC3>].

⁶ DANIELLE SERED, *UNTIL WE RECKON*, 238 (Hardback ed., The New Press) 2019. (“[Acknowledgement] means saying, even if we want to claim that we did not know the effects of mass incarceration would have . . . , that we could have known, it was our responsibility to know, and we know now.”) This same logic applies to the harm caused when a child is removed from their family, even if removal is meant to be temporary.

⁷ *Id.*

⁸ Jim La Belle, *Boarding School: Historical Trauma among Alaska’s Native People*, NAT’L RES. CTR. FOR AM. INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN ELDERS 2 (2005), *available at* https://www.uaa.alaska.edu/academics/institutional-effectiveness/departments/center-for-advancing-faculty-excellence/_documents/boarding-school-historical-trauma-among-alaska-s-native-people.pdf [<https://perma.cc/2PQ7-TGL5>].

⁹ *Id.*

¹⁰ *Id.*

school.¹¹ Parents that did not comply were threatened with jail.¹² Though some children had positive experiences, many children reported that rampant abuse took place in boarding schools.¹³ Both Native Americans and Alaska Natives have come forward to discuss the physical, sexual, and emotional abuse they experienced.¹⁴ They reported that they were not taught their Native language, culture, or history at boarding school.¹⁵ The boarding school era ran through the 1970s.¹⁶

Another method of assimilating indigenous children was adoption. Between 1958 and 1967, the federal government and the Child Welfare League of America, which is a coalition of public and private child welfare groups, facilitated the Indian Adoption Project.¹⁷ Both the Bureau of Indian Affairs (BIA), which is the federal agency responsible for the administration and management of matters related to Alaska Natives and Native Americans, and the Children's Bureau, which is the federal agency responsible for improving the child welfare system, supported this project.¹⁸ The Indian Adoption Project removed Indian children from sixteen western states and placed the children primarily in eastern states with non-Native American/Alaska Native families.¹⁹ Native American activists challenged the Indian Adoption Project, which non-Natives had championed as a triumph of equality.²⁰ In 2001, at a National Indian Child Welfare Association (NICWA) conference in Anchorage, the Child Welfare League of America formally apologized for its participation in the program.²¹ In 2000, the BIA issued a formal apology for its prior role in

¹¹ *Id.* at 4.

¹² *Id.*

¹³ *Id.* at 9.

¹⁴ For Native American experiences, see Mary Annette Pember, *Death By Civilization*, THE ATLANTIC (May 8, 2019), <https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/> [<https://perma.cc/YM7H-5AJ8>]. For Alaska Native experiences, see Diane Hirshberg & Suzanne Sharp, *Thirty Years Later: The Long-Term Effect of Boarding Schools on Alaska Natives and Their Communities*, INST. OF SOC. & ECON. RESEARCH, UNIV. OF ALASKA ANCHORAGE 2, 11-13 (2005), available at https://iseralaska.org/static/legacy_publication_links/boardingschoolfinal.pdf [<https://perma.cc/7YBL-6UWC>].

¹⁵ For Native American experiences, see Mary Annette Pember, *Death By Civilization*, THE ATLANTIC (May 8, 2019), <https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/> [<https://perma.cc/4R63-JQJP>]. For Alaska Native experiences, see Diane Hirshberg & Suzanne Sharp, *Thirty Years Later: The Long-Term Effect of Boarding Schools on Alaska Natives and Their Communities*, INST. OF SOC. & ECON. RESEARCH, UNIV. OF ALASKA ANCHORAGE 2, 9 (2005), available at https://iseralaska.org/static/legacy_publication_links/boardingschoolfinal.pdf [<https://perma.cc/7YJL-A9Q6>].

¹⁶ La Belle, *supra* note 8, at 4.

¹⁷ PRESS RELEASE, BUREAU OF INDIAN AFFAIRS, INDIAN ADOPTION PROJECT INCREASES MOMENTUM (Apr. 18, 1967), available at <https://www.indianaffairs.gov/as-ia/opa/online-press-release/indian-adoption-project-increases-momentum> [<https://perma.cc/ZA3R-4GCF>].

¹⁸ *Id.*

¹⁹ *Id.*; see also *The Adoption History Project*, UNIV. OF OREGON, <https://pages.uoregon.edu/adoption/topics/IAP.html> (last updated Feb. 24, 2012).

²⁰ *Indian Adoption Project*, UNIV. OF OREGON (last updated Feb. 24, 2012), <https://pages.uoregon.edu/adoption/topics/IAP.html> [<https://perma.cc/T6L6-3G6M>].

²¹ David E. Simmons, , *Improving the Well-Being of American Indian and Alaska Native Children and Families through State-Level Efforts to Improve Indian Child Welfare Act Compliance*, NAT'L INDIAN CHILD WELFARE ASS'N 2 (2014), available at <https://www.nicwa.org/wp-content/uploads/2016/11/Improving-the-Well-being-of-American-Indian-and-Alaska-Native-Children-and-Families.pdf> [<https://perma.cc/YDD8-H8P2>]; see also Shay Bilchik, Executive Director, Child Welfare League of America, *Keynote Address at the National Indian Child Welfare Association Conference: Apology from the Child Welfare League of America* (Apr. 24, 2001), available at

separating Indian children from their parents.²²

Though the Indian Adoption Project ended in 1967, the Adoption Resource Exchange of North America (ARENA) began in 1966.²³ ARENA was established by the Child Welfare League of America.²⁴ ARENA continued to remove Native American and Alaska Native children, in addition to other children, from their parents and place them for adoption in non-Native homes through the early 1970s.²⁵

Also in the 1970s, Congress received detailed information regarding the number of Native American and Alaska Native children in foster homes and those who were adopted by non-Native families.²⁶ For example, from 1973 to 1976, 1 out of every 29.6 Alaska Native children was adopted.²⁷ That is a rate 4.6 times higher than for non-Native children; 93% of Alaska Native children were adopted by non-Native families.²⁸ Additionally, Alaska Native children were three times more likely to be in foster care than non-Native children.²⁹ Native American children faced similar rates; in California, 1 out of every 26.3 Native American children was adopted.³⁰ This was a rate 8.4 times higher than for non-Native children, and 92.5% of Native American children in California were adopted by non-Native families.³¹ The preceding statistics were “calculated on the most conservative basis possible; . . . [and] therefore reflect the most minimal statement of the problem.”³² Congress studied this problem for several years and held multiple congressional hearings before enacting ICWA.

2. What ICWA Is

In 1978, Congress enacted ICWA.³³ Congress has the authority to issue such a law because of “the special relationship between the United States and the Indian tribes and their members.”³⁴ ICWA is often misunderstood to be a race-based law.³⁵ It derives, however, from Congress’s constitutional authority of plenary power over Indian affairs.³⁶ ICWA is about respecting the

https://theacademy.sdsu.edu/elearning/icwa-elearning-bias-media-context/story_content/external_files/ApologyCWLA.pdf [<https://perma.cc/FB5G-WE8R>].

²² PRESS RELEASE, BUREAU OF INDIAN AFFAIRS, GOVER APOLOGIZES FOR BIA’S MISDEEDS (September 8, 2000) available at <https://www.bia.gov/as-ia/opa/online-press-release/gover-apologizes-bias-misdeeds> [<https://perma.cc/R3XB-6D8D>].

²³ UNIV. OF OREGON, *supra* note 20.

²⁴ Karen Balcom, *The Logic of Exchange: The Child Welfare League of America, The Adoption Resource Exchange Movement and the Indian Adoption Project, 1958-1967*, in *Adoption & Culture*, 5 (2007).

²⁵ *Id.* See also UNIV. OF OREGON, *supra* note 18.

²⁶ S. REP. NO. 95-597, at 46-50 (1977).

²⁷ *Id.* at 46.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 46-47.

³² *Id.* at 46.

³³ Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–63).

³⁴ 25 U.S.C. § 1901 (2018).

³⁵ *E.g.*, *Brackeen v. Bernhardt*, 937 F.3d 406 at 426 (5th Cir. 2019) (discussing district court’s erroneous finding that ICWA is a race-based law).

³⁶ 25 U.S.C. § 1901(1) (2018).

sovereignty of tribes: specifically, a tribe’s *parens patriae* power over their members, most particularly their children.³⁷

Congress found that state agencies were removing too many Indian children from their families, “often unwarranted,” and placing them in non-Indian families and institutions.³⁸ ICWA defined an “Indian child” as a person under eighteen years of age, who is unmarried, and is either a tribal member or eligible for membership as a tribal member, and is the biological child of a tribal member.³⁹ ICWA defined an Indian as “any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation” as demarcated in federal law.⁴⁰ Indian tribes also have a federal definition.⁴¹ ICWA has many important provisions for the protection of Indian families; for purposes of this Article, the focus is on temporary removal of an Indian child.

The BIA issued regulations related to ICWA cases effective December 12, 2016.⁴² The BIA derives authority to issue regulations from ICWA, 25 U.S.C. § 1952,⁴³ and its authority to manage Indian affairs from 25 U.S.C. § 2.⁴⁴ As a federal agency interpreting federal law pursuant to statutory authority, the BIA’s interpretations of ICWA are entitled to deference by courts.⁴⁵

3. When ICWA Does and Does Not Apply

ICWA applies whenever an Indian child is the subject of a child custody proceeding.⁴⁶ Child custody proceedings include “involuntary proceedings,”⁴⁷ “voluntary proceedings that could prohibit the parent or Indian custodian from regaining custody of the child upon demand,”⁴⁸ and a “proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of a child,” including foster care.⁴⁹ Status offenses are offenses that would

³⁷ See 25 U.S.C. §§ 1901(3)-(4) (2018). See also WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* 226, 230 (Trade Paperback ed., Fulcrum Publishing) 2010.

³⁸ 25 U.S.C. § 1901(4) (2018).

³⁹ 25 U.S.C. § 1903(4) (2018).

⁴⁰ 25 U.S.C. § 1903(3) (2018).

⁴¹ See 25 U.S.C. § 1903(8) (2018) (defining Indian tribe as “any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village...”).

