

Indian Child Welfare Act (“ICWA”) Disclosure

Preface

If we do not comply with ICWA in an adoption proceeding when it is required that we comply and the adoption is challenged, the adoption could be overturned and the child taken from you.

Explanation

Congress enacted ICWA, 25 U.S.C. § 1901, *et seq.*, “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 which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.” 25 U.S.C. § 1902.

Section 1903(6) of ICWA provides: “‘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***. . .”(emphasis added). ICWA applies to Indian tribes and Alaskan Villages federally recognized by the United States Bureau of Indian Affairs.

The emphasized passage in the foregoing quote applies equally to biological mothers ***AND*** fathers, including, by way of example, but not limited to the following:

1. A birth father not identified by the mother;
2. A birth father who does ***NOT*** register with a putative father registry;
3. A birth father who receives pre-birth notice of the adoption and does not file a paternity action;
4. A birth father who receives post-birth notice of the adoption and does not file a motion to contest; and
5. A birth mother or birth father who do not know they are members of, or eligible for membership in, an Indian tribe.

Additionally, the quoted passage does not specify a time frame. In other words, potentially, a birth parent could seek tribal membership after they have consented to the adoption or later.

Each tribe sets its own membership enrollment qualifications. Simply put, there is not a universal quantum of blood requirement to be eligible for membership in a tribe, nor is there a centralized location to check tribal membership. Each tribe maintains its own membership rolls, and ICWA does not specify a time frame within which a tribe must respond to a membership inquiry.

Complying with ICWA is not difficult and, in most cases, does **NOT** involve notifying the tribe or even determining that the child being adopted fits within the definition of an “Indian child,” **but it can add up to \$7,500 to the cost of your adoption.**

In the United States Supreme Court case, **Adoptive Couple v. Baby Girl**, 570 U.S. 637 (2013), the Cherokee tribe took this case to the Supreme Courts of South Carolina and Oklahoma, and to the United States Supreme Court, involving a child that was 1.2% (3/256) Indian. A tribe like the Cherokee Tribe has unlimited time and resources. For the most part, prospective adoptive parents have **neither**. Fortunately for the adoptive parents in that case, the United States Supreme Court ruled in their favor but **not** because of the small amount of Indian blood.

Given the uncertainties and difficulties in determining whether a child is an “Indian child,” the safest course of action to protect against a claim that the adoption took place in violation of ICWA, but for the additional expense, would be to comply with ICWA in **EVERY** adoption, with few exceptions, which we would be happy to discuss on a case-by-case basis.

Of course, **NOT** every adoption is subject to an ICWA challenge – only those adoptions involving an “Indian child.” Furthermore, in a state like Indiana, with a statute of limitations on challenges to adoptions, those statutes of limitations may protect adoptive parents, who do not comply with ICWA in an adoption involving an “Indian child.” As an example, **Indiana Code** § 31-19-14-4 may provide that protection roughly one (1) year after an adoptive placement.

We believe that a court will more likely use a statute like **Indiana Code** § 31-19-14-4 to uphold an adoptive placement in response to an ICWA challenge, if the adoptive parents did not ignore ICWA, when they knew ICWA applied. In other words, if the adoptive parents knew that the child was an “Indian child” and decided not to comply with ICWA, a court may not use the foregoing statute to save the adoption.

But, complying with ICWA gives rise to other risks, including, but not limited to the following:

1. A consenting birth parent must appear in court, in person or via Zoom, no sooner than ten (10) days after the child’s birth to give their ICWA consent in open court, which obviously gives rise to the possibilities that:
 - a. They will not appear at the hearing, or
 - b. They will appear at the hearing and not consent to the adoption.
2. Making the birth parents, who do not appear at the ICWA hearing or who appear and do not consent to the adoption, aware that ICWA may provide them a way to challenge the adoption.
3. Alerting other family members of the birth parents of the existence of ICWA.

Summary

In short, complying with ICWA adds another layer of protection but, perhaps, at significant additional cost. Some states have enacted their own versions of ICWA, which may

complicate matters. If you would like to discuss the implications of ICWA or have us comply with ICWA, let us know before we file a petition for adoption on your behalf. Based upon information provided to us by the birth mother or father, if we have reason to believe the child you are adopting is, or may be, an “Indian child,” **we will bring ICWA compliance to your attention. Otherwise, we will rely on you to inform us that you would like to comply with ICWA.**

Affirmation

We have read the foregoing Disclosure and had the opportunity to ask the attorneys at Kirsh & Kirsh, P.C., questions about ICWA and understand our obligation to inform Kirsh & Kirsh, P.C., of our desire to comply with ICWA. We also understand that rarely, if ever, will Kirsh & Kirsh, P.C., have independent knowledge that a child is, in fact, an “Indian child,” and, therefore, must rely upon the information provided by the birth mother or father.

Dated: _____

