
6. EMERGENCY REMOVAL

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. § 1922. Emergency removal or placement of child; termination; appropriate action.

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

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

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6.1 What does § 1922 generally cover?

This is a section of limited applicability that applies to Indian children that reside or are domiciled on a reservation, but are temporarily located off and are in imminent physical damage or harm.

6.2 How does an Indian child's domicile or residency affect a state court's jurisdiction in regards to emergency removal proceedings?

Generally, tribes retain exclusive jurisdiction over child custody matters when the Indian child resides

or is domiciled on an Indian reservation. 25 U.S.C. § 1911(a). There may be times, however, when an Indian child is temporarily located off the reservation and in danger. Because the Tribe may not have immediate physical contact with the child a state may act to protect the child and § 1922 provides for that eventuality by allowing the state to assert temporary jurisdiction. See also FAQ 2, Jurisdiction.

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6.3 What are the requirements that provide a state court with temporary jurisdiction over emergency removal proceedings?

For a state court to assert temporary jurisdiction under § 1922 over an Indian child subject to exclusive tribal jurisdiction, the child must be temporarily located off the reservation and in imminent danger of physical damage or harm.

Additionally some states impose statutory requirements mandating that the state court's emergency removal order include an affidavit containing information regarding: (1) the names, tribal affiliation(s), and addresses of the Indian child, the parents of the Indian child and Indian custodians, if any; (2) a specific and detailed account of the circumstances that lead the agency responsible for the removal of the child to take that action; and (3) statements of the specific actions that have been taken to assist the parents or Indian custodians so that the child may safely be returned to their custody as recommended by the BIA Guidelines. Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,589 (Nov. 26, 1979) (guidelines for state courts).

6.4 Can a state court exercise emergency removal jurisdiction over an Indian child who is domiciled on or a resident of a reservation, while the child is on the reservation?

A state court can only exercise emergency removal jurisdiction over an Indian child who is domiciled on or resident of a reservation while the child is on the reservation, if the state was granted jurisdiction under Public Law 280, or other federal law and exclusive jurisdiction was not subsequently reassumed by the tribe under § 1918, or if such state action has been agreed to by the tribe and state under an ICWA agreement pursuant to § 1919. *Doe v. Mann (Mann II)*, 415 F.3d 1038 (9th Cir. 2005).

Practice Tip:

ICWA practitioners should note that other federal laws at times may limit a specific tribe's jurisdiction. For example the Passamoquoddy and Pennobscot Tribes of Maine are subject to a specific statutory provision concerning their jurisdiction over child custody proceedings, including emergency proceedings, arising on their respective reservations. The State of Maine has exclusive jurisdiction on those reservations until the tribes assume exclusive jurisdiction from the State. 25 U.S.C. § 1727 (2000). Practitioners are encouraged to determine whether a specific statute affects the jurisdiction of the Indian tribe at issue in your ICWA proceeding.

6.5 Does a state's emergency removal authority extend to non-reservation Indian children?

Yes. A state may assert emergency removal jurisdiction under inherent state authority but must take immediate steps to comply with the ICWA.

6.6 When does a state emergency removal or placement involving a resident or domiciled reservation Indian child terminate?

Pursuant to § 1922, the emergency removal terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child or as soon as the tribe exercises jurisdiction over the case, whichever is earlier. Imminent physical danger to the child is a narrower standard than the ICWA standard for foster care placement. *In re Charles*, 810 P.2d 393 (Or. Ct. App. 1991).

Emergency removals or placements are to be as short as possible. Section 1922 mandates the state authority, official or agency to either initiate a child custody proceeding subject to the provisions of the ICWA, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Practice Tip:

If it is confirmed that the child is subject to exclusive tribal jurisdiction, then the tribal court is the only court of competent jurisdiction.

6.7 Does § 1922 apply to tribal emergency removal or placement proceedings?

No. Tribes retain inherent authority to exercise jurisdiction over their children in emergency situations.

6.8 Must a parent or Indian custodian be notified of an emergency removal action?

Yes.

Practice Tip:

Notice requirements pertaining to emergency removals are often found in intergovernmental agreements between tribes and states under § 1919 and may also be part of tribal and state practices.

6.9 Must a tribe be notified of emergency removal action?

Yes. Section 1922 does not relieve a state from the duty to notify a tribe of an emergency removal action. Because of the parents' due process rights (incorporated into state law) the hearing may need to be held less than ten days after notice to the tribe. Nothing prevents the tribe from intervening in the proceeding under § 1911(c) during this period.

Practice Tip:

Notice requirements pertaining to emergency removals are often found in intergovernmental agreements between tribes and states under § 1919 and may also be part of tribal and state practices.

6.10 Do the placement preferences set forth in ICWA apply in emergency removal proceedings?

Courts are split on when the placement preferences apply in emergency removal proceedings. Some courts require application of the placement preference immediately. *In re Desiree F.*, 99 Cal. Rptr. 2d 688, 700 (Ct. App. 2000). Others allow a temporary deviation from the placement preferences in emergencies. *In re S.B.*, 30 Cal. Rptr. 3d 726 (Ct. App. 2005) (certified for partial publication). *See also In re Charles*, 688 P.2d 1354 (Or. Ct. App. 1984). Even so, a party should follow the ICWA requirements when possible in an emergency removal proceeding and move the child to a preferred placement.

Practice Tip:

State workers should always attempt to locate a relative for an emergency placement. Contacting tribes and Indian organizations that assist with placements may identify such placements. See also FAQ 16, Placement.

6.11 Is expert witness testimony required in an emergency removal of an Indian child?

It is unlikely that the testimony of a qualified expert witness is required at an "emergency removal" hearing within the meaning of § 1922. *In re J.A.S.*, 488 N.W.2d 332 (Minn. Ct. App. 1992). Expert witness testimony, however, may be required under state law.



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**** Access to the full-text of opinions and additional materials is at 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

Circuit Court of Appeals

Doe v. Mann (Mann II), 415 F.3d 1038 (9th Cir. 2005)

STATE CASES

Alaska

A.H. v. State, 779 P.2d 1229 (Alaska 1989)

D.E.D. v. State, 704 P.2d 774 (Alaska 1985)

California

In re Desiree F., 99 Cal. Rptr. 2d 688 (Ct. App. 2000)

In re S.B., 30 Cal. Rptr. 3d 726 (Ct. App. 2005) (certified for partial publication)

Iowa

In re J.W., 498 N.W.2d 417 (Iowa Ct. App. 1993)

Minnesota

In re J.A.S., 488 N.W.2d 332 (Minn. Ct. App. 1992)

In re R.I., 402 N.W.2d 173 (Minn. Ct. App. 1987)

Oregon

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

In re Charles, 688 P.2d 1354 (Or. Ct. App. 1984)