⁴² Indian Child Welfare Act Proceedings, 81 Fed. Reg. 114, 38,778 (June 14, 2016). Codified at 25 C.F.R. 23.1-23.4.

⁴³ 25 U.S.C. § 1952 (2018) provides:

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

⁴⁴ 25 U.S.C. § 2 (2018) provides:

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

⁴⁵ *E.g.*, *Chevron v. N.R.D.C.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”) (citations omitted).

⁴⁶ 25 C.F.R. § 23.103 (2020).

⁴⁷ 25 C.F.R. § 23.103(a)(1)(i) (2020).

⁴⁸ 25 C.F.R. § 23.103(a)(1)(ii) (2020).

⁴⁹ 25 C.F.R. § 23.103(a)(1)(iii) (2020).

not be considered a crime if committed by an adult, such as truancy or incorrigibility.⁵⁰ A “child custody proceeding” includes a “foster care placement,” which is defined as:

*any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution ... where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[.]*⁵¹

ICWA does not provide a definition of institution.⁵² Both *Black’s Law Dictionary*⁵³ and the *Merriam-Webster.com Dictionary*⁵⁴ definitions of institution include facilities for the treatment of individuals with health conditions; *Black’s Law Dictionary* specifically references individuals who need treatment for mental illness. Moreover, ICWA’s legislative history reveals that the general term institution was meant to encompass residential facilities for the treatment of an individual’s mental health. A prior draft described institutions as “including but not limited to a correctional facility, institution for juvenile delinquents, *mental hospital*, or halfway house[.]”⁵⁵ Most juvenile delinquency actions were explicitly removed from ICWA at the request of the U.S. Department of the Interior.⁵⁶ But the U.S. Department of the Interior did not object to the inclusion of mental health facilities.⁵⁷ And unlike juvenile delinquency, mental health facilities were never explicitly removed from the definition of a foster care placement.⁵⁸ The legislative history of ICWA is replete with examples of institution having a broad inclusivity.⁵⁹

⁵⁰ 25 C.F.R. § 23.2 (2020).

⁵¹ 25 U.S.C. § 1903(1)(i) (2018). Emphasis added.

⁵² See 25 U.S.C. § 1903 (2018) and 25 C.F.R. § 23.2 (2020).

⁵³ Institution, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁵⁴ *Institution*, MERRIAM-WEBSTER.COM DICTIONARY (Last accessed Apr. 18, 2020), <https://www.merriam-webster.com/dictionary/institution> [<https://perma.cc/A8CF-VY3X>].

⁵⁵ *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 32 (1977) (emphasis added).

⁵⁶ H.R. Rep. No. 95-1386 at 31 (1978). Cf. *Hearing on the Oversight of the Indian Child Welfare Act Before the S. Select Comm. on Indian Affairs*, 96th Cong. 72-73 (1980) (“Every tribal social worker and program administrator surveyed stated that Indian juvenile delinquency is a problem of great concern to the tribes. Every social worker commented on the absence of legal authority to intervene in state juvenile court proceedings and stated that the lack of resources and remedial services, for Indian youth and their families s inhibits tribes from actively working on such cases even where the state juvenile justice system is willing to cooperate.”)

⁵⁷ H.R. Rep. No. 95-1386 at 31 (1978).

⁵⁸ Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, Department of Interior, Guideline B-3 (1979) (repealed 2015). See also 25 C.F.R. § 23.103(b) (2020).

⁵⁹ See e.g., *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 1 (1977) (“institutions (including boarding schools)”); *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 76 (1978) (testimony of Mona Shepherd, social service coordinator, Rosebud Sioux Tribe); *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 78 (1978) (testimony of Faye La Pointe, Coordinator of Social Services for Child Welfare, Rosebud Sioux Tribe); *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 84-85 (1978) (testimony of Rena Uviller, director, Juvenile Rights Project, American Civil Liberties Union).

ICWA also provides clarification on what it means for a parent to have their child returned upon demand: “*Upon demand* means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.”⁶⁰ “Voluntary proceeding” is defined as “a proceeding for foster-care ... that either parent, both parents, or the Indian custodian has, of ... their free will, without a threat of removal by a State agency, consented to for the Indian child.”⁶¹ ICWA applies to emergency proceedings, which will be discussed in detail in Section A.5. *infra*.⁶²

Because ICWA is a response to the unnecessary removal of children from their families primarily by state agencies,⁶³ ICWA does not apply to certain proceedings. ICWA does not apply to tribal court proceedings,⁶⁴ “a proceeding regarding a criminal act that is not a status offense,”⁶⁵ a custody proceeding of an Indian child between the child’s parents,⁶⁶ or a “voluntary placement” chosen by the parents.⁶⁷

4. What ICWA Does

ICWA provides specific safeguards for parents, Indian custodians, and tribes when Indian children are at risk of removal or are removed from their families and tribes. Absent an emergency, which is discussed in Section I.A.5. *infra*, the party seeking to involuntarily remove an Indian child must show by clear and convincing evidence, including the testimony of a qualified expert witness, that removal of the child from the child’s parents or Indian custodian is necessary to prevent serious emotional or physical damage to the child before a court can issue an order for a foster care placement of the child.⁶⁸ Who may serve as a qualified expert witness is discussed *infra* in Sections II. and III.D.

At least ten days before a hearing occurs regarding involuntary removal, the party seeking to remove an Indian child must notify the parents, Indian custodians, and tribe.⁶⁹ The hearing shall be delayed an extra 20 days at the request of a parent, Indian custodian, or tribe.⁷⁰ The parents or Indian custodian, if determined by the court to be indigent, are entitled to court-appointed counsel in any removal proceeding.⁷¹ The court may appoint counsel to the child if the court finds such an appointment is in the child’s best interests.⁷²

In addition to the safeguards when an Indian child is at risk of involuntary removal, ICWA also provides protections for Indian families when the parent initially agreed to a voluntary foster

⁶⁰ 25 C.F.R. § 23.2 (2020).

⁶¹ *Id.*

⁶² 25 C.F.R. § 23.103(a)(2) (2020).

⁶³ 25 U.S.C. § 1901-1902 (2018).

⁶⁴ 25 C.F.R. § 23.103(b)(1) (2020).

⁶⁵ 25 C.F.R. § 23.103(b)(2) (2020).

⁶⁶ 25 C.F.R. § 23.103(b)(3) (2020).

⁶⁷ 25 C.F.R. § 23.103(b)(4) (2020).

⁶⁸ 25 U.S.C. § 1912(e) (2018).

⁶⁹ 25 U.S.C. § 1912(a) (2018).

⁷⁰ *Id.*

⁷¹ 25 U.S.C. § 1912(b) (2018).

⁷² *Id.*

care placement if that action could prohibit the parent or Indian custodian from regaining custody of the child upon demand.⁷³ For example, an Indian parent may want their child to receive inpatient mental health care, and welcome state assistance in navigating the complexities of receiving aid through Medicaid and the Indian Health Service.⁷⁴

One important protection is that the federal regulations require that state courts must verify on record whether the child is an Indian child or there is reason to believe the child is an Indian child.⁷⁵ If there is reason to believe the child is an Indian child, state courts “must ensure that the party seeking placement has taken steps to verify the child’s status,”⁷⁶ including contacting the tribe that the child is believed to be a member of or is eligible for membership in.⁷⁷ State courts must ensure that an Indian child’s placement complies with the federal regulations.⁷⁸

Further, ICWA requires that the Indian child who was voluntarily removed must be returned to the parent or Indian custodian when the parent withdraws their consent either through a written document filed with the court, testimony to the court, or another available method pursuant to state law.⁷⁹ The court “must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.”⁸⁰

The Indian child’s tribe has the right to intervene as a party in a state child custody proceeding for a foster care placement.⁸¹ The BIA has provided technical guidance for how state courts should determine which tribe is the Indian child’s tribe for purposes of ICWA if an Indian child is eligible for or is a member of multiple tribes.⁸² The tribe’s intervention authorizes the tribe, as a party, to receive and examine documents in the court’s file in any proceeding for a foster care placement.⁸³

Tribes have exclusive jurisdiction over proceedings involving Indian children in state court if the child resides or is domiciled on the reservation, absent when jurisdiction is vested in the State by federal law (i.e., an emergency).⁸⁴ If an Indian child is a ward of the tribal court, the tribe retains exclusive jurisdiction regardless of where the child is domiciled.⁸⁵

Tribes, parents, and Indian custodians can petition in state court proceedings to transfer

⁷³ 25 U.S.C. § 1913(b) (2018). *See also* 25 C.F.R. § 23.103(a)(2) (2020).

⁷⁴ The issue of parents agreeing to foster care for their children to receive better mental health services is beyond the scope of this article. Texas passed a bill to assist parents in this situation. The text of the bill is available at: <https://capitol.texas.gov/tlodocs/84R/billtext/html/SB01889I.htm>. *See also* bill analysis, available at: <https://capitol.texas.gov/tlodocs/84R/analysis/html/SB01889F.htm>. While this assistance is helpful, the larger issue of insufficient mental health services looms.

⁷⁵ 25 C.F.R. § 23.124(a) (2020).

⁷⁶ 25 C.F.R. § 23.124(b) (2020).

⁷⁷ *Id.*

⁷⁸ 25 C.F.R. § 23.124(c) (2020).

⁷⁹ 25 C.F.R. § 23.127(b) (2020). *See also* 25 U.S.C. § 1913(b) (2018).

⁸⁰ 25 C.F.R. § 23.127(c) (2020). *See also* 25 U.S.C. § 1913(b) (2018).

⁸¹ 25 U.S.C. § 1911(c) (2018).

⁸² 25 C.F.R. § 23.109 (2020).

⁸³ 25 U.S.C. § 1912(c) (2018).

⁸⁴ 25 U.S.C. § 1911(a) (2018).

