

Memorandum

To: Professor Fort
From: Austin Moore
RE: New Mexico ICWA Cases Annotated
Date: February 13, 2018

25 U.S.C. § 1901: Congressional Findings

- *Garcia v. Gutierrez*, 147 N.M. 105 (N.M. 2009) (holding that it is not the role of a state court to decide whether Tribe has jurisdiction in child-custody matters)¹
- *In re Esther V.*, 248 P.3d 863 (N.M. 2011) (holding that when construing ICWA the court must resolve all ambiguities liberally in favor of the Indian parent and the tribe in order to effectuate the purpose of the Act, which is to prevent the unnecessary removal of Indian children)
- *In re R.W.*, 772 P.2d 366 (N.M. Ct. App. 1989) (holding that a trial court's decision to terminate parental rights must be supported by evidence establishing a basis for termination beyond a reasonable doubt)

25 U.S.C. § 1903: Definitions

- *State ex rel. Child., Youth and Fams. Dep't. v. Nathan H.*, 370 P.3d 787 (N.M. Ct. App. 2016) (holding that whether department fulfilled statutory obligation to pursue enrollment as member of Indian tribe on behalf of the child must be determined on a case-by-case factual basis)
- *State ex rel. Child., Youth and Fams. Dep't. v. Marsalee P.*, 302 P.3d 761 (N.M. Ct. App. 2013) (holding that department's must fulfill its statutory obligation to pursue enrollment as members of Indian tribe on behalf of the children fulfilled before terminating mother's parental rights)
- *Garcia v. Gutierrez*, 217 P.3d 591 (N.M. 2009) (holding that ICWA definition of "reservation" does not apply to the UCCJEA)²
- *Cherino v. Cherino*, 176 P.3d 1184 (N.M. Ct. App. 2007) (holding that ICWA did not apply to custody dispute arising out of divorce proceedings in which mother was awarded custody)
- *In re Ashley Elizabeth R.*, 863 P.2d 451 (N.M. Ct. App. 1993) (holding that lack of registration with a tribe cannot be considered good cause not to transfer)
- *In re Baby Child*, 700 P.2d 198 (N.M. Ct. App. 1985) (holding that although ICWA contains no definition of "domicile," New Mexico holds that an illegitimate child takes the domicile of its mother at the time of its birth)

¹ Cross referenced with § 1903

² Cross referenced with § 1901

25 U.S.C. § 1911: Indian tribe jurisdiction over Indian child custody proceedings

- *In re Wayne R.N.*, 757 P.2d 1333 (N.M. Ct. App. 1988) (holding that good cause not to transfer existed when respondent-father's request to transfer was made almost six months after respondents were served and had counsel appointed for them; when respondents, children, and witnesses lived in New Mexico and the relevant tribal court was in Oklahoma; and tribal representatives were present in the proceedings)
 - *But see* 25 C.F.R. § 23.118(c) (1) (2016) (stating that a court may not consider in a determination of "good cause" if the proceeding is at an advanced stage if the Indian child's parent, custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage)
- *In re Laurie R.*, 760 P.2d 1295 (N.M. Ct. App. 1988) (holding that although mother's oral request for the proceeding to be transferred was valid, good cause not to transfer existed because the proceedings were at an advanced stage)
 - *But see* 25 C.F.R. § 23.118(c) (1) (2016) (stating that a court may not consider in a determination of "good cause" if the proceeding is at an advanced stage if the Indian child's parent, custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage)
- *State ex rel. Child., Youth and Fams. Dep't. v. Andrea M.*, 10 P.3d 191 (N.M. Ct. App. 2000) (holding that parent may not veto a transfer to tribal court when the tribal court has exclusive jurisdiction)
- *Spear v. McDermott*, 916 P.2d 228 (N.M. Ct. App. 1996) (holding that state court, which had jurisdiction at the beginning of the proceedings, retained jurisdiction until formal transfer, even if children had become domiciled within tribal nation while the case was pending in state court)
- *In re Begay*, 765 P.2d 1178 (N.M. Ct. App. 1988) (holding that a tribe's waiver of the right to intervene must be express and not based simply on its failure to intervene at the initial proceeding)³

Commented [MAM1]: Did I get this right? I am not sure I understood the reasoning in this case correctly

25 U.S.C. § 1912: Pending court proceedings

- *State ex rel. Child., Youth and Fams. Dep't. v. Marlene C.*, 212 P.3d 1142 (N.M. Ct. App. 2009) (holding that department could not rely on Mother's consent to temporary custody to vitiate ICWA requirements under § 1912(d)-(e))⁴
- *State ex rel. Child., Youth and Fams. Dep't. v. Arthur C.*, 251 P.3d 729 (N.M. Ct. App. 2011) (holding that CYFD made active efforts by referring father to parenting skills programs, counseling, and drug, alcohol, mental health, and family relations assessments; arranging supervised visitation, making efforts to contact father, and providing transportation)

³ Cross referenced with § 1914

⁴ Cross referenced with § 1914

- *State ex rel. Child., Youth and Fams. Dep't. v. Yodell B.*, 367 P.3d 881 (N.M. Ct. App. 2015) (holding that active efforts connotes a more involved and less passive standard than that of reasonable efforts)
 - *State ex rel. Child., Youth and Fams. Dep't. v. Yodell B.*, 367 P.3d 881 (N.M. Ct. App. 2015) (holding that a parent's failure to engage in or complete a treatment program does not excuse an initial failure by the department to make active efforts)
 - *State ex rel. Child., Youth and Fams. Dep't. v. Yodell B.*, 367 P.3d 881 (N.M. Ct. App. 2015) (holding that department failed to provide active efforts by only pointing father in the direction of service providers, but failing to help locate and obtain services, failing to ensure service providers were communicating with department about father's progress,)
- *In re Laurie R.*, 760 P.2d 1295 (N.M. Ct. App. 1988) (holding that termination of mother's parental rights was sufficiently supported by evidence that child was neglected, had remained for extended period of time in care of third persons, and had never had strong bond with mother)

25 U.S.C. § 1914: Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

- *State ex rel. Child., Youth and Fams. Dep't. v. Marlene C.*, 212 P.3d 1142 (N.M. Ct. App. 2009) (holding that failure of mother to expressly raise violations of ICWA at the adjudicatory hearing did not prevent appellate court from reviewing the record to determine if the district court fulfilled its obligation to abide by the requirements of §§ 1911, 1912, and 1913)⁵
- *In re Begay*, 765 P.2d 1178 (N.M. Ct. App. 1988) (holding that it is unnecessary that the child, parent or guardian, and the tribe must participate in every child-custody proceeding)⁶

25 U.S.C. § 1915: Placement of Indian children

- *State ex rel., Child., Youth and Fams. Dep't. v. Casey J.*, 355 P.3d 814 (N.M. Ct. App. 2015) (holding that there was good cause to deviate from the ICWA placement preference where qualified expert witness testified there was good cause, the tribe concurred with the deviated placement, and no relative, no Navajo, and no Indian homes had been identified and approved for placement)

⁵ Cross referenced with § 1912

⁶ Cross referenced with § 1911