American Indian Law Review

Volume 15 | Number 1

1-1-1990

Protecting Abused Children: A Judge's Perspective on Public Law Deprived Child Proceedings and the Impact of the Indian Child Welfare Acts

Edward L. Thompson

PROTECTING ABUSED CHILDREN: A JUDGE'S PERSPECTIVE ON PUBLIC LAW DEPRIVED CHILD PROCEEDINGS AND THE IMPACT OF THE INDIAN CHILD WELFARE ACTS

*Edward L. Thompson**

TABLE OF CONTENTS

Section 1.	Introduction		4
Section 2.	History and Philosophy		5
	A.	The fundamental nature of the parent-child bond	5
	B.	Duty to report child abuse	6
	C.	Philosophy of the juvenile court	7
	D.	Indian children	9
	E.	The secret world of juvenile court proceedings	13
Section 3.	Pretrial Matters		14
	A.	Jurisdiction	14
	B.	The Uniform Child Custody Jurisdiction Act	15
	C.	Jurisdiction under the Indian Child Welfare Act	18
	D.	Due process	19
	E.	Overview of juvenile code deprived child proceedings	20
	F.	Preliminary Inquiry—Screening the case to determine whether formal court action is necessary	21
	G.	The deprived child petition	22
	H.	Emergency proceedings	24

* B.B.A. 1980, University of Oklahoma; J.D. 1983, University of Oklahoma; Visiting Assistant Professor of Law, College of Law, University of Oklahoma, 1986-1987; Associate District Judge, First Judicial District, Texas County, Oklahoma, 1987-present. This article is in partial fulfillment of the requirements for the Master of Judicial Studies degree program at the University of Nevada-Reno in cooperation with the National Judicial College.

I. Emergency removal of an Indian child 29
J. Amendments to the petition and subsequent pleadings 35
K. Service of process—providing notice to interested parties 37
L. Additional notice requirements under the Uniform Child Custody Jurisdiction Act 45
M. Special Notice requirements for state court proceedings involving Indian children 46
(i) Notice requirements under the Federal Indian Child Welfare Act 48
(ii) Notice where the child may be a member of more than one tribe... 51
(iii) Notice requirements under the Oklahoma Indian Child Welfare Act..... 57
N. Judicially created exception to the applicability of the Indian Child Welfare Act 59
O. Indian's right to intervene in State Court proceedings..... 63
P. Transfer of the case from state court to tribal court..... 63
Q. Good cause not to transfer 65
R. Reasonable efforts to keep the child in the home 67
S. Guardian Ad Litem and court appointed special advocates 68
Section 4. Adjudication 68
A. The deprived status adjudicatory hearing 68
B. Time for holding the adjudicatory hearing 68
C. Trial court's duty to inquire under the UCCJA 69
D. Right to assistance of counsel..... 70
E. Right to assistance of counsel for Indian children 73
F. Indian Child Welfare Act—right to access to reports..... 73
G. Referees..... 74
H. Right to jury trial..... 74

I. Demand for jury trial and peremptory challenges 76
J. The Rule of Evidence 76
K. Standard of proof 78
L. Special standard of proof and evidentiary requirements for Indian child proceedings 79
M. The court's order at the conclusion of the adjudicatory hearing 81
Section 5. Disposition 82
A. The dispositional hearing 82
B. Placement plan for child placed outside the home 85
C. Placement preferences for Indian children 87
D. The rights and duties of a person or agency receiving custody of the child pursuant to the court's dispositional order 88
E. Parents' financial obligation concerning children placed outside the home 89
F. Review hearings 90
Section 6. Terminating Parental Rights 92
A. The purpose and effect of terminating parental rights 92
B. Pleadings 95
C. Notice of termination of parental rights 95
D. Conduct of the termination hearing 96
E. Right to counsel 97
F. Right to jury trial in proceedings to terminate parental rights 97
G. Standard of proof 98
H. Circumstances in which parental rights may be terminated 100
(i) written consent 100
(ii) abandonment 101
(iii) failure to correct conditions which led to the child being adjudged deprived 101
(iv) willful failure to support the child 103