⁸⁵ *Id.*

jurisdiction from the state to the tribe.⁸⁶ A state court shall transfer the proceeding to the tribe absent good cause, an objection by either parent, or declination of the tribe.⁸⁷

The tribal right to jurisdiction is important because the United States explicitly recognizes each tribe's sovereignty and the powers inherent with such sovereignty.⁸⁸ Without this clear directive, state power can harm tribes.⁸⁹ For example, prior to ICWA's enactment, New Mexico acknowledged that a grandfather had a right to custody of his grandson under Navajo custom.⁹⁰ The court, however, declined to apply Navajo law in New Mexico, and a non-Indian family adopted the child.⁹¹ After ICWA, a tribe can request jurisdiction, and the court *shall* transfer the proceeding to the tribe absent limited exceptions.⁹²

ICWA is a floor, not a ceiling, for establishing protections for Indian families.⁹³ Some states have adopted statutes to provide additional protections and clarification for Indian families.⁹⁴ ICWA requires that the higher standard between federal and state law for protecting the rights of the parent or Indian custodian of an Indian child shall control in a child custody proceeding.⁹⁵ Thus, providing ICWA's full protections requires a knowledge of state law as well.

5. ICWA's Application in an Emergency

Civil commitment proceedings frequently begin as emergencies. As such, ICWA's provisions governing emergencies warrant special attention. ICWA applies to emergency proceedings.⁹⁶ "*Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child."⁹⁷ ICWA authorizes the temporary suspension of its full protections, however, if state law warrants an emergency removal of an Indian child; though the authorization is limited only to removal necessary "to prevent

⁸⁶ 25 U.S.C. § 1911(b) (2018).

⁸⁷ *Id.* See also 25 C.F.R. § 23.118 (2020).

⁸⁸ WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* 226, 230 (Fulcrum Publishing, Trade Paperback ed. 2010).

⁸⁹ *Id.* at 230.

⁹⁰ *John Doe v. Heim*, 555 P.2d 906, 913-914 (N.M. App. 1976).

⁹¹ *Id.* See also WALTER R. ECHO-HAWK, *supra* note 88, at 227.

⁹² 25 U.S.C. § 1911(b) (2018) (emphasis added).

⁹³ 25 U.S.C. § 1902 (2018) ("The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of *minimum Federal standards* for the removal of Indian children from their families and the placement of such children in foster or adoptive homes . . .") (emphasis added); see also 25 U.S.C. § 1921 (2018) ("In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.").

⁹⁴ See Iowa Indian Child Welfare Act codified at IOWA CODE §§ 232B.1-14 (2018); see also Michigan Indian Family Preservation Act codified at MICH. COMP. LAWS §§ 712B.1-41 (2018); California's Tribal Customary Adoption codified at CAL. WELF. & INST. CODE § 366.24 (adopted 2010, amended 2013); Washington's Indian Child Welfare Act codified at WASH. REV. CODE § 13.38 (adopted 2011); Oregon's Indian Child Welfare codified at OR. REV. STAT. at §§ 350.300, 418.312, 418.595, 418.627, 419A.004 et seq., 419B.100 et seq. (adopted 2020).

⁹⁵ 25 U.S.C. § 1921 (2018).

⁹⁶ 25 C.F.R. § 23.103(a)(2) (2020).

⁹⁷ 25 C.F.R. § 23.2 (2020).

imminent physical damage or harm to the child.”⁹⁸ ICWA states that if a petitioner improperly removes an Indian child, then the state court “shall decline jurisdiction ... and shall forthwith return the child to his parent or Indian custodian” unless the child would face a “substantial and immediate danger or threat of such danger.”⁹⁹

The applicable federal regulation governing emergencies is 25 C.F.R. § 23.113: “Any emergency removal ... of an Indian child ... must terminate immediately when removal ... is no longer necessary to prevent imminent physical damage or harm to the child.”¹⁰⁰ The state court must make a finding on the record that emergency removal is necessary to prevent such harm.¹⁰¹ The state court is required to continuously evaluate whether the Indian child can be returned when new information indicates that the emergency has ended.¹⁰²

An emergency proceeding can be terminated one of three ways: 1) by initiating full child custody proceedings within the breadth of ICWA protections,¹⁰³ 2) by transferring jurisdiction to the appropriate tribe,¹⁰⁴ or 3) by restoring the child to the parent.¹⁰⁵ At any hearing during an emergency proceeding, a state court must “determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child”¹⁰⁶ and “immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.”¹⁰⁷

Agency is defined as “a non-profit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, pre-adoptive, or adoptive placements.”¹⁰⁸ The regulations refer to the “agency” that assumed emergency custody.¹⁰⁹ The BIA purposefully issued a wide-ranging definition of agency to “comport[] with [ICWA’s] broad language imposing requirements on ‘any party’ seeking placement of a child.”¹¹⁰ In matters where the tribe has exclusive jurisdiction, the agency responsible for removing the child must provide a detailed explanation of what efforts are made to transfer jurisdiction of the matter back to the tribe.¹¹¹

Congress placed a high bar on agencies and courts when it adopted the “imminent physical damage or harm” standard because emergency proceedings do not have the same

⁹⁸ 25 U.S.C. § 1922 (2018).

⁹⁹ 25 U.S.C. § 1920 (2018).

¹⁰⁰ 25 C.F.R. § 23.113(a) (2020).

¹⁰¹ 25 C.F.R. § 23.113(b)(1) (2020).

¹⁰² 25 C.F.R. § 23.113(b)(2) (2020).

¹⁰³ 25 C.F.R. § 23.113(c)(1) (2020).

¹⁰⁴ 25 C.F.R. § 23.113(c)(2) (2020).

¹⁰⁵ 25 C.F.R. § 23.113(c)(3) (2020).

¹⁰⁶ 25 C.F.R. § 23.113(b)(3) (2020).

¹⁰⁷ 25 C.F.R. § 23.113(b)(4) (2020).

¹⁰⁸ 25 C.F.R. § 23.102 (2020).

¹⁰⁹ *I.e.*, 25 C.F.R. § 23.113(d)(9) (2020).

¹¹⁰ *See* Department of the Interior, Bureau of Indian Affairs; 25 C.F.R. § 23, Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 at 38,792 (June 14, 2016).

¹¹¹ 25 C.F.R. § 23.113(d)(9) (2020).

substantive and procedural protections as other types of child custody proceedings within ICWA.¹¹² This standard “focuses on the child’s health, safety, and welfare” and includes circumstances such as “sexual abuse, domestic violence, or child labor exploitation.”¹¹³ This standard also emphasizes imminence “because the immediacy of the threat is what allows the State to temporarily suspend the initiation of a full ‘child-custody proceeding’ subject to ICWA.”¹¹⁴

The BIA commented on the distinction between emergencies and non-emergencies: when harm is not “imminent,” “issues that might at some point in the future affect the Indian child’s welfare may be addressed either without removal or with removal on a non-emergency basis (complying with the Act’s section 1912 requirements).”¹¹⁵ In other words, absent an emergency, a court cannot order an Indian child’s removal from their parents unless several criteria are met: 1) the parents, Indian custodian, and tribe received notice of the proceedings, 2) the parents and Indian custodian received court-appointed counsel if they are indigent, and 3) the moving party demonstrated by clear and convincing evidence, including the testimony of a qualified expert witness, that removal of the child from the child’s parents or Indian custodian is necessary to prevent serious emotional or physical damage to the child.¹¹⁶

B. State Court Civil Commitment Proceedings

1. The Road to Modern Civil Commitment Proceedings

Individuals with mental illness who faced civil commitment endured myriad hardships before the advent of modern proceedings.¹¹⁷ From the 19th century to the mid-20th century, it was common practice to institutionalize people with mental illnesses long-term because the assumption was that people with mental illness would benefit from inpatient care.¹¹⁸ But medical care at that time comprised of restraints, sedation, and experimentation with different drugs.¹¹⁹ Legal protections were often scarce. The prevailing requirements were only that a person presented with a mental illness, and that treatment was expected to help; often the individual had no right to due process.¹²⁰ Individuals who were released faced the loss of their civil rights, including custody of their children.¹²¹

¹¹² See Department of the Interior, Bureau of Indian Affairs; 25 C.F.R. § 23, Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 at 38,794 (June 14, 2016).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ 25 U.S.C. § 1912(a), (b), and (e) (2018).

¹¹⁷ See, e.g., Megan Testa and Sara G. West, *Civil Commitment in the United States*, PSYCHIATRY, Oct. 2010, 30-40 at 32; *Addington v. Texas*, 441 U.S. 418 (1979); *O’Connor v. Donaldson*, 422 U.S. 563 (1975).

¹¹⁸ Megan Testa and Sara G. West, *Civil Commitment in the United States*, PSYCHIATRY, Oct. 2010, 30-40 at 32. See also Winnie S. Chow and Stefan Priebe, *Understanding Psychiatric Institutionalization: A Conceptual Review*, BMC PSYCHIATRY, 2013, Vol. 13, 169-182, at 173, 179.

¹¹⁹ Testa, *supra* note 118, at 32.

¹²⁰ *Id.*

¹²¹ *Id.*

In the mid-20th century, a confluence of factors spurred reform.¹²² The 1950s saw the creation of the first class of effective antipsychotic medication.¹²³ The medication allowed certain individuals to be treated on an outpatient basis.¹²⁴ By 1960, institutions were being widely criticized as outdated because of the option to treat an individual with medication and outpatient services.¹²⁵ Additionally, 1960 saw the creation of Medicare and Medicaid; institutions, which were historically privately funded, now received federal funds, and the public was concerned about the cost versus the benefit of institutional care.¹²⁶ In 1963, President John F. Kennedy signed the Community Mental Health Centers Act, which transitioned patients from institutions to outpatient care.¹²⁷ Finally, advocates for reform, including patients, sought less restrictive options for individuals with mental illness.¹²⁸ Deinstitutionalization had begun.¹²⁹

2. The United States Supreme Court Issues Minimum Protective Standards for Individuals Facing Civil Commitment

Though state law governs much of civil commitment jurisprudence, there are several overarching United States Supreme Court decisions that inform the minimum protective standards required under the United States Constitution for individuals facing civil commitment. In the 1970s, the United States Supreme Court specifically addressed the state's interest in civil commitment,¹³⁰ what burden of proof is required to deprive a person of their liberty,¹³¹ what kind of conduct the petitioner must prove in order to deprive a person of their liberty,¹³² and with regard to children, what level of procedural due process is necessary.¹³³

¹²² *Id.* at 32-33. *See also* Winnie S. Chow and Stefan Priebe, *Understanding Psychiatric Institutionalization: A Conceptual Review*, BMC PSYCHIATRY, 2013, Vol. 13, 169-182.

