TO: Partners of The Law Offices of Bergman and Reller
FROM: Associate's Andersen, Barber, Noeil, Thiessen, and Tran
RE: Child Welfare Services: Application of "Indian Child Welfare Act"
DATE: March 9, 2018

ISSUES

A) Does ICWA apply to minor child who is not a member of an Indian Tribe?
B) If ICWA applies does the state or Indian Tribe have jurisdiction?
C) Does good cause exist to involuntarily terminate father's parental rights?
D) In placement of minor into pre-adoptive home, are foster parents required to be Native American?

SHORT ANSWERS

A. Yes, the Indian Child Welfare Act of 1978 applies. Parents are of Native American ancestry. Indian Child as per **§ 1903(4)**, "**Indian child**" means any unmarried person who is under age eighteen and is either (a) a member of an **Indian** tribe or (b) is eligible for membership in an **Indian** tribe and is the biological **child** of a member of an **Indian** tribe."
B. As a result of the child being born on the reservation, even with his residency not being represented later in his life, his eligibility as a member still stands through his heritage. The matter of jurisdiction relies on the tribe asking to take the case, otherwise the child proceedings will continue under the state's authority if no agreements exist between the two entities specifying otherwise.
C. Yes, good cause exists to involuntarily remove parental rights from father due to his incarceration in state prison.
D. Possibly, placement preferences of minor child must be timely, therefore under **§ 1915**, the mother's preference should be taken for initial placement. Depending on the circumstances of the case, the child's Indian tribe may have final authority which could alter any initial placement decisions.

FACTS

Two possible Native American Parents: father is currently in jail on drug charges and mother has physical custody of child, but also has a history of abusing prescription narcotics. When father was arrested due to a domestic dispute, child welfare services was brought in to the situation. Child was temporarily removed from the parents' custody. Upon further evaluation at the time, the child was remanded back to the mother. Due to prior issues and the current situation, the mother has decided to put her son up for adoption, both parents have no immediate or extended family. Thus, child welfare services has taken custody of the son and placed him in a temporary foster home. Parents were not married and were in an "off and on" relationship. Father is currently in jail, he is, however, of Navajo ancestry and grew up on the reservation participating heavily within the culture until the age of 19. Following that, the father left the reservation and has not been back since and is currently 24 years of age. The Mother has Native American ancestry, the grandmother lived on the Cherokee nation reservation, yet she (the mother) is not a member of the tribe and has not participated in any Native American culture. Due to the father's incarceration child welfare services seeks to remove parental rights. The mother as custodial parent is voluntarily waiving her parental rights. Miss. Cady Longmire of

Child Welfare Services does not know if ICWA applies and if it does, in what manner would that affect the child's proceedings.

DISCUSSION

Is ICWA applicable to a minor child, where this child is not a member of a federally recognized Indian tribe, and if so Child Welfare Services (Miss Cady Longmire) seeks advice as to how this case should proceed. This topic has multiple issues in regards to the procedural aspects in dealing with a potential ICWA case, to the application of certain sections of ICWA. These issues to which will be addressed are **(1)** does ICWA apply, **(2)** preliminary considerations, **(3)** the process of notifying the tribe, **(4)** jurisdictional rights, **(5)** jurisdictional agreements between the state and tribe, **(6)** voluntary and involuntary termination of parental rights, and lastly **(7)** placement preferences of pre-adoptive foster care.

1. Application of ICWA

As to whether ICWA applies, initially the answer is yes. As per **§1903(4)**, "Indian Child" means any unmarried person who is under the age 18 and is either **(a)** a member of an Indian tribe or **(b)** is eligible for membership in an Indian Tribe and is the biological child of a member of an Indian Tribe. As per the facts the minor child's father is a presumed member of the Navajo Nation; making the minor child at least potentially eligible for membership within the Navajo Nation.

2. Preliminary Considerations

In this situation, when the Indian Child Welfare Act applies, the safety of the child results in "emergency removal or placement" under **§1922**. The safeguarding of the child is a priority at all times by the State and the Tribe. The reason for the subsection in the first place, is to protect any "child in need of aid" against the physical harm and to remove them immediately ***(AS 47.10.010(a)(2)(A))***. In the proceedings of this emergency the acknowledgement of the placement of the child in foster care will be enacted in preventative measures.