(v) criminal conviction of child abuse; a finding in a deprived child action of abuse that is heinous or shocking; or a finding in a deprived child action of repeated abuse..... 104
(vi) criminal conviction of the death of a sibling 106
(vii) lengthy incarceration..... 106
(viii) mental illness 106
I. Oklahoma District Court Rule 8.2..... 107
J. Post-termination placement of the child..... 107
K. Placement preference for Indian children 108
L. Return of custody of the Indian child. 110
Section 7. Suggested Changes in the Law 111
Section 8. Summary..... 112

Introduction

This nation is losing the battle to protect its most precious resource—its children. In Oklahoma alone, the number of children dying from child abuse has nearly doubled in seven years. In 1981, 10,109 incidents of child abuse were reported. Of those, 3,733 were confirmed by the Oklahoma Department of Human Services. Thirteen children died. In 1988, 23,179 abuse incidents were reported; 7,522 were confirmed, and twenty-three children died.[1]

These are statistics we can live without. Congress and the Oklahoma legislature have passed laws authorizing public law proceedings to protect physically abused, sexually abused, and neglected children.[2] Unfortunately, law schools offer few, if any, courses in juvenile law. As a result, lawyers find themselves in juvenile court with little practical knowledge of the law in the area. Even juvenile court judges may have no experience and still be assigned a juvenile docket.

The purpose of this article is to guide lawyers and judges through the maze of overlapping and sometimes conflicting

1. OKLA. DEPT. OF HUMAN SERVS., COMPARISON OF CHILD ABUSE REPORTS—SFY 1981 THROUGH SFY 1988 at 1 (1988).

2. Examples include the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272; Indian Child Welfare Act of 1978, Pub. L. 95-608, 25 U.S.C. §§ 1901-1963; Oklahoma Juvenile Code, 10 OKLA. STAT. §§ 1101-1506; Oklahoma Indian Child Welfare Act, *id.* §§ 40-40.9.

legislation, and the interpretation of that legislation by the courts.

Starting with an overview of the fundamental nature of the parent-child relationship, the article next examines the philosophy that spawned the juvenile court system, and explains the special needs of Indian children. The article then takes the reader through a step-by-step analysis of juvenile court proceedings, concluding with suggested changes in the law.

History and Philosophy

The Fundamental Nature of the Parent-Child Bond

Parents have a natural and fundamental interest in the care, custody, and control of their children.[3] Derived from the common law, the care, custody and control of one's child is a fundamental interest protected by both the United States and Oklahoma Constitutions.[4] One aspect of this fundamental interest is the right to rear and retain custody of one's children.[5]

In *Stanley v. Illinois* the United States Supreme Court stated:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man" and "[r]ights far more precious . . . than property rights." "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Ninth Amendment.[6]

The Oklahoma Supreme Court has adopted the United States Supreme Court's view of the fundamental integrity of the family unit,[7] not only by citing the United States Constitution, but also by recognizing that the companionship, care and management of one's child is a fundamental right protected by the Oklahoma Constitution.[8] This right emanates from the constitutional right

3. *In re* T.H.L., 636 P.2d 330, 332 (Okla. 1981).

4. Davis v. Davis, 708 P.2d 1102, 1109 n.33 (Okla. 1985).

5. Zabloski v. Redhail, 434 U.S. 374, 386 (1978).

6. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations omitted).