¹²³ Testa, *supra* note 118, at 33.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 32-33.

¹²⁷ *Id.* at 33.

¹²⁸ *Id.* *See also* Winnie S. Chow and Stefan Priebe, *Understanding Psychiatric Institutionalization: A Conceptual Review*, BMC PSYCHIATRY, 2013, Vol. 13, 169-182, at 169.

¹²⁹ Winnie S. Chow and Stefan Priebe, *Understanding Psychiatric Institutionalization: A Conceptual Review*, BMC PSYCHIATRY, 2013, Vol. 13, 169-182, at 179.

¹³⁰ *Addington v. Texas*, 441 U.S. 418 (1979).

¹³¹ *Id.* at 426.

¹³² *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

¹³³ *Parham v. J.R.*, 442 U.S. 584 (1979).

a. Minimum Constitutional Federal Protective Standards for Adults

A person facing an involuntary civil commitment to a state mental health hospital has a right to due process under the Fourteenth Amendment to the United States Constitution.¹³⁴ In *Addington v. Texas*, the United States Supreme Court addressed both the state’s interest in civilly committing an individual and the standard of proof necessary to commit an individual against their will.¹³⁵ The Court recognized the state’s legitimate interest in the involuntary civil commitment of an individual with a mental illness in certain circumstances: under the state’s police power if the individual is dangerous, or under the state’s *parens patriae* power if the individual is unable to care for themselves.¹³⁶ Those powers, however, must be balanced against the individual’s right to liberty.

The individual facing the involuntary civil commitment should not equally bear the risk of error with the state since an erroneous finding against an individual – the loss of the individual’s liberty – is much more severe than an erroneous finding against the state; thus, the standard of proof must be higher than preponderance of the evidence (at least 51% likely to be true).¹³⁷

The Court also declined to find that the burden should be beyond a reasonable doubt; it is questionable whether the state could meet the beyond a reasonable doubt standard given that psychiatry “turns on the *meaning* of the facts”¹³⁸ as opposed to the straightforward question of criminal law – whether the accused committed the act alleged.¹³⁹ In addition to the practical problems, the Court also found that the importance of the burden on the state, which prevents both wrongful stigma and loss of liberty, is not completely analogous between criminal law and involuntary civil commitment.¹⁴⁰

The Court then considered the standard of clear and convincing evidence, which the Court found establishes “a fair balance between the rights of the individual and the legitimate concerns of the state.”¹⁴¹ As such, the Court held that the standard of proof for individuals facing an involuntary civil commitment is a “burden equal to or greater than the ‘clear and convincing’ standard” to be determined by state law.¹⁴²

In *O’Connor v. Donaldson*, the Court addressed what conduct the state must prove to involuntarily commit an individual. It held that a state cannot involuntarily commit “a non-dangerous individual who is capable of surviving in freedom by himself or with the help of willing and responsible family members or friends.”¹⁴³ The Court noted that the state has a “proper

¹³⁴ *Addington v. Texas*, 441 U.S. 418, 426 (1979) (“This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. See, e.g., *Jackson v. Indiana*, 406 U.S. 715, ... (1972); *Humphrey v. Cady*, 406 U.S.C. 504 ... (1972); *In re Gault*, 387 U.S. 1 ... (1967); *Specht v. Patterson*, 886 U.S. 605 ... (1967).”)

¹³⁵ 441 U.S. at 418.

¹³⁶ *Id.* at 426.

¹³⁷ *Id.*

¹³⁸ *Id.* at 429.

¹³⁹ *Id.* at 429-430.

¹⁴⁰ *Id.* at 428.

¹⁴¹ *Id.* at 431.

¹⁴² *Id.* at 433.

¹⁴³ 422 U.S. at 576.

interest in providing care and assistance to the unfortunate,”¹⁴⁴ but the “mere presence of mental illness” does not support confining an individual to an institution if the person can live safely in their community.¹⁴⁵ Further, “incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends.”¹⁴⁶

b. Minimum Constitutional Federal Protective Standards for Children

In short succession, the United States Supreme Court expanded the rights of adults facing involuntary civil commitment and clarified the standards regarding the state’s *parens patriae* and police powers. But it was unclear to what extent those rulings applied to children facing civil commitment. In *Parham v. J.R.*, children in Georgia brought a class action lawsuit arguing that their constitutional right to liberty had been deprived without procedural due process; the children had been committed to the various Georgia psychiatric hospitals because their parents or the state child welfare agency enrolled the children as voluntary patients.¹⁴⁷ The United States Supreme Court, which applied the balancing test from *Mathews v. Eldridge*,¹⁴⁸ held that:

[W]e must consider first the child’s interest in not being committed. Normally, however, since this interest is inextricably linked with the parents’ interest in and obligation for the welfare and health of the child, the private interest at stake is a combination of the child’s and parents’ concerns. Next, we must examine the State’s interest in the procedures it has adopted for commitment and treatment of children. Finally, we must consider how well Georgia’s procedures protect against arbitrariness in the decision to commit a child to a state mental hospital.¹⁴⁹

For the first factor, the Court noted it is undisputed that a child, like an adult, “has a substantial liberty interest in not being confined unnecessarily for medical treatment[.]”¹⁵⁰ The Court also noted it is undisputed that “the state’s involvement in the commitment decision constitutes a state action under the Fourteenth Amendment.”¹⁵¹

The Court bifurcated the roles of natural parents and state child welfare agencies. The Court found that natural parents “retain a substantial ... role in the decision, absent a finding of neglect or abuse”¹⁵² and that parents should be considered as acting in the child’s best interests.¹⁵³ As such,

¹⁴⁴ *Id.* at 575.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 442 U.S. at 584.

¹⁴⁸ 424 U.S. 319 (1976) (“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”)

¹⁴⁹ *Parham*, 442 U.S. at 600.

¹⁵⁰ *Id.* at 600.

¹⁵¹ *Id.*

¹⁵² *Id.* at 604.

¹⁵³ *Id.*

the Court held that natural parents “retain plenary authority to seek such care for their children, subject to a physician’s independent examination and medical judgment.”¹⁵⁴

For state child welfare agencies, the Court found that “having custody and control of the child *in loco parentis*¹⁵⁵ [state child welfare agencies have] a duty to consider the best interest of the child with respect to a decision on commitment to a mental hospital.”¹⁵⁶ The Court discounted the idea that the Georgia state child welfare agency will not act in a child’s best interests since Georgia’s state statute provided that presumption and no party “questioned the validity of the statutory presumption that the State acts in the child’s best interests.”¹⁵⁷ The Court did “acknowledge the risk of [a child] being ‘lost in the shuffle,’” but found that whether a child under the care of a state child welfare agency has been given less protection than children with natural parents was a question to be answered on remand.¹⁵⁸

For the second factor, the Court considered two issues. Initially, it expressed concern that natural parents acting in good faith would not seek treatment for their children “if such care is contingent on participation in an adversary proceeding designed to probe their motives and other private family matters in seeking the voluntary admission.”¹⁵⁹ The Court also found that the state “has a genuine interest in allocating priority to the diagnosis and treatment of patients as soon as they are admitted to a hospital rather than to time-consuming procedural minutes before the admission.”¹⁶⁰ Both considerations weighed in favor of less protections for children than adults.

For the third factor, the Court held that an inquiry of “some kind”¹⁶¹ by a neutral factfinder is required to make sure the statutory requirements for admission are met.¹⁶² It reached that conclusion by considering “what process adequately protects the child’s constitutional rights by reducing risks of error without unduly trenching on traditional parental authority,” and without interfering with the legitimate interests of the state.¹⁶³ The Court also held that “it is necessary that the child’s continuing need for commitment be reviewed periodically by a similarly independent procedure.”¹⁶⁴ It noted that the neutral factfinder did not have to be a judicial or administrative officer, but could be an independent medical expert.¹⁶⁵ A formal, or even quasi-formal, adversary hearing is not required.¹⁶⁶ States, however, can choose to require such a hearing.¹⁶⁷ In other words, federal law does not require a hearing, but state law can. The Court emphasized that “procedural

¹⁵⁴ *Id.*

¹⁵⁵ Meaning “in the place of a parent,” BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁵⁶ *Id.* at 619.

¹⁵⁷ *Id.* at 618.

¹⁵⁸ *Id.* at 619-620.

¹⁵⁹ *Id.* at 605.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 606.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 607.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.”¹⁶⁸

C. Siloed State Examples: Alaska and Washington

Though individual states are not required to provide a court proceeding for a child’s civil commitment,¹⁶⁹ states can choose to do so. States can also expand rights to Indian families and tribes.¹⁷⁰ Alaska and Washington provide good examples of the siloed state because of their civil commitment statutes and experience with the Indian Child Welfare Act.

Alaska provides several rights for children facing civil commitment, including the right to a state court proceeding.¹⁷¹ Alaska is also home to 229 federally recognized Indian tribes¹⁷² and is no stranger to applying ICWA in state court proceedings when the state’s child welfare agency seeks the removal of an Indian child.¹⁷³ Yet Alaska’s statutes and rules are silent as to ICWA’s application for Indian children in the context of a civil commitment.¹⁷⁴

Similarly, Washington provides the right to a hearing for children facing involuntary civil commitment.¹⁷⁵ Washington, home to twenty-nine federally recognized Indian tribes,¹⁷⁶ enacted a state ICWA to further protect the rights of Indian families and tribes.¹⁷⁷ The statutes, however, are in the juvenile court section of the Revised Code of Washington (RCW),¹⁷⁸ and the RCW governing mental health does not include a reference to ICWA.¹⁷⁹ Washington’s Mental Proceedings Rule (MPR) also makes no reference to ICWA.¹⁸⁰ Since each state’s laws will vary, the next section discusses the harm of isolating these two practices through the federal legal framework.

