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## 21. APPLICATION OF STANDARDS HIGHER THAN ICWA REQUIREMENTS

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**Disclaimer:** *A Practical Guide to the Indian Child Welfare Act* is intended to facilitate compliance with the letter and spirit of ICWA and is intended for educational and informational purposes only. It is not legal advice. You should consult competent legal counsel for legal advice, rather than rely on the *Practical Guide*.

### 25 U.S.C. § 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

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.

**Disclaimer:** The above provision of the Indian Child Welfare Act is set forth to facilitate consideration of this particular topic. Additional federal, state or tribal law may be applicable. Independent research is necessary to make that determination.



### Frequently Asked Questions

- 21.1. Do state and federal statutes that provide higher standards of protection to the rights of parents or an Indian custodian apply in ICWA cases?
- 21.2. Does the protection of § 1921 extend to a tribe?
- 21.3. What if a state has its own state ICWA?
- 21.4. Do a state's error preservation rules apply in a state proceeding involving an "Indian child" triggering the application of the ICWA?

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#### 21.1. Do state and federal statutes that provide higher standards of protection to the rights of parents or an Indian custodian apply in ICWA cases?

Yes. The Indian Child Welfare Act (ICWA) § 1921 specifically provides that "where State or Federal law applicable to a child custody proceeding . . . 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," that standard shall be applied. For example, where Michigan law contained a more stringent notice requirement than ICWA to ensure that inquiry and notification are performed, that standard applied. *In re Elliott*, 554 N.W.2d 32, 38 (Mich. Ct. App. 1996). Minnesota has enacted more stringent laws that an individual must meet to qualify as an expert witness possessing expertise in Indian child-rearing practices. See MINN. DEP'T OF HUMAN SERVS., MINNESOTA SOCIAL SERVICES MANUAL, XIII-3586 (1999); *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992). Thus, the practitioner should consult federal, state and tribal law to determine if it contains more stringent

requirements, especially in a state that has enacted its own version of the ICWA, or parts of it.

#### 21.2. Does the protection of § 1921 extend to a tribe?

Yes. Though not specifically mentioned in § 1921, at least one court has held that where higher standards are present in state statutes, such protection extends to tribes. *Cherokee Nation v. Nomura*, 2007 OK 40, 160 P.3d 967.

#### 21.3. What if a state has its own state ICWA?

A number of states have enacted their own version of the requirements of ICWA and thus state law may provide higher standards of protections or notice provisions than contained in the ICWA. The practitioner should check state law in this regard.

**21.4 Do a state's error preservation rules apply in an ICWA proceeding?**

Some state courts have ruled that their error preservation rules apply in an ICWA proceeding. *See, e.g., In re J.D.B.*, 584 N.W.2d 577 (Iowa App. 1998); *In re Pedro N.*, 41 Cal. Rptr. 2d 819 (Ct. App. 1995). But others disagree. *See, e.g., In re L.A.M.*, 727 P.2d 1057 (Alaska 1986). A party or practitioner is well-advised to object to any error based on the ICWA at the trial court level, otherwise a failure to timely object may be considered a waiver or harmless error even where the challenge is brought under § 1914.



**\*\* Access to the full-text of opinions and additional materials is at [www.narf.org/icwa](http://www.narf.org/icwa) \*\***

**The following list is representative of cases that discuss the topic. The list is not exhaustive. The practitioner should conduct independent research.**

#### **FEDERAL CASES**

##### **United States Supreme Court**

*Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1987)

#### **STATE CASES**

##### **Alaska**

*In re Erin G.*, 140 P.3d 886 (Alaska 2006)

*In re J.M.*, 718 P.2d 150 (Alaska 1986)

*In re L.A.M.*, 727 P.2d 1057 (Alaska 1986)

*In re T.N.F.*, 781 P.2d 973 (Alaska 1989)

##### **Arizona**

*Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000)

##### **California**

*In re Brandon M.*, 63 Cal. Rptr. 2d 671 (Ct. App. 1997)

*County of Inyo v. Jeff*, 277 Cal. Rptr. 841 (Ct. App. 1991)

*In re Jullian B.*, 99 Cal. Rptr. 2d 241 (Ct. App. 2000) (certified for partial publication)

*In re Matthew Z.*, 95 Cal. Rptr. 2d 343 (Ct. App. 2000) (certified for partial publication)

*In re Pedro N.*, 41 Cal. Rptr. 2d 819 (Ct. App. 1995)

*Slone v. Inyo County Juvenile Court*, 282 Cal. Rptr. 126 (Ct. App. 1991)

##### **Colorado**

*In re Catholic Charities & Cmty. Servs. of the Archdiocese of Denver, Inc.*, 942 P.2d 1380 (Colo. Ct. App. 1997)

##### **Iowa**

*In re J.D.B.*, 584 N.W.2d 577 (Iowa Ct. App. 1998)

*In re K.B.*, 682 N.W.2d 81 (Iowa Ct. App. 2004) (unpublished table decision) *available at* No. 03-0530, 2004 WL 573793 (Iowa Ct. App. March 24, 2004)

##### **Michigan**

*In re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996)

*In re T.M.*, 628 N.W.2d 570 (Mich. Ct. App. 2001)

##### **Minnesota**

*Gerber v. Eastman*, 673 N.W.2d 854 (Minn. Ct. App. 2004)

*In re M.T.S.*, 489 N.W.2d 285 (Minn. Ct. App. 1992)

##### **Montana**

*In re S.R.*, 2004 MT 227, 322 Mont. 424, 97 P.3d 559

*In re Skillen*, 1998 MT 43, 287 Mont. 399, 956 P.2d 1

##### **New York**

*In re Oscar C., Jr. (Oscar II)*, 600 N.Y.S.2d 957 (App. Div. 1993)

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### **Oklahoma**

*Cherokee Nation v. Nomura*, 2007 OK 40, 160 P.3d 967

### **Oregon**

*In re Charles*, 810 P.2d 393 (Or. Ct. App. 1991)

*In re Charloe*, 640 P.2d 608 (Or. 1982)

*In re Collins*, 35 P.3d 339 (Or. Ct. App. 2001)

*Nelson v. Hunter*, 888 P.2d 124 (Or. Ct. App. 1995)

*In re Shuey*, 850 P.2d 378 (Or. Ct. App. 1993)

### **Texas**

*In re W.D.H., III*, 43 S.W.3d 30 (Tex. App. 2001)

### **Utah**

*In re D.A.C.*, 933 P.2d 933 (Utah Ct. App. 1997)

*In re Holloway*, 732 P.2d 962 (Utah 1986)

*In re S.A.E.*, 912 P.2d 1002 (Utah Ct. App. 1996)

### **Washington**

*In re M.D.*, 42 P.3d 424 (Wash. Ct. App. 2002)

### **Wisconsin**

*In re Britniya R.A.*, 2000 WI App 47, 233 Wis. 2d 275, 610 N.W.2d 230 (unpublished table decision) available at No. 99-2453-56, 2000 WL 91936 (Wis. Ct. App. Jan. 28, 2000)

*In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992)

*Kathy P. v. State*, 532 N.W.2d 471 (Wis. Ct. App. 1995) (unpublished table decision) available at No. 95-0123, 1995 WL 97416 (Wis. Ct. App. March 10, 1995)