This includes a jurisdictional matter, for the Tribe, in most cases, will take custody of the child during the proceedings temporarily if the Indian child is sought to be in any pending physical or emotional harm. Jurisdiction relies on whether the child is domiciled on or resident of the reservation, will grant the Tribe custody, if not the State court will exercise State law, yet ICWA is still applicable to an Indian child not on reservation lands. All tribal emergency removals do not have to apply to ICWA under Tribal law, under their authority and jurisdiction of the child's situation.

3. The Process of Notifying the Tribe

The adherence to **§1912(a)** of ICWA is essential to avoid any violations of the act at the onset. Sending a notice to potential Indian tribes to which the child belongs is required when any adoption care of parental right termination proceedings are initiated. The plain language of **§1912(a)** is an incomplete picture of what is now required, with the courts having assigned high standards for thoroughness and completeness of the notice. Unfortunately, the burden for ensuring that this level of work is met lands on our client.

Being that the notice required by ICWA has been developed as an added means to determine whether a child can be an Indian child, it becomes crucial at this stage to ensure a proper notice is provided. ***In re Isaiah W.*** the California Supreme Court found the **§1912(a)**

notice to serve more than just a notice for tribes of their ability to assert authority, but provide the word themselves as to the child's eligibility for tribal membership ***(In re Isaiah W., 203 Cal. Rptr. 3d 633, 373 P.3d 444 (Cal. 2016))***. In the current matter, making certain that the **§1912(a)** notice to the potential tribes is sent completely and in the correct manner will prevent any early violations of ICWA which could potentially render all actions taken unlawful.

The tribes who receive and respond to the notice will also play an important role in establishing whether this child is eligible for tribal membership. This parallel purpose of the **§1912(a)** notice, although not written into the law, was established by the California Supreme Court to be a key aspect of the notice. However, not receiving an affirmative response from tribes regarding membership does not rule out ICWA. The client must prepare to any potential response to the notice; sending the notice may have a neutral effect on the outcome, but not sending the notice will ensure a negative outcome.

When the notice is prepared and sent for the client, there are two key elements that must be present in order for the notice itself to not create a point of contention: it must contain the complete information regarding family history and relations of the child, and it must be sent to all applicable tribes. The notice is required to contain all information available, according to ***In re Breanna S.***, since such information could have a sway on whether tribes see the child as eligible for membership ***(In re Breanna S., 8 Cal. App. 5th 636, 2017 WL 588029 (2d Dist. 2017))***. This aspect of the notice is viewed through the lens of *Isaiah*, being that it is a means of providing the tribes with input on the proceedings and defining what Indian children are their Indian children. The notice must, secondly, be sent to all tribes the child could be a potential member of, not just the largest ones. This has been found by the courts to be an incomplete notice, as not all tribes may have the same standards for membership and it only takes one tribe's say-so to make a child eligible ***(In re O.C., 2016 WL 6879279 (Cal. App. 1st Dist. 2016))***. The net must be cast wide, otherwise we risk a negative outcome.

If the ICWA notice requirements set out by the courts are followed to their greatest extent, small mistakes can be eased as long as they are minor and in the presence of otherwise acceptable work. The court has found that state social workers can be assumed to be following ICWA in similar proceedings unless there is abundant evidence to the contrary; the state can be assumed to be acting in good will ***(In re L.B., 3 Cal. Rptr. 3d 16 (Cal. App. 3d Dist. 2003))***. This by no means leads us to think that mistakes on the notice will be made, however an eye for being thorough will contribute to shielding our client from any unintended mistakes on the notice.

4. Inherent Jurisdictional Rights

In light of the situation presented, if Child Services (Ms. Longmire) wanted to terminate the parental rights of the father due to his inability to properly support the child from his current imprisonment, it may have grounds to do so through the tribal courts, if the tribal courts can procure jurisdiction under ICWA **§1911(b)**.