¹⁶⁸ *Id.* at 612-613 (quoting *Mathews v. Eldridge*, 424 U.S. 319 at 344 (1976)).

¹⁶⁹ *Id.* at 607.

¹⁷⁰ 25 U.S.C. § 1919 (2018). *See also* 25 U.S.C. § 1902 (2018).

¹⁷¹ ALASKA STAT. § 47.30.775 (2020) (citing that the right to a hearing provided to an adult at ALASKA STAT. § 47.30.715 (2020) also applies to a minor). *See also* ALASKA STAT. § 47.30.690 (2020) (youth’s rights when “voluntarily” committed to the state psychiatric facility by a parent). Alaska also has additional statutory scrutiny when the child welfare agency seeks to commit a youth. *See* ALASKA STAT. § 47.10.087 (2020).

¹⁷² Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 82 Fed. Reg. 4915 (January 17, 2017). Alaska is home to approximately 40% of all federally recognized Indian tribes.

¹⁷³ Alaska Child In Need of Aid Rule 1(f). Available at <http://www.courts.alaska.gov/rules/index.htm>.

¹⁷⁴ Alaska’s Rules of Court specifically apply ICWA to state child welfare agency proceedings, but not to civil commitment proceedings (Alaska Child In Need of Aid Rule 1(f) and Probate Rule 1. Available at <http://www.courts.alaska.gov/rules/index.htm>). *See also* ALASKA STAT. §§ 47.30.690-695 (2020), § 47.30.775 (2020).

¹⁷⁵ WASH. REV. CODE 71.05.230 (2020).

¹⁷⁶ Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 82 Fed. Reg. 4915 (January 17, 2017). *See also* www.washingtontribes.org.

¹⁷⁷ WASH. REV. CODE 13.38.010 *et seq.* (2020).

¹⁷⁸ WASH. REV. CODE Title 13, “Juvenile Courts and Juvenile Offenders,” contains Washington’s ICWA statutes at WASH. REV. CODE 13.38.010 *et seq.* (2020).

¹⁷⁹ WASH. REV. CODE 71.05.010 *et seq.* (2020).

¹⁸⁰ Washington MPR 6.1A, 6.2A, 6.3A, 6.4A, 6.5A.

II. THE CURRENT SILOED PRACTICE: FAILING TO APPLY ICWA TO STATE COURT CIVIL COMMITMENT PROCEEDINGS OF INDIAN CHILDREN HARMS INDIAN FAMILIES AND TRIBES

By acknowledging ICWA’s application in child welfare proceedings, but not for civil commitments, states cause harm to Indian children, their parents, and their Tribes. Most commonly, ICWA is applied in state court proceedings regarding child welfare, in hearings more commonly known as “abuse and neglect” or dependency actions. ICWA, however, applies in other state court proceedings as well. ICWA applies to any action to remove an Indian child for a foster care placement, which includes an institution, if the action means the parent or Indian custodian cannot have the child back upon demand.¹⁸¹ The BIA issued federal regulations clarifying that this includes truancy actions,¹⁸² voluntary proceedings,¹⁸³ and emergency proceedings,¹⁸⁴ if it could result in the removal of an Indian child. Recall the reasons that Congress enacted ICWA outlined in Section I.A.1. *supra*: ICWA exists because of the “alarmingly high percentage of Indian families ... broken up by the removal, often unwarranted, of their children,”¹⁸⁵ and that states handling child custody proceedings have historically been unsuccessful at recognizing indigenous culture and its impact on Indian communities.¹⁸⁶ The reasons Congress enacted ICWA are sharply reflected in civil commitment proceedings because Indian children are being removed from their parents, Indian custodians, and tribes without the full protections of ICWA.¹⁸⁷

Because of the United State Supreme Court’s decision in *Parham*,¹⁸⁸ there is no guarantee that Indian children facing involuntary civil commitment are receiving court oversight. One of ICWA’s protections is that it requires that the state official or agency terminate an emergency proceeding when it is no longer necessary.¹⁸⁹ To enforce this provision, the BIA requires the court to monitor the agency.¹⁹⁰ The BIA defines agency as “a non-profit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, pre-adoptive, or adoptive placements.”¹⁹¹

¹⁸¹ 25 U.S.C. § 1903(1)(i) (2018).

¹⁸² 25 C.F.R. § 23.103(a)(1)(iii) (2020).

¹⁸³ 25 U.S.C. § 1913(b) (2018). *See also* 25 C.F.R. § 23.103(a)(2) (2020).

¹⁸⁴ 25 C.F.R. § 23.103(a)(2) (2020).

¹⁸⁵ 25 U.S.C. § 1901(4) (2018).

¹⁸⁶ 25 U.S.C. § 1901(5) (2018).

¹⁸⁷ Consider Alaska, which is home to 229 of the 567 federally recognized tribes (Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 82 Fed. Reg. 4915 (January 17, 2017)). Alaska’s Rules of Court specifically apply ICWA to state child welfare agency proceedings, but not to civil commitment proceedings. (Alaska Child In Need of Aid Rule 1(f) and Probate Rule 1. Available at <http://www.courts.alaska.gov/rules/index.htm>.)

¹⁸⁸ *See* Section I. B. 2. b. *supra*.

¹⁸⁹ 25 U.S.C. § 1922 (2018).

¹⁹⁰ 25 C.F.R. § 23.113(b)(4) (2020).

¹⁹¹ 25 C.F.R. § 23.102 (2020).

There is no indication that courts are currently treating psychiatric hospitals or mental health professionals petitioning for civil commitment as meeting the definition of agency.¹⁹² But it is reasonable to interpret agency to include the psychiatric hospital or mental health professionals because foster care placement includes any action to place an Indian child in an institution.¹⁹³ Indeed, the BIA only excludes attorneys and law firms from the definition of agency.¹⁹⁴ It is true that the definition of agency states that it provides or performs services to the parents as opposed to the child; if a child is receiving inpatient care, however, any psychiatric facility or mental health professional treating that child is presumably providing services to the parents as well as the child, such as visitation during the inpatient period and coordinating outpatient care for discharge planning.¹⁹⁵ And consider ICWA’s explicit application to truancy,¹⁹⁶ which is a youth’s unexcused absence from school.¹⁹⁷ Truancy, like residential psychiatric care, can be premised on the actions of the child, but involves services to the parents.¹⁹⁸

ICWA’s protections regarding evidence are also unlikely being adhered to in current civil commitment proceedings.¹⁹⁹ It is true that the burden of proof – clear and convincing evidence – regarding the temporary removal of the Indian child for an involuntary civil commitment and a non-emergency action to place an Indian child in an institution under ICWA would likely be the same in a state court proceeding.²⁰⁰ However, there is a difference in the evidence required.

¹⁹² Consider Alaska, which is home to 229 of the 567 federally recognized tribes (Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 82 Fed. Reg. 4915 (January 17, 2017)). Alaska’s Rules of Court specifically apply ICWA to state child welfare agency proceedings, but not to civil commitment proceedings. (Alaska Child In Need of Aid Rule 1(f) and Probate Rule 1. Available at <http://www.courts.alaska.gov/rules/index.htm>.)

¹⁹³ 25 U.S.C. § 1903(1)(i) (2018).

¹⁹⁴ *Guidelines for Implementing the Indian Child Welfare Act*, U.S. DEPARTMENT OF THE INTERIOR 78 (2016), available at <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf> [<https://perma.cc/P8Q4-BMVH>].

¹⁹⁵ *E.g.*, Washington State’s Child Study and Treatment Center: “The hospital welcomes families ... to participate in treatment and discharge planning so children can successfully return to their family home.” *Child Study and Treatment Center*, WASHINGTON STATE DEPT. OF SOCIAL AND HEALTH SERVICES (Last accessed Apr. 27, 2020), <https://www.dshs.wa.gov/bha/division-state-hospitals/child-study-and-treatment-center> [<https://perma.cc/A3WF-8YL4>].

¹⁹⁶ 25 C.F.R. § 23.103(a)(1)(iii) (2020).

¹⁹⁷ Truancy, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁹⁸ *E.g.*, Laurel Andrews, *Facing Poor School Attendance, Alaska Turns to Fines and Prizes*, ANCHORAGE DAILY NEWS (updated September 28, 2016), <https://www.adn.com/education/article/fairbanks-fines-students-who-miss-too-much-school/2014/04/30/> [<https://perma.cc/E3U8-VTRD>]. Accessed May 5, 2020. *See also* ALASKA STAT. § 14.30.020 (2020) and ALASKA STAT. § 11.51.130(a)(3) (2020).

¹⁹⁹ Consider Alaska, which is home to 229 of the 567 federally recognized tribes (Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 82 Fed. Reg. 4915 (January 17, 2017)). Alaska’s Rules of Court specifically apply ICWA to state child welfare agency proceedings, but not to civil commitment proceedings. (Alaska Child In Need of Aid Rule 1(f) and Probate Rule 1. Available at <http://www.courts.alaska.gov/rules/index.htm>.)

²⁰⁰ *See* Addington v. Texas, 441 U.S. 418 (1979) (holding burden of evidence for commitment of adult) and 25 U.S.C. § 1912(e) respectively. *See also* Parham v. J.R., 442 U.S. 584 (1979) (lessening procedural due process protections for children in civil commitment proceedings).

