

#### 4.16 - Is notice required in a voluntary proceeding involving a foster care placement of, or termination of parental rights to, an Indian child?

The only explicit requirement of notice is that in 1912(a), relating to involuntary proceedings. *Cherokee Nation v. Nomura*, 2007 OK 40, 160 P.3d 967, while dealing with a state statute requiring notice in voluntary proceedings also noted that the purposes of the federal act cannot be met without notice to the tribe in voluntary proceedings. *But see Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999), *affd on other grounds sub nom. Navajo Nation v. Norris*, 331 F.3d 1041 (9th Cir. 2003); *Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159 (Alaska 1989) (no notice to tribe required of proceeding for voluntary termination of parental rights). In addition, the BIA Guidelines indicate that notice is not required in voluntary proceedings. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979) (guidelines for state courts).

The better practice is to provide such notice. Indian tribes and extended family members have substantial rights under the ICWA even in voluntary proceedings. See also FAQ 17, Voluntary Proceedings. A practitioner who does not provide notice runs the risk that a tribe will learn about the proceeding at a later date and object at that time, perhaps arguing that the child was a resident of or domiciled on the reservation or is a ward of the tribal court and that jurisdiction was exclusively in the tribal court. Providing notice to a tribe will also allow the tribe to identify if there are good tribal or family placements available for a child and will lessen the risk of a child being transferred to a new placement after an extended time in an initial placement event that can be difficult for all concerned. For these reasons, several states have enacted more stringent requirements and require notice be given to tribes in both voluntary and involuntary Indian child custody proceedings. See, e.g., IOWA CODE 232B.5(8) (2003) (providing notice to tribes in voluntary proceedings); MINN. STAT. 260.761(3) (1999) (providing notice to tribes in voluntary adoptive and pre-adoptive proceedings); OKLA. STAT. tit. 10, 40.4 (2006) (providing notice to tribes in voluntary proceedings). See also FAQ 17.4, Voluntary Proceedings and FAQ 18.11, Adoption.

#### Practice Tip:

The decisions that have ruled against notice in voluntary proceedings have not fully considered the due process issues pertaining to such notice. Parents have a liberty interest in the care, custody, and management of their children which is protected by the due process clause of the United States Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). The protection of a tribes interest in any Indian children is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989) (quoting from *In re Halloway*, 732 P.2d 962, 969-70 (Utah 1986) (noting findings of Congress as to the importance of children to tribes continued existence, and prerogatives of tribes under the ICWA and concluding they must be seen as a means of protecting . . . the interests . . . of the tribes themselves). Once a right has been recognized, the process that is due before it can be adversely affected is a consideration separate from, and not governed by, the source of the right. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Thus, the failure of Congress to specifically provide for notice in voluntary proceedings, may not obviate the need for notice in such proceedings. For notice to be required, it is sufficient that the person or entity whose rights may be adversely affected may become a party, they need not actually be a party. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 488 (1988). While the precise notice required in involuntary proceedings would not necessarily be required in voluntary proceedings, notice reasonably calculated to provide actual notice under the circumstances may be required. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). That requires mailing where the entity is reasonably ascertainable as is the case with tribes. *Id.*

#### 17.4 - Is notice required under voluntary placement?

The notice provisions of the ICWA in § 1912(a) apply on their face only to involuntary foster care placement and termination of parental rights proceedings (including involuntary termination of parental rights proceedings that are part of an adoption proceeding). Because Indian tribes and extended family members have substantial rights under the ICWA in voluntary proceedings, especially regarding placement of an Indian child (the child's tribe may adopt a modified placement preference order by resolution, § 1915(c), which must be followed in the absence of good cause to the contrary extended family members who would be willing to take custody of an Indian child must be considered before good cause to avoid the placement preferences can be found), and because of the Tribe's right to intervene in any proceeding for foster care placement of an Indian child or termination of parental rights to an Indian child, a number of courts have implicitly required that the Indian tribe and extended family members be notified of any voluntary placement proceedings under the ICWA. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *In re M.E.M.*, 725 P.2d 212 (Mont. 1986); *In re Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993); *In re Junious M.*, 193 Cal. Rptr. 40 (Ct. App. 1983) (certified for partial publication); *In re J.R.S.*, 690 P.2d 10 (Alaska 1984). The only explicit requirement of notice is that in § 1912(a), relating to involuntary proceedings. *Cherokee Nation v. Nomura*, 2007 OK 40, 160 P.3d 967, while dealing with a state statute requiring notice in voluntary proceedings also noted that the purposes of the federal act cannot be met without notice to the tribe in voluntary proceedings.