Due to the unknown origin of birth (i.e. domiciliary status) of the child, Child Services is advised to inquire after either the place of birth of the child, tribal domiciliary of either parent, or the status of the child as a member of the Navajo Nation. This information could be garnered from the notice letter that must be sent out to all applicable tribes of the child pursuant of **§1912**.If the child meets any of the criteria as mentioned above, the child is considered a domiciliary of The Navajo Nation, as pursuant of ICWA **§1911(a).** Therefore, tribal jurisdiction can be established and the adoption process can be transferred from the state court to tribal court ***(In re Youpee's Adoption, 11 Pa. D. & C.4th 71 (Com. Pl. 1991)***. Once the tribal court gets

jurisdiction they can then can choose to continue the foster care of the child. If the child was born on the reservation, the child can be claimed as a domiciliary of The Navajo Nation under **§1911(a)**. Even if the majority of the child's life was spent off the reservation ***(In re Youpee's Adoption, 11 Pa. D. & C.4th 71 (Com. Pl. 1991)***. Thus, if Child Services wants to continue the foster care of the child, they are then advised to inquire after the origin of birth of the child to see if **§1911** of ICWA is applicable in this scenario.

If the child is found to not be a domiciliary of The Navajo Nation and if the client wishes to continue to put the child into custody of the foster care system, jurisdiction of the tribe can still be established under **§ 1911(b) of ICWA**, but it is contingent on if the Navajo tribal court would want to accept jurisdiction in the proceedings. The father in this scenario can stop the proceedings if he formally gives good cause or object at the time of court proceedings or after the proceedings have concluded ***(Pitre v. Shenandoah, 633 F. App'x 44 (2d Cir. 2016)***. It is important for the client to know that; good cause in this instance is a reason presented to the court that proves that the parent is capable of taking care of his or her children. However, due to the father's current imprisonment, the father may be deemed unfit to properly care for the child, and it could then possibly be assumed that the father lacks good cause. Therefore, **§ 1911(b)** can then be applicable in this scenario. Due to absence of objection or good cause, if the tribe accepts to oversee the proceedings, the tribe has jurisdiction and can uphold Child Service's transference of the child to foster care ***(Pitre v. Shenandoah, 633 F. App'x 44 (2d Cir. 2016)*** and can concur with Child Service's assessment to remove the father's parental rights. But if the father is able to establish good cause, then the client must be warned that jurisdiction will remain with the state courts.

ICWA is applicable in terms of jurisdiction under the possibility that the child is a domiciliary of the Navajo Nation. If this is the case, the foster care of the child can continue under tribal jurisdiction due to precedent set by a recent previous case in ***Pitre v. Shenandoah, 633 F. App'x 44 (2d Cir. 2016*** and **§1911** of ICWA. If the tribal court accepts jurisdiction over foster care of the child, the tribal court under **§ 1911(b)** can maintain Child Services placement of the child in foster care. However, if Child Services wishes to pursue this option, the scenario is viable only if there is no good cause and objection from the father.

5. Jurisdictional Agreements between States and Tribes

Although either entities can attempt to claim absolute jurisdiction over the child proceedings, it is feasible for both parties to enter into agreement holding concurrent jurisdiction and working on avoiding any judicial disputes.

§1911 of ICWA assigns exclusive jurisdiction to the tribal courts for the proceedings of Indian children. However, "exclusive jurisdiction" of the tribes can be waived or shared with the state authorities and its courts if an agreement was in place to authorize that. A later more specific section of ICWA, **§1919** declares that possibility of concurrent jurisdiction in matter of proceedings related to Indian children. ***(In re Parental Rights as to S.M.M.D., 128 Nev. 14, 272 P.3d 126 (2012))***

Agreements between states and tribes dealing with proceedings of Indian children require the demonstration of validity under **§1919** of ICWA. For that to be achieved, the following criteria need to be met: i)The presence of evidence of cooperation between any state agency responsible for child proceedings and the tribes ii) Maintaining open channels of communication between tribal social services and the state for the purpose of keeping both sides informed of any

developments in the case. iii) The court securing tribal approval before moving forward with the proceedings in the case of the children becoming eligible for tribal membership. Meeting these conditions illustrates that both authorities recognized that the children were in concurrent "legal and physical custody" of the tribe and state. ***(In re Parental Rights as to S.M.M.D., 128 Nev. 14, 272 P.3d 126 (2012))***