In an involuntary civil commitment, the evidence generally must show that the person has a mental illness and cannot live outside the facility “nondangerously.”²⁰¹ The focus is on the individual’s mental illness and its manifestations, such as whether the individual has attempted self-harm. In an emergency proceeding regarding the involuntary removal of an Indian child, the evidence must show that the child would face imminent harm if left in the care of the parent or Indian custodian.²⁰² The focus is usually on the parents’ conduct, such as whether the child has been neglected to the point that the government must intervene to prevent the impending harm. Emergency proceedings involving an Indian child should last no longer than thirty days,²⁰³ at which point full ICWA protections – including the higher requirements for removal – should begin if an Indian child has not been returned to the child’s parent or Indian custodian, or jurisdiction has not been transferred to the child’s tribe.²⁰⁴ In a non-emergency state proceeding regarding the involuntary removal of an Indian child, the evidence must show that removal of the child from the child’s parents or Indian custodian is necessary to prevent serious emotional or physical damage to the child, including the testimony of a qualified expert witness.²⁰⁵

Pursuant to ICWA, a qualified expert witness *must* be qualified to testify on the causal connection between the child’s continued custody by the parent or Indian custodian and the serious emotional or physical damage that is likely to happen to the child due to the parent’s conduct.²⁰⁶ Further, the qualified expert witness *should* be qualified to testify as to the prevailing social and cultural standards of the Indian child’s tribe.²⁰⁷ Lastly, federal regulations state that “[t]he social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.”²⁰⁸ By contrast, the mental health professional in a civil commitment proceeding has no statutory requirement to be knowledgeable about the individual’s culture or situation.²⁰⁹ It is true that the mental health professional must speak to the less restrictive alternative option.²¹⁰ It is likely, however, that without cultural competence a mental health professional will not consider a potential less restrictive alternative; for instance, the mental health professional may value Western models of treatment over indigenous models.²¹¹

²⁰¹ O’Connor v. Donaldson, 422 U.S. 563 at 576 (1975). The exact wording will vary by state. Using Alaska as an example, an individual can only be involuntarily committed if they are “likely to cause serious harm” or are so “gravely disabled” they cannot live safely outside an institutional setting. See ALASKA STAT. § 47.30.735(c) (2020).

²⁰² 25 U.S.C. § 1922 (2018). See also 25 C.F.R. § 23.113(a) (2020).

²⁰³ 25 C.F.R. § 23.113(e) (2020).

²⁰⁴ 25 C.F.R. § 23.113(c) (2020).

²⁰⁵ 25 U.S.C. § 1912(e) (2018).

²⁰⁶ 25 C.F.R. § 23.122(a) (2020) (emphasis added).

²⁰⁷ *Id.*

²⁰⁸ 25 C.F.R. § 23.122(c) (2020).

²⁰⁹ Each state’s statute will vary but consider ALASKA STAT. §§ 47.30.730-735 (2020). See also *Olmstead v. L.C.*, 527 U.S. 581 (1999) (holding that, pursuant to the Americans with Disabilities Act’s provision on anti-discrimination by public providers, states must place individuals with mental disabilities in community settings rather than institutions when the state’s treatment professionals recommend a community setting, the community setting is supported by the individual, and the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities).

²¹⁰ *Id.*

²¹¹ See Section III. D. *infra*.

Beyond the question of agency and evidentiary issues, ICWA also provides protections for Indian families; some of the protections, however, are not necessarily provided for in a state’s proceedings governing civil commitment of a child.²¹² First, indigent parents and Indian custodians are entitled to court-appointed counsel in any involuntary proceeding to remove an Indian child.²¹³ The state court can also provide the child counsel if it is in the child’s best interests.²¹⁴ Second, depending on the facts of the case, tribes have exclusive²¹⁵ or concurrent²¹⁶ jurisdiction over children of their tribe, and as such, can move to have the Indian child’s case transferred to tribal jurisdiction.²¹⁷ Third, tribes can intervene as a party to a state court proceeding.²¹⁸ The party status gives tribes a right to “timely examine all report and other documents . . . upon which any decision” that could result in a temporary removal of the Indian child by the court may be based.²¹⁹

ICWA also provides protections for Indian families when the parent initially agreed to a voluntary proceeding for a foster care placement, but that action could prohibit the parent or Indian custodian from regaining custody of the child upon demand.²²⁰ For example, a parent may agree to a voluntary proceeding for a foster care placement in a psychiatric treatment center because the parent believes the child needs that specialized care. In state proceedings for voluntary removal of an Indian child, ICWA requires that the Indian child must be returned to the parent or Indian custodian when the parent withdraws their consent either through a written document filed with the court, through testimony to the court, or another available method pursuant to state law.²²¹ The court “must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.”²²² Continuing the example, say the parent files a written request to withdraw their child, but the psychiatric treatment center considers the withdrawal to be medical neglect. If the practitioners are unfamiliar with ICWA, the parent may not have their child returned to them. If ICWA is applied correctly, the psychiatric center has two options if it sincerely believes the child needs treatment: file an emergency petition if they think the situation so merits, or return the child and file a non-emergency petition for treatment.²²³

²¹² Consider Alaska, which is home to 229 of the 567 federally recognized Tribes (Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 82 Fed. Reg. 4915 (January 17, 2017)). Alaska’s Rules of Court specifically apply ICWA to state child welfare agency proceedings, but not to civil commitment proceedings (Alaska Child In Need of Aid Rule 1(f) and Probate Rule 1. Available at <http://www.courts.alaska.gov/rules/index.htm>).

²¹³ 25 U.S.C. § 1912(b) (2018) (appointment of counsel in involuntary proceedings); 25 C.F.R. § 23.103 (2020) (when does ICWA apply).

²¹⁴ 25 U.S.C. § 1912(b) (2018).

²¹⁵ 25 U.S.C. § 1911(a) (2018).

²¹⁶ 25 U.S.C. § 1911(b) (2018).

²¹⁷ 25 U.S.C. § 1911(b) (2018). *See also* 25 C.F.R. § 23.113(c)(2) (2020).

²¹⁸ 25 U.S.C. § 1911(c) (2018).

²¹⁹ *Id.* *See also* 25 C.F.R. § 23.134 (2020) (governing emergency proceedings as well as non-emergency proceedings).

²²⁰ 25 U.S.C. § 1913(b) (2018). *See also* 25 C.F.R. § 23.103(a)(1)(ii) (2020).

²²¹ 25 C.F.R. § 23.127(b) (2020). *See also* 25 U.S.C. § 1913(b) (2018).

²²² 25 C.F.R. § 23.127(c) (2020). *See also* 25 U.S.C. § 1913(b) (2018).

²²³ 25 U.S.C. §§ 1912, 1922 (2018). *See also* 25 C.F.R. § 23.113 (2020).

Civil commitment proceedings are often confidential.²²⁴ Without the enforcement of these rights in civil commitment proceedings, tribes may not be able to locate their members – or the wards of their courts.²²⁵ Parents and non-parental custodians may wrongfully have their children removed based on a cultural misunderstanding. Indian custodians may not be recognized at all. Consider: an Indian youth, raised by her Indian grandmother since shortly after her birth, is initially brought by a friend to a psychiatric hospital due to suicidal ideation. Grandmother is an Indian custodian by tribal custom.²²⁶ But the psychiatric hospital and the state court who are unfamiliar with ICWA only attempt to notify the Indian youth’s parents, who they cannot locate. Grandmother is frantic because she does not know where her granddaughter is, and no agency will confirm or deny they have seen her because grandmother does not have any court-ordered guardianship. These are all unforced errors: such unnecessary trauma is avoidable.

III. END THE SILO AND PROMOTE INTERDISCIPLINARY PRACTICE CONSISTENT WITH CONGRESS’S INTENT TO PROTECT INDIAN FAMILIES AND TRIBES: APPLY ICWA TO STATE COURT PROCEEDINGS REGARDING CIVIL COMMITMENTS OF INDIAN CHILDREN

ICWA was enacted for the benefit of Indians.²²⁷ Its attendant federal regulations are issued in consideration of “the canon of construction, applied by Federal courts, that Federal statutes should be liberally construed in favor of Indians, with ambiguous provisions interpreted for their benefit.”²²⁸ The BIA published extensive commentary on situations that trigger ICWA’s application: when there is an action that may culminate in a foster care placement, which includes placing a child in an institution;²²⁹ and in emergency situations.²³⁰ As such, it is reasonable to apply ICWA to state court proceedings for the civil commitment of Indian children given the plain language of ICWA: that Indian children cannot be forcibly removed from their parents and tribe to be placed in an institution until specific criteria are met.²³¹

²²⁴ *E.g.*, ALASKA STAT. § 47.30.845 (2020).

²²⁵ *In re Gabriella B.*, Supreme Court Nos. S-17022/S-17122, 2019 WL 2880964 (Alaska 2019).

²²⁶ 25 U.S.C. § 1903(6) (2018).

²²⁷ 25 U.S.C. §§ 1901-3 (2018).

²²⁸ Indian Child Welfare Act Proceedings, 81 Fed. Reg. 114, 38785 (June 14, 2016) (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Doe v. Mann*, 415 F.3d 1038, 1047 (9th Cir. 2005)).

²²⁹ Indian Child Welfare Act Proceedings, 81 Fed. Reg. 114, 38799 (June 14, 2016). *See also* Section I. A. 3. *supra*.

²³⁰ Indian Child Welfare Act Proceedings, 81 Fed. Reg. 114, 38816-38821 (June 14, 2016). *See also* 25 U.S.C. § 1922 (2018) and 25 C.F.R. § 23.113 (2020).

²³¹ 25 U.S.C. § 1912(e) (2018) (for non-emergencies); 25 U.S.C. § 1922 (2018) (for emergencies). *See also* 25 U.S.C. § 1903(1)(i) (2018) (defining “foster care placement” to include placement of an Indian child in an institution).