Several state courts have ruled that while notice of an ICWA voluntary proceeding is not required under the language of the ICWA itself, intervention by the Indian child's tribe is allowed or required under the permissive or mandatory intervention court rules of the State (the equivalent of Rule 24 of the Federal Rules of Civil Procedure). See *J.R.S.*, 690 P.2d 10. If these state court rules are applied, notice is required so the relevant tribe can properly exercise its right of intervention. Some courts have held that Indian tribes are not entitled to notice under the ICWA or under state court rules of voluntary ICWA proceedings. See *Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999), *aff'd on other grounds sub nom. Navajo Nation v. Norris*, 331 F.3d 1041 (9th Cir. 2003); *Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159 (Alaska 1989). This ruling has occurred for the most part with regard to voluntary adoption proceedings. See [FAQ 4.16](#), [Notice](#), and [FAQ 18.11](#). Adoption, for further discussion of the need for notice in voluntary proceedings. Some states require such notice by statute. See, e.g., [Iowa Code § 232B.5\(8\)](#) (2003) (providing for notice to tribes in voluntary proceedings); [Minn. Stat. § 260.761\(3\)](#) (1999) (providing for notice to tribes in voluntary adoptive and pre-adoptive proceedings); [Okla. Stat. tit. 10, § 40.4](#) (2006) (providing for notice to tribes in voluntary proceedings).

Under § 1915(c), a consenting parent may request anonymity with regard to the ICWA's placement preferences, and the court or agency effecting placement of an Indian child may give weight to such desire in applying the placement preferences of the ICWA. A few courts have ruled that a parent's request for anonymity with regard to their Indian child means the child's tribe does not get notice of the pending ICWA proceeding. Other courts have ruled that a parent cannot adversely impact an Indian tribe's right to notice under the ICWA, and that notice to the Tribe will not compromise the parent's anonymity. See *Baby Girl Doe*, 865 P.2d 1090.

**18.11 - What type of notice does the Act require for an adoptive placement?**

In involuntary proceedings, the ICWA requires that notice be given to the parent or Indian custodian and the child's tribe by registered mail, return receipt requested, where the court knows or has reason to know that an Indian child is involved . . . . 25 U.S.C. 1912(a). An adoptive placement effected after an involuntary termination of parental rights is an involuntary proceeding and notice to the tribe of both the termination and the adoption is required.

Some courts hold that notice is not required to be sent to a tribe in voluntary adoptive placements. Catholic Soc. Servs., Inc. v. C.A.A., 783 P.2d 1159 (Alaska 1990). Several practical reasons dictate that notice be given to a tribe in voluntary child custody proceedings. For one, once parental rights have been terminated, particularly in a matter involving a child who resides or is domiciled on the reservation, the tribe's interest in the child becomes paramount, and the ICWA anticipates tribal involvement in voluntary foster care placement and termination of parental rights proceedings through transfer and intervention petitions, 1911(b)-(c), and in placement decisions. 25 U.S.C. 1915; Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989). For another, it is not uncommon that voluntary placements later convert to involuntary child custody proceedings in which notice is required.

**Practice Tips:**

Several states have enacted more stringent requirements and require that notice be given to tribes in both voluntary and involuntary Indian child custody proceedings. IOWA CODE 232B.5(8) (2003) (providing notice to tribes in voluntary proceedings); MINN. STAT. 260.761(3) (1999) (providing notice to tribes in voluntary adoptive and pre-adoptive proceedings); OKLA. STAT. tit. 10, 40.4 (2006); OR. REV. STAT. 109.309 (2005). See also, FAQ 4, Notice, especially FAQ 4.16, and FAQ 17.4, Voluntary Proceedings, concerning the need for notice in voluntary proceedings.

Notice is also advisable, and may be mandated, in a voluntary proceeding where the domicile of the child and parents is unclear, or the wardship status of the child is unclear, because the state court has a responsibility to determine its jurisdiction under the ICWA, even in voluntary proceedings, and notice to the tribe may be the best way to determine if the parent or parents consenting to a voluntary placement or termination are domiciled on a reservation or if the child is a ward of a tribal court. See Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989). There may also be situations where the parent or parents consenting are unsure of the Indian status of the child and the state court may be compelled to notify the tribe to ascertain the child's status with the tribe to assure compliance with the ICWA.

**39.2.5 NOTICE REQUIREMENTS**

Under ICWA, there is a distinction between voluntary and involuntary placement. ICWA only requires notice in cases involving involuntary placement in foster care or termination of parental rights. The party seeking placement or TPR must notify the child's parent or Indian custodian and the tribe of the pending proceedings and the right to intervene. Notification must take place by registered mail with return receipt requested. No proceeding may be held until at least 10 days after receipt of notice; an additional 20 days may be granted. 25 U.S.C. §1912(a).

ICWA does not contain similar notice provisions for voluntary placement but the New Mexico Children's Code does. It requires that the Indian tribe be notified in abuse, neglect *or adoption* proceedings. §32A-1-14(B).