It is important to note the tribal authorities lack of involvement, whether when it comes to their intent or action, with the proceedings of the Indian child or the possibility of them choosing not to pursue the case after an initial involvement from their part does not constitute an agreement between the state and the tribe in any manner. ***(Doe v. Doe, 158 Idaho 614, 349 P.3d 1205 (2015))***

Any agreements between the states and the tribes for the purpose of allowing the transfer of jurisdiction of Pre adoptive proceedings is not valid under **§1919** of ICWA since it goes beyond the authority that congress intended to give for statue. ***(In re Welfare of R.S., 805 N.W.2d 44 (Minn. 2011))***

6. Voluntary and Involuntary Termination of Parental Rights

Given the information provided by Child Services regarding the family, the mother has voluntarily and knowingly terminated her parental rights, therefore removing herself as custodian of the child's life. However, in terminating the father's parental rights, as through evidentiary support and "good cause" beyond reasonable doubt would prevent any trauma to the child ***(D.E.D. v. STATE, 704 P .2d 774)***. However, in this case the father must be notified of the removal action under **§1912**. As well as the tribe being notified of the emergency removal of the child, in the event the child is being seized by the state, which would affect the hearing date by a maximum of ten days, ensuring that the tribe could intervene during any of that time ***(U.S.C.A. Const.Amends. 5, 14)***. If the parents cannot be found, within the ten day window of time, the Secretary of State will be thusly notified to take the proper action in relation to ICWA and State law on behalf of the child's safety ***(D.E.D. v. STATE, 704 P .2d 774)***.

7. Placement Preferences of Pre Adoptive Foster Care of Minor Child

Section **1915(b)** describes the placement preferences for foster care or pre-adoptive placements under ICWA guidelines. Under said criteria, the child shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall be placed within reasonable proximity to his or her home, and preference shall be given in the absence of good cause to the contrary, to a placement with: **i)** a member of the Indian child's extended family; **ii)** a foster home licensed, approved, or specified by the Indian child's tribe; **iii)** an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or **iv)** an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Section **1915(c)** does allow for personal preferences of the child's parents, or a deviation from placement preferences in **1915(b)** via the child's tribe where it is stated that "if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court affecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child," […] and that "where appropriate, the preference of the Indian child or parent shall be considered…" At this point the mother's

preference should be referred to for initial placement of the child in order to maintain timeliness. It should be understood that this placement be assumed temporary as the child's Indian Tribe may prefer a different placement holding to **1915(b)**. As the mother is the custodial parent, and in voluntarily giving up her rights her preferences in the child's placement does hold weight, but as found in **(*In the Matter of Baby Boy L., v. Christopher Yancey. 103 P.3d 1099. S.Ct of Oklahoma. Dec. 7, 2004*)** while she is the custodial parent, the biological father must also give consent as well.

There have been cases where contact with the child's Indian Tribe is troublesome. Or responses from the child's Indian Tribe take much longer than expected. The length of time the child is in the home, and the length of time it can take the Indian tribe to establish its placement preferences when in excess, has been found to be a violation of the Fifth Amendment's due process **(*In re Santos Y. v. Arturo G. Et al. 92 Cal.App.4th 1274, Feb. 13, 2002*)**, California Supreme Court has declared that "children… have fundamental rights-including the fundamental right… to have a placement that is stable, and permanent."**(**1315 In re Jasmon O.(1994) 8 Cal.4th 398, 419, 33 Cal.Rptr.2d 85, 878P.2d 1297*)**. It has also been found that "a child has a constitutional right to a reasonably directed early life, unmarked by unnecessary and excessive shifts in custody…" **(Id. At p. 242, fn. 6, 10 Cal.Rptr.2d 131)**. So timeliness is of the utmost concern not only for Child Welfare Services but also for the child's Indian Tribe.