A. An Interdisciplinary Checklist for Practitioners in State Court Civil Commitment Proceedings

ICWA creates limits on the removal of Indian children for the protection of Indian children, their parents, and their tribes. ICWA imposes four initial duties that would apply in any state court civil commitment proceeding involving a child. First, determine if there is reason to believe the child is an Indian child, which triggers ICWA's application.²³² Second, determine whether notice has been provided to the parents and tribe.²³³ Third, determine the appointment of counsel for the parents, Indian custodian, and child if it is in the child's best interests.²³⁴ Fourth, determine whether the tribe has exclusive jurisdiction of the child.²³⁵

These duties must be considered for two reasons. As an initial matter, ICWA and the federal regulations governing its enforcement control over a state's statutes and case law because of the Supremacy Clause of the United States Constitution.²³⁶ A state's civil commitment statutes may not provide the protections for parents and children that are in ICWA. Indeed, state laws regarding civil commitment are unlikely to provide protections to tribes that are ascribed in ICWA.²³⁷ Finally, if a state court proceeding does not provide ICWA's protections regarding jurisdiction and removal then the child, parent, Indian custodian, or tribe may petition "any court of competent jurisdiction" to invalidate that state court action.²³⁸ These duties are not a high burden to the court. It would primarily be an additional inquiry of the court to the petitioner at the outset of the proceeding.

Two subsequent duties provide further protections for Indian children, parents, and their tribes by ensuring that Indian children are only removed from their parents if the party seeking removal can meet the high legal burden. Initially, if the proceeding qualifies as an emergency, then the court must monitor the emergency, specifically focusing on a method to end the emergency.²³⁹ Moreover, in either a method to end the emergency or in non-emergency situations, the court must determine whether the party seeking removal of the Indian child from their parent has met their burden of clear and convincing evidence, including the testimony of a qualified expert witness, that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.²⁴⁰

²³² 25 U.S.C. § 1912(a) (2018). *See also* 25 U.S.C. § 1903(1)(i) (2018) (defining foster care placement to include placement in an institution). *See also* 25 C.F.R. § 23.107(c) (2020).

²³³ 25 U.S.C. § 1912(a) (2018).

²³⁴ 25 U.S.C. § 1912(b) (2018).

²³⁵ 25 U.S.C. § 1911(a) (2018).

²³⁶ "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

²³⁷ *See* Section I. C. *supra*.

²³⁸ 25 U.S.C. § 1914 (2018).

²³⁹ 25 C.F.R. § 23.113 (2020). *See also* 25 U.S.C. § 1922 (2018).

²⁴⁰ 25 U.S.C. § 1912(e) (2018).

B. The Checklist in Action: The Four Initial Duties

The first duty is to ascertain whether ICWA applies. ICWA applies to a state court civil commitment proceeding if the child at issue is an Indian child and the proceeding may result in removal of the child for placement in an institution.²⁴¹ The federal regulations issued by the BIA provide guidance for courts on how to determine if the child is an Indian child.²⁴² For instance, the court must inquire whether there is reason to know that the child is an Indian child, and the parties' responses must be on record.²⁴³ If there is reason to know the child may be an Indian child, then the court must treat the child as an Indian child until the court receives information confirming that the child does not meet the definition of an Indian child.²⁴⁴

The second and third duties are straightforward. The court must determine that parties entitled to notice received it.²⁴⁵ The court must appoint counsel for indigent parents.²⁴⁶ The court may also appoint counsel for the child.²⁴⁷

The fourth duty is to determine whether the tribe has exclusive jurisdiction over the child.²⁴⁸ It is imperative that a state court proceeding address jurisdiction immediately. It is true that states can take action to protect an Indian child in an emergency.²⁴⁹ If a tribe has exclusive jurisdiction, however, ICWA does not allow a state to maintain an emergency proceeding except for the time necessary to effectuate the transfer of the Indian child back to their tribe.²⁵⁰

After these four duties are completed, the judicial officer can determine whether the state court action should continue. If so, this triggers subsequent duties under ICWA to determine whether the Indian child can be removed from their parents.

C. The Checklist in Action: The Subsequent Duty to End the Emergency

One of ICWA's primary principles is that removal of an Indian child from their parent shall not happen until after a court hears clear and convincing evidence, including the testimony of a qualified expert witness, that removal of the child from the child's parents or Indian custodian is necessary to prevent serious emotional or physical damage to the child.²⁵¹ ICWA authorizes an exception, however, for emergencies.²⁵²

²⁴¹ 25 U.S.C. § 1912(a) (2018). *See also* 25 U.S.C. § 1903(1)(i) (2018) (defining foster care placement to include placement in an institution) and 25 U.S.C. § 1903(4) (defining "Indian child").

²⁴² 25 C.F.R. § 23.107 (2020).

²⁴³ *Id.* at (a).

²⁴⁴ *Id.* at (b).

²⁴⁵ 25 U.S.C. § 1912(a) (2018).

²⁴⁶ 25 U.S.C. § 1912(b) (2018).

²⁴⁷ *Id.* It should be noted that for discrepancies between ICWA and state law, whichever provides more protections controls. As such, if state law requires the appointment of counsel for a child, then it is ICWA-compliant for the child to be appointed counsel as a matter of right. 25 U.S.C. § 1921 (2018).

²⁴⁸ 25 U.S.C. § 1911(a) (2018).

²⁴⁹ 25 U.S.C. § 1922 (2018).

²⁵⁰ 25 C.F.R. § 23.110 (2020). *See also* 25 C.F.R. § 23.113(c)(2) (2020).

²⁵¹ 25 U.S.C. § 1912(e) (2018).

²⁵² 25 U.S.C. § 1922 (2018).

In order to constitute an emergency under ICWA, an Indian child must be at risk of imminent physical damage or harm.²⁵³ What constitutes imminent physical damage or harm is defined under state law.²⁵⁴

Certainly, it is possible for the same conduct to qualify as an emergency removal pursuant to ICWA and an emergency commitment proceeding for mental health purposes. Recall the United States Supreme Court's ruling in *O'Connor v. Donaldson* that a state cannot involuntarily commit "a nondangerous individual who is capable of surviving in freedom by himself or with the help of willing and responsible family members or friends."²⁵⁵ One example could be that an Indian child attempted suicide. Such acute behavior, depending on the circumstances, could constitute both imminent harm to the child as a danger to oneself based on the child's mental health.

Continuing with this example, an emergency state court civil commitment proceeding regarding an Indian child who is involuntarily committed for a suicide attempt would be subject to ICWA. ICWA requires that the state court work to end the emergency.²⁵⁶

An emergency should not extend beyond 30 days.²⁵⁷ The state court must promptly hold a hearing when there is new information the emergency may have ended.²⁵⁸ There are three ways to end an emergency.²⁵⁹

First, the state court can provide full protections under ICWA.²⁶⁰ Full protections of ICWA include the higher standard for removal of an Indian child: clear and convincing evidence, including the testimony of a qualified expert witness, that removal of the child from the child's parents or Indian custodian is necessary to prevent serious emotional or physical damage to the child.²⁶¹ This protection is discussed in detail *infra* Section III.D.

Second, the state court can transfer the Indian child to tribal jurisdiction.²⁶² This would include either the tribe's exclusive or concurrent jurisdiction.²⁶³ It is the state court's responsibility to timely contact the tribal court in writing to see if the tribal court wants to decline the transfer.²⁶⁴

Third, the state court can restore the Indian child to their parent.²⁶⁵ This option is intended for when the safety threat that caused the emergency is over.²⁶⁶ Returning to the example of an Indian child who attempted suicide, a parent may argue in the state court civil commitment proceeding that the acute nature of the suicide attempt has ameliorated as both the impulse has passed and the parent has made arrangements to treat their child's mental health. When there is a

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ 422 U.S. 562 at 576 (1975).

²⁵⁶ 25 U.S.C. § 1922 (2018). *See also* 25 C.F.R. § 23.113 (2020).

²⁵⁷ 25 C.F.R. § 23.113(e) (2020).

²⁵⁸ 25 C.F.R. § 23.113(b)(2) (2020).

²⁵⁹ 25 U.S.C. § 1922 (2018). *See also* 25 C.F.R. § 23.113(c) (2020).

²⁶⁰ 25 U.S.C. § 1922 (2018). *See also* 25 C.F.R. § 23.113(c)(1) (2020).

²⁶¹ 25 U.S.C. § 1912(e) (2018).

²⁶² 25 U.S.C. § 1922 (2018). *See also* 25 C.F.R. § 23.113(c)(2) (2020).

²⁶³ 25 C.F.R. § 23.113(c)(2) (2020). *See also* 25 C.F.R. § 23.110(b) (2020).

²⁶⁴ 25 C.F.R. § 23.116 (2020).

²⁶⁵ 25 U.S.C. § 1922 (2018). *See also* 25 C.F.R. § 23.113(c)(3) (2020).

²⁶⁶ BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 25 (2016), <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf> [<https://perma.cc/A4FP-UPFN>].

dispute between the parent and the petitioner, courts place heavy emphasis on the qualified expert witness.²⁶⁷

D. The Checklist in Action: The Subsequent Duty to Ensure Removal Only Happens if a Qualified Expert Witness Testifies

As either a cure for the emergency, or in a non-emergency situation, the party seeking removal of the Indian child from their parent must present clear and convincing evidence, including the testimony of a qualified expert witness (QEW), that removal of the child from the child's parents or Indian custodian is necessary to prevent serious emotional or physical damage to the child.²⁶⁸ The social worker regularly assigned to the Indian child may not serve as the QEW.²⁶⁹ The bar on the assigned social worker serving as the QEW matters because states have differing standards on who qualifies as a mental health professional for purposes of qualifying as an expert witness in an involuntary civil commitment; Alaska, for example, qualifies a licensed clinical social worker.²⁷⁰

The QEW *must* be qualified to testify regarding whether the continued custody by the parent or Indian custodian is likely to result in that type of harm, and *should* be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.²⁷¹ While practitioners seeking removal of an Indian child are often able to retain an expert on mental health, an expert who is also culturally competent is often lacking.²⁷²

The BIA has provided further guidance regarding when cultural competence matters. It allows "limited circumstances" where cultural knowledge is "plainly irrelevant."²⁷³ But the BIA "disagrees ... with the ... suggestion that State courts or agencies are well-positioned to assess when cultural biases or lack of knowledge is, or is not, implicated. ICWA was enacted in recognition of the fact that the opposite is generally true."²⁷⁴ The BIA also highlights that "some theories, such as certain bonding and attachment theories, presented by experts in foster-care ... proceedings are based on Western or Euro-American cultural norms and may have little application outside that context."²⁷⁵

There are major differences between Western and indigenous cultures. Indeed, one such dissertation on the differences and its effect on mental health treatment is the Society of Indian Psychologists' (SIP) *Commentary on the American Psychological Association's (APA) Ethical Principles of Psychologists and Code of Conduct*, which arose because of the negative impact the

²⁶⁷ *E.g., In re April S.*, 467 P.3d 1091 (Alaska 2020).

²⁶⁸ 25 U.S.C. § 1912(e) (2018).

²⁶⁹ 25 C.F.R. § 23.122(c) (2020).

²⁷⁰ ALASKA STAT. § 47.30.915(13) (2020).

²⁷¹ 25 C.F.R. § 23.122(a) (2020) (emphasis added).

²⁷² *E.g., In re April S.*, 467 P.3d 1091 (Alaska 2020).

²⁷³ Indian Child Welfare Act Proceedings, 81 Fed. Reg. 114, 38,830 (June 14, 2016).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

APA's code of ethics had for professionals working with indigenous populations.²⁷⁶ SIP notes that the original ethical code was developed without input from indigenous populations.²⁷⁷ Furthermore, SIP delineates the differences, noting that Western values often focus on the siloed objective individual, whereas indigenous cultures value interdisciplinary action that considers the community.²⁷⁸

In addition to their overarching values, Western and indigenous cultures can vary in treating mental health issues. Take therapy, for example. SIP's Commentary discusses that the APA's ethical code on written informed consent between the patient and the professional "do[es] not reflect the verbal nature of communication in Native communities" because many indigenous communities are oral cultures.²⁷⁹ Insisting on a written document as the only way to establish consent is a Western bias.²⁸⁰ SIP also notes that the APA's ethical code regarding what is a "recognized technique or procedure" constitutes a Western bias for two reasons: first, "recognized" procedures are generally considered Western procedures, and second, Western approaches to treatment can be viewed as "cold, irrelevant, and harmful" to indigenous peoples.²⁸¹

Returning to the scenario where the Indian child attempted suicide, add the two issues raised by SIP. The Indian child and her parents do not want to sign any forms. The family wants to address the Indian child's mental health with both outpatient therapy and traditional healing activities, including a spiritual ceremony and subsistence gathering.

Now consider how a proposed QEW without cultural competence may view this plan.²⁸² Such a QEW may testify that the family cannot provide the treating professional with informed consent by refusing to sign the forms. The family's plan does not fit into the traditional Western model for mental health treatment. A proposed QEW without cultural competence may argue that the parents are unfit to meet the Indian child's medical needs because the parents do not accept the Western standard. This is precisely what ICWA is designed to address.

In addition to specific courses of mental health treatment, recall also the history of how the United States has treated its indigenous peoples discussed in I.A.1. *supra*. The assimilation of indigenous peoples through the separation of their children from their families and tribes ran paramount through the 1970s.²⁸³

²⁷⁶ MELINDA A. GARCIA & MELISSA TEHEE. COMMENTARY ON THE AMERICAN PSYCHOLOGICAL ASSOCIATION'S (APA) ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT 7 (Society of Indian Psychologists 2014).

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 74-75.

²⁷⁹ *Id.* at 91.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 92.

²⁸² While there are differences between psychiatry, a medical field dedicated to disorders of mind and behavior, and psychology, a field that studies the mind as it relates to behavior, both often work in tandem to treat individuals with mental health disorders and could be considered qualified expert witnesses for purposes of state civil commitment proceedings and ICWA. *E.g., compare* ALASKA STAT. § 47.30.915(13) (2020) (who may serve as a mental health professional in a civil commitment proceeding), *with* 25 C.F.R. § 23.122 (2020) (who may serve as a qualified expert witness for ICWA).

²⁸³ *Supra* Part I.A.1.

Include this context for the same example of the Indian child who attempted suicide. The family also does not want the child in a locked facility hundreds of miles from their tribe, separated from their family and culture. A proposed QEW who lacks cultural competence may view this as medical neglect instead of what it is: a credible fear that the dominant government may separate the child and limit the child's interactions with their family and culture.

The Alaska Supreme Court has considered a QEW's lack of cultural competency in the context of a child welfare proceeding where the state child welfare agency sought to place the Indian child in an out-of-state psychiatric treatment center.²⁸⁴ It unanimously held that for this Indian child's situation, which included suicide attempts, the QEW did not need to be culturally competent.²⁸⁵ The court recognized that there are limited circumstances where cultural competence is irrelevant, and it determined this was such a circumstance.²⁸⁶ There is a wide gulf, however, between the BIA's example of a limited circumstance of sexual abuse by a parent²⁸⁷ and the more difficult question of a child's mental health treatment. It is common sense to ensure that a child will not be sexually abused by their parent. How to treat mental health needs is more complex. The court erred when it dispensed the cultural competency requirement in this scenario.

The court also tried to find exception predicated on the Indian child's conduct, and not on conditions of her mother's home.²⁸⁸ This is error. Unless the conduct is considered criminal, a petitioner's request for foster care placement based on an Indian child's conduct still merits a culturally competent expert.²⁸⁹ For example, if a petitioner seeks to remove an Indian child because they are truant, then the petitioner's expert should be culturally competent.²⁹⁰

To find exceptions to ICWA compliance when faced with difficult questions begs revisiting why ICWA had to be passed in the first place – state agencies and courts are not well-versed in Indian culture.²⁹¹ Consider the court's end result here: after dispensing with ICWA's QEW standards, an Indian child was removed from her mother's home and placed thousands of miles from her family and tribe in a locked facility that is acknowledged to be culturally incompetent.²⁹²

The concurring opinion from the court, however, recognized that a QEW's cultural competence should not be unilaterally excluded from situations involving an Indian child's mental health.²⁹³ "The difficulty of these issues alone does not quash Congress's emphasis on contextualizing an Indian child's needs" because "[d]oing so would emphasize [the petitioner's]

²⁸⁴ *In re April S.*, 467 P.3d 1091 (Alaska 2020).

²⁸⁵ *Id.* at 1099.

²⁸⁶ *Id.* See also Indian Child Welfare Act Proceedings, 81 Fed. Reg. 114, 38,830 (June 14, 2016).

²⁸⁷ Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,830.

²⁸⁸ *In re April S.*, 467 P.3d at 1099.

²⁸⁹ See 25 C.F.R. § 23.103(a)(1)(iii) (2020) (ICWA applies to status offenses, such as truancy), 25 U.S.C. § 1903(1)(i) (2018) (defining foster care placement), 25 U.S.C. § 1912(e) (2018) (no foster care order can be in effect unless the petitioner proves removal is necessary, including the testimony of a qualified expert witness), and 25 C.F.R. § 23.122 (2020) (who may serve as a qualified expert witness).

²⁹⁰ *Id.*

²⁹¹ Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,830.

²⁹² *In re April S.*, 467 P.3d at 1097, 1099.

²⁹³ *Id.* at 1099-1101 (Winfrey, J., concurring).

responsibility and ultimately allow courts to better, and more fairly, adjudicate difficult questions in the spirit of ICWA’s regulations and guidelines.”²⁹⁴ To not hold the petitioner to its burden of a culturally competent QEW risks “the possibility that some of” an Indian child’s “heightened needs may be caused, or at least exacerbated by being in a facility entirely disconnected from her culture.”²⁹⁵

The explicit importance of cultural competence derives from ICWA, not from civil commitment jurisprudence.²⁹⁶ This underscores the importance of answering the initial question on whether ICWA applies.²⁹⁷ Unless practitioners check for ICWA’s application, Indian children, their families, and their tribes will not receive their full protections under federal law. The result will be unnecessarily separated families, which is a serious trauma recognized by both cultures.²⁹⁸

This Article does not posit that the petitioner in civil commitments proceedings must incur a new cost and burden; rather, the plain language of ICWA shows that it has always applied to state civil commitment proceedings, and the petitioner must follow federal law. It is also possible that the QEW and the petitioner’s witnesses would have complimentary testimony; indeed, there are expert witnesses who would meet the criteria to testify about both why an individual needs to be involuntarily committed and why, in the case of an Indian child, releasing the child back to their parents or Indian custodian would be unsafe. “Regardless whether the outcome would be the same with testimony about Native cultural and social practices, standardizing and reinforcing expectations for culturally informed testimony would create and maintain a worthwhile safeguard.”²⁹⁹

IV. CONCLUSION

It is in everyone’s best interests to ensure a child is removed only if necessary. To do otherwise is to do harm.³⁰⁰ The plain language of ICWA supports its application in the context of civil commitment proceedings of Indian children. Though ICWA’s application in child welfare proceedings is long recognized, there is silence on ICWA’s interplay with the equally important area of civil commitment. This Article demonstrates why ICWA matters for Indian children facing removal from their parents or Indian custodians for placement in an institution due to a civil commitment proceeding. The rights accorded to tribes to protect their members, also infringed with the current siloed practice, must be recognized. The checklist provided in this Article can end the siloes, encourage better interdisciplinary practice, and most importantly, reduce trauma for Indian families by providing them all their rights and protections under the law.

²⁹⁴ *Id.* at 1101.

²⁹⁵ *Id.* at 1099.

²⁹⁶ *Cf.* 25 C.F.R. § 23.122(a) (2020) and *Addington v. Texas*, 441 U.S. 418 (1979).

²⁹⁷ *Supra* Part III.A.

²⁹⁸ American Bar Association, *supra* note **Error! Bookmark not defined.**. See also WENDY PETERS ET AL., POSITION STATEMENT REGARDING THE UPDATED GUIDELINES TO THE INDIAN CHILD WELFARE ACT (2015), (Society of Indian Psychologists 2015).

²⁹⁹ *In re April S.*, 467 P.3d at 1101 (Winfrey, J., concurring).

³⁰⁰ American Bar Association, *supra* note **Error! Bookmark not defined.**. See also PETERS ET AL., *supra* note 298.