7. A.E. v. State, 743 P.2d 1041, 1048, n.30 (Okla. 1987); *In re* Wright, 524 P.2d 790, 792 (Okla. 1974).

8. *In re* Adoption of Blevins, 695 P.2d 556, 558 (Okla. Ct. App. 1984) (quoting *In re* Adoption of Darren Todd H., 615 P.2d 287, 290 (Okla. 1980)).

to privacy,[9] and is recognized by the Oklahoma legislature.[10]

A presumption exists that the child's best interest is served by leaving the child in the care of natural parents,[11] who are expected to have the strongest bond of love and affection and best able to provide for their own child.[12]

Unfortunately, some parents betray that trust. *In re Jerry L.*[13] relates the tragic story of a three-year-old child who was sexually molested by his parents. The child was forced to perform sexual acts with his parents, resulting in the child contracting anal gonorrhea. As a result of such abuse, there is a growing trend away from considering parental rights as paramount to those of a helpless child. Parental rights are entitled to protection, but must be balanced against those of the child. Where parental rights and the rights of a child conflict, the child should be protected.[14] A child has the right to proper care. The parents have an obligation to honor that right. If they fail to do so, parents cannot complain if the State takes steps to protect the child's rights.[15] As the Oklahoma Supreme Court stated in *In re T.H.L.*:

> The interest of children in a wholesome environment has a constitutional dimension no less compelling than that the parents have in the preservation of family integrity. In the hierarchy of constitutionally protected values both interests rank as fundamental and must hence be shielded with equal vigor and solicitude.[16]

A Duty to Report Child Abuse

It is the policy of the State of Oklahoma to protect children from abuse and neglect[17] such as non-accidental physical or mental injury by a person responsible for the child's health or welfare;[18] sexual abuse[19] (including rape, incest and lewd or

9. *Id.*
10. 10 OKLA. STAT. § 1135(A) (Supp. 1986).
11. *In re* T.H.L., 636 P.2d 330, 332 (Okla. 1981); *In re* Meekins, 554 P.2d 872, 874 (Okla. Ct. App. 1976).
12. *Meekins*, 554 P.2d at 874; York v. Halley, 534 P.2d 363, 365-66 (Okla. 1975).
13. 662 P.2d 1372 (Okla. 1983).
14. *In re* Stacy W., 623 P.2d 1057, 1060 (Okla. Ct. App. 1980).
15. *Id.*
16. *T.H.L.*, 636 P.2d at 334 (citations omitted).
17. 21 OKLA. STAT. § 845(A) (Supp. 1985).
18. *Id.* § 845(B)(1).
19. *Id.*

indecent acts or proposals[20]) by a person responsible for the child's welfare;[21] sexual exploitation (including allowing a chid to engage in prostitution, or permitting the lewd, obscene or pornographic photographing, filming, or depicting of a child in those acts[22]—so-called "kiddie porn"); and negligent treatment or maltreatment, including the failure to provide adequate food, clothing, shelter or medical care.[23] Every person has the duty to report child abuse.[24] Those who make a report of child abuse in good faith are immune from civil or criminal liability.[25]

The child abuse report should be made promptly to the county office of the Department of Human Services (DHS) in the county where the suspected injury occurred.[26] The DHS then has the responsibility to investigate the report.[27] If the DHS finds evidence of abuse and neglect, it forwards its findings to the district attorney's office in the county where the suspected injury occurred, and its recommendation as to disposition.[28] The district attorney then makes the decision whether to file a deprived child proceeding.

Philosophy of the Juvenile Court

The philosophy of the juvenile court system is rooted in social welfare philosophy, rather than in the corpus juris.[29] Its proceedings are civil, not criminal.[30] The power to disrupt a family relationship and interfere with a child's personal liberty is placed

20. *Id.* § 845(B)(3).

21. *Id.*

22. *Id.* § 845(B)(4).

23. *Id.* § 845(B)(1).

24. 21 OKLA. STAT. § 846(A) (Supp. 1987). While everyone has the duty to report abuse and neglect, the legislature emphasized the special duty of physicians, surgeons, doctors of medicine and dentistry, osteopathic physicians, residents and intern, registered nurses, and teachers.

25. 21 OKLA. STAT. § 847 (Supp. 1984). This section also states:

> Any person participating in good faith and exercising due care in the making of a report pursuant to the provisions of [21 OKLA. STAT. § 845 (Supp. 1985)] or [21 OKLA. STAT. § 846.1 (Supp. 1984)] shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report.

26. 21 OKLA. STAT. § 846 (Supp. 1987). The DHS maintains a Child Abuse Hotline twenty-four hours a day at 1-800-522-3511.

27. DHS has the responsibility to provide intake, probation and parole services for juveniles. 21 OKLA. STAT. § 1141 (Supp. 1982).

28. 21 OKLA. STAT. § 846(A) (Supp. 1987).

29. Kent v. United States, 383 U.S. 541, 554 (1966).

30. *Id.*

in the courts.[31] The purpose of juvenile law is to facilitate the state's intervention into the family domain to protect abused and neglected children.[32]

The history of the juvenile justice system evolved simultaneously with the child welfare system.[33] Before the nineteenth century, children who received inadequate care from their families were assisted by local communities and churches as charity cases.[34] The emerging child welfare system was seen in various innovative trends in the nineteenth century such as shelters for dependent, neglected, or abandoned children, and the establishment of a juvenile court by Illinois in 1899.[35]

In Oklahoma, legislative concern for neglected and abused children predates statehood.[36] In 1905, the Legislative Assembly of the Territory of Oklahoma created the Children's Aid Society and prescribed methods for protecting dependent, neglected and ill-treated children within the territory.[37] Laws dealing with state power to intervene through the judicial process to adjudicate a child's deprived status are entirely of statutory origin.[38] In *Davis v. Davis* the Oklahoma Supreme Court stated, "None of these legal norms existed at common law."[39] The main body of law concerning dependent and neglected children is found in title 10, chapter 51 of the Oklahoma Statutes, commonly referred to as the Juvenile Code.[40] Special courts within the county court system designated by the Oklahoma Legislature as "juvenile courts" were created in 1909 to administer legal process under this new body of law.[41] Until 1968, the county courts were vested with jurisdiction over all cases falling within the terms of the Juvenile Code.[42] Oklahoma then revised its constitution and reorganized the judicial branch of government.[43] County courts

31. Carder v. Court of Criminal Appeals, 595 P.2d 416, 421 (Okla. 1979).

32. A.E. v. State, 743 P.2d at 1041, 1051 (Okla. 1987) (Opala, J., concurring).

33. *Id.* at 1050 n.12.

34. *Id.*

35. *Id. See* 1899 Ill. Laws 131. The Illinois Juvenile Court Act marked the first implementation of a separate judicial framework whose sole concern was directed to the problems of youth.

36. Davis v. Davis, 708 P.2d 1102, 1105 (Okla. 1985).

37. *Davis*, 708 P.2d at 1105, n.8. *See* 1905 Okla. Sess. Laws, ch. 14 at 201.

38. *Davis*, 708 P.2d at 1105.

39. *Id.*

40. 10 OKLA. STAT. §§ 1101-1506 (1981).

41. 1909 Okla. Sess. Laws, ch. 14 at 185. *See also Davis*, 708 P.2d at 1116.

42. 1909 Okla. Sess. Laws, ch. 14 § 2 at 186; 10 OKLA. STAT. § 102 (1960); *Davis*, 708 P.2d at 1106 n.12.

43. Former article VII of the Oklahoma Constitution, consisting of sections 1-25, as ratified in 1907, was repealed and present article VII was enacted by State Question No. 448, Legislative Referendum No. 164 (adopted by election July 11, 1967).

were abolished,[44] and all juvenile cases were transferred to the district courts.[45] Statutes dealing with the juvenile process authorize the state to assume custody of a deprived child and perform duties as surrogate parents:

> This form of government intervention is based upon the principle of *parens patriae* (parent of the country). The doctrine not only allows the legislature to enact laws affecting children, but also places on it the duty to do so. Every child from the moment of its birth, owes allegiance to the government of his country, and conversely, is entitled to the protection of that government, both in his person as well as his property.[46]

Before the Juvenile Code's enactment, the state could not interfere by public action with the parental management of a child.[47] The Juvenile Code was designed to enable the state to intercede by judicial proceedings whenever public protection for an underage citizen was deemed necessary.[48]

Under the Juvenile Code, the public policy of the State of Oklahoma is to assure adequate and appropriate care and treatment for every child; to allow for the use of the least restrictive method of treatment consistent with the treatment needs of the child; and to protect the rights of every child placed out of home pursuant to law.[49] The purpose of the Juvenile Code is that the care, custody and discipline of the child approximate, as nearly as may be, that which should be given by a parent.[50]

Indian Children

To appreciate why Congress and the Oklahoma Legislature promulgated Indian Child Welfare Acts, one must understand

44. OKLA. CONST. art. VII, § 7(b).

45. *Id.* § 7(a) provides in part: "[T]he District Court shall have unlimited original jurisdiction of all justiciable matters, except as otherwise provided in this Article, and such power of review of administrative action as may be provided by statute . . . ." *See also* 1968 Okla. Sess. Laws, ch. 282, § 102, and 10 OKLA. STAT. § 1102 (A) (1981) (upon the filing of a petition, the District Court shall have jurisdiction of any child who is alleged to be deprived, who is found within the county).

46. *Davis*, 708 P.2d at 1106.

47. *Id.* However, private-law civil actions can be brought for abuse of parental authority under 10 OKLA. STAT. § 9 (1981); for adoption without parental consent under 10 OKLA. STAT. § 60.6 (Supp. 1986); and for termination of parental rights under 10 OKLA. STAT. § 1130(D) (Supp. 1987).

48. *Davis*, 708 P.2d at 1106.

49. 10 OKLA. STAT. § 1129(2) (Supp. 1981).

50. 10 OKLA. STAT. § 1129(1) (Supp. 1982).

the historical treatment of Indian children. Guidance is provided by Oklahoma Supreme Court Justice Yvonne Kauger:

> Well before this country became a nation, the insensitive precedent had been cast to destroy Indian culture and tribal cohesiveness by removing Indian children from their families and tribal environments. Continuing separation of Indian children from their heritage is one of the most tragic and destructive aspects of contemporary Indian life. State intrusion into native American parent-child relationships impedes the ability of the tribe to perpetuate itself, and, ultimately, it unjustifiably results in a coerced assimilation of the First Americans into a larger more harmonious society.[51]

Well-meaning social workers sometimes seek the removal of Indian children from their traditional Indian family home because of what they perceive to be abuse or neglect, when, in fact, none exists. They simply misunderstand traditional Indian lifestyles. Justice Kauger provides perhaps the most succinct explanation of traditional Indian lifestyles:

> Indian lifestyles differ markedly from those of the non-Indian world. Continuing tribal traditions result in a world view and a concept of group identity which create a culture within a culture, the values of which generally are unknown, unnoticed, or unrecognized by those who are unacquainted with tribal customs. The significant differences in tribal values concerning heritage, kinship, concepts of time, scheduling seasonal activities, geographical location, race, religions, economics, language, historicity, sexual mores, and family practice and structure must be recognized, notwithstanding their apparent incompatibility with middle class mores. . . . In the case of Native Americans, it must be realized that the relationship of Indian tribes to American society is, and always has been, an especially unique relationship premised *not* upon race, but upon law created by the United States Constitution, and perpetuated by treaties [albeit more often breached than honored] between sovereign nations. To those who fear that a child of mixed blood will not be stamped with the imprimatur of the dominant society, the answer is, the dominant society will impact on minority traditions and mores, but the heritage of the Indian people will not be transmitted and

51. *In re* Adoption of Baby Boy D., 742 P.2d 1059, 1072 (Okla. 1985) (Kauger, J., concurring in part and dissenting in part).

assimilated by its youth in the absence of exposure within the tribal community.[52]

Hearings were held before the United States Senate Subcommittee on Indian Affairs in 1974 and in 1977, regarding state juvenile courts' handling of the special needs of Indian children, their families, and their tribes. Congress recognized the vital relationship between Indian tribes and their children. Congress specifically found that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.[53] Congress further found that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.[54]

Congress appreciated the culture shock and underlying trauma in removing a child from an Indian environment and placing