As per **California code section 360.6** which establishes the **"existing Indian family doctrine,"** because the mother was never a member of her ancestral Indian tribe, nor a practicing member within the political, social, cultural aspects of tribal life, ICWA may not constitutionally apply in her case in regards to the placement preferences of section **1915**. **(*In re Santos Y., v. Arturo G. et al. 92 Cal.App.4th 1274. Feb. 13, 2002*)**. Because of this the focus turns to the father who is a member of the Navajo Nation, and was an active member within the Navajo Nation. For the last 5 years he has not been an active member. While this should not preclude him, the fact that the child has not been in a "political, social, or cultural Indian home" during its short life could preclude ICWA from applying constitutionally to this case, "Any application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause." **(*Bridget R., supra, 41 Cal.App.4th at p. 1509, 49 Cal.Rptr.2d 507*)**. The enactment of section 360.6 does not alter the outcome of an equal protection analysis. California has no independent constitutional authority authorizing it to enact legislation governing federally recognized Indian tribes. Moreover, to the extent that section 360.6 could be viewed as incorporating ICWA, incorporation could not result in any lesser level of scrutiny than would be required absent the incorporation… Under these circumstances strict scrutiny would be compelled, and section 360.6 would fail the test of serving a compelling state interest, narrowly tailored to achieve that interest." **(*In re Santos Y., v. Arturo G. et al. 92 Cal.App.4th 1274. Feb. 13, 2002*)**.

CONCLUSION

With the history of the parents, both heavily using drugs, negatively affecting the child, causing Child Services to step in as a result. Further, steps taken to ensure the child's safety, apply under **§1922 of ICWA** in the "emergency removal and placement", during which time the court can decide to terminate parental rights. This emergency removal will prevent any continuation of harm to the child, while hearings and trial matters proceed thusly.

State services should draft their notice with all information on the child's heritage, even those which are believed to be inconsequential. Furthermore, all potential tribes that the child could belong to should receive this notice, as to not violate the parallel purpose of the notice. The notice should contain all the information available, be sent by certified mail, and all correspondences and responses from tribes should be preserved.

In case the tribe was willing to transfer (or share) the jurisdiction of the child proceeding with the state, **§ 1919 of ICWA** allows for such arrangement. The way to proceed with this option is to create an agreement that satisfies the conditions the court set **in *re Parental Rights as to S.M.M.D*** and to make sure that the tribe is actively agreeing to them. It is also important to note that this kind of agreement does not authorize the transfer of pre-adoptive rights to the tribes if the state wished to.

Based on what Child Services has presented, we recommend that Child Services should first try to get more information on the birth of the child. In certain situations, such as potential adoption under federal jurisdiction done by a state court or continuation of foster care placements, **§1911(a)** can be applicable, if Child Services wants to continue the foster care of the son, it might be a plausible route to do so through tribal courts if or when the tribal courts have jurisdiction. As evidence by a precedence shown in a previous case where an adoption was overturned by a tribal court when jurisdiction was transferred to them and afterwards the child Youpee was placed in the care of Indian foster parents***(In re Youpee's Adoption, 11 Pa. D. & C.4th 71 (Com. Pl. 1991).*** But this precedence applies only on the contingency of the child being a domiciliary of the tribe. If the Navajo Nation tribal court applies this precedent the court may have jurisdiction over the child's foster care placement proceedings. On the off chance that the child's domiciliary status is not established, then under **§1911(b)** there must be a lack of good reason or dissent from the father in relations to the father attempting to get his child back from foster care. If both of these criteria are met and the tribal court agrees to accept jurisdiction, then the tribal courts can choose to continue the foster care of the child in question.

In regards to the placement of the minor child, **§1915** has been heavily contested. Because of this, due caution is advised. The sooner all parties weigh in the better as there can be Fifth, Tenth, and Fourteenth Amendment issues in regards to this situation. If possible, initial placement to an Indian family, or facility can circumvent these disputes if the minor child's biological parents agree to this initially. If the biological parents have no preference or due to availability an Indian family or facility is unavailable, later issues may arise if the child's Indian tribe prefers an alternate placement which depending on the circumstances could raise constitutional issues due to California's application of the "existing Indian family doctrine."