COMMONWEALTH of VIRGINIA

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The Honorable Delores L. McQuinn
Member, Virginia House of Delegates
Post Office Box 406
Richmond, Virginia 23218

Dear Delegate McQuinn:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issue Presented

In your request, you ask in what kinds of cases does the Indian Child Welfare Act of 1978 apply in the Commonwealth of Virginia.[1]

Applicable Law and Discussion

I. Purpose of the Act

Per 25 U.S.C. § 1901, the Act was passed to address a congressional finding that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." Through the Act, Congress sought to reverse past policies by recognizing the importance of keeping Indian children with their families and tribes, and declared it to be the policy of the United States to:

> [p]rotect 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.[2]

The United States Supreme Court has recognized that "[t]he numerous prerogatives accorded the tribes through the [Act]'s substantive provisions . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves."[3]

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[1] 25 U.S.C. § 1901 *et seq.*

[2] 25 U.S.C. § 1902.

[3] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989).

When evidence of abuse or neglect necessitates removal of an Indian child from his or her home, the Act helps ensure the child remains connected to his or her extended family and culture. To further these protections, federally recognized tribes have specific rights under the Act, such as the right to intervene in state court foster care and termination of parental rights proceedings, tribal jurisdiction over certain Indian child custody proceedings, and the right to issue tribal resolutions to set child placement preferences different from those set out in the Act.[4] In Virginia, the Act applies to seven federally recognized Tribal Nations which include the Chickahominy Indian Tribe, Chickahominy Indian Tribe-Eastern Division, Monacan Indian Nation, Nansemond Indian Nation, Pamunkey Indian Tribe, Rappahannock Tribe, and Upper Mattaponi Indian Tribe.

II. Application of the Act

The Act applies when two requirements are met. First, the child must be an Indian child, defined as: "any unmarried person who is under the age of 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."[5] Second, the proceeding must be an action for (or an action that may culminate in) foster care placement, termination of parental rights, preadoptive placement, or adoptive placement.[6] Additionally, the Act applies in involuntary proceedings, voluntary proceedings that could result in the inability to regain custody of the child upon demand, and emergency proceedings.[7] The key to determining whether a proceeding is involuntary is whether the placement (1) is done under threat of removal by the state and (2) prohibits the parent from regaining custody of the child upon demand (*i.e.*, upon verbal request and without any formalities or contingencies).[8]

To facilitate the effective implementation of the Act, the United States Department of the Interior, Bureau of Indian Affairs (BIA) has issued guidelines that are applicable in Virginia to "provide a reference and resource for all parties involved in child custody proceedings involving Indian children. These guidelines explain the statute and regulations. The guidelines also provide examples of best practices for the implementation of the statute, with the goal of encouraging greater uniformity in the application of [the Act]."[9]

Application of the Act is a multi-step process. First, a court must find that there is clear and convincing evidence, "including testimony of a qualified expert witness, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotion or physical damage to the

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[4] 25 U.S.C. § 1911(c); 25 U.S.C. § 1911(a), (b); 25 U.S.C. § 1915(c).

[5] 25 U.S.C. § 1903(4).

[6] 25 U.S.C. § 1903(1), 25 C.F.R. § 23.2. Officers of the court working on child welfare cases should inquire as soon as possible whether an Indian child is involved and contact the child's tribe immediately so that the tribe may become involved and serve as a resource for the Commonwealth. Early notice allows for awareness of any issues and give tribes time to identify any tribal foster care families or other possible placements. *See*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, *Guidelines for Implementing the Indian Child Welfare Act*, § D, pp. 30-33 (2016) available at https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

[7] 25 C.F.R. § 23.103.

[8] 25 C.F.R. § 23.103; 25 C.F.R. § 23.2.

[9] U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, *Guidelines for Implementing the Indian Child Welfare Act* (2016) available at https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

child."[10] The qualified expert witness "must be qualified to testify regarding whether the child's continued custody by the parent . . . is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe."[11] The qualified expert witness may not be the "social worker regularly assigned to the Indian child"[12] but another social worker with "expertise beyond the normal social worker qualifications" may qualify.[13]

Next, the court must make a finding that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[14] The goal of the active efforts requirement is to keep Indian children with their parents by protecting against "unwarranted removals by ensuring that parents who are, or who may readily become, fit parents are provided with services necessary to retain or regain custody of their child."[15]

Finally, if a child is removed on a temporary or permanent basis, the Act provides a list of placement preferences.[16] Members of the child's extended family are the first choice under all types of placements. For adoptive placements, the preferences are (1) a member of the Indian child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.[17] For foster care or preadoptive placements, the preferences are (1) a member of the Indian child's extended family; (2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.[18] The "placement shall be . . . the least restrictive setting which most approximates a family and in which [the Indian child's] special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home."[19]

Courts must follow the Act's placement preferences absent a finding of "good cause to the contrary."[20] The Act's regulations set out five factors on which courts may base a determination of good cause to deviate from the Act's placement preferences.[21] The court's determination "must be made on the record or in writing and should be based on one or more" of the below factors:

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[10] 25 U.S.C. § 1912(e). *See* Thompson v. Fairfax County Dep't of Family Servs., 62 Va. App. 350 (2013) (termination of parental rights under ICWA).

[11] 25 C.F.R. § 23.122(a).

[12] 25 C.F.R. § 23.122(c).

[13] U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, *Guidelines for Implementing the Indian Child Welfare Act*, § G.2 (2016).

[14] 25 U.S.C. § 1912(d).

[15] U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, *Guidelines for Implementing the Indian Child Welfare Act*, § E.1 (2016).

[16] 25 U.S.C. § 1915.

[17] *Id.* § 1915(a).

[18] *Id.* § 1915(b).

[19] *Id.*

[20] 25 U.S.C. § 1915(a).

[21] 25 C.F.R. § 23.132.

> (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
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> (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
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> (3) The presence of a sibling attachment that can be maintained only through a particular placement;
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> (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
>
> (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.[22]

"Congress intended 'good cause' to be a limited exception to the placement preferences, rather than a broad category that would swallow the rule."[23] The placement preference and therefore any good cause analysis must align with the social and cultural standards of the Tribe.[24] Further, the Act codifies the presumptive determination that the minimum federal standards under it are in the "best interests" of Indian children.[25]

Conclusion

It is my opinion that the ICWA applies to Virginia cases involving, or that could culminate in, foster care placement, termination of parental rights, and pre-adoptive or adoptive placements for children who meet the ICWA's definition of "Indian child". It is further my opinion that during applicable proceedings, state and federal law require that Virginia courts protect the interests of Indian children and promote the security and stability of federally recognized tribes.

With kindest regards, I am,

Very truly yours,

Mark R. Herring

Mark R. Herring
Attorney General

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[22] *Id.*

[23] U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, *Guidelines for Implementing the Indian Child Welfare Act*, § H.4 (2016).

[24] *See* 25 U.S.C. § 1915(d) ("The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the [Tribe]").

[25] 25 U.S.C. § 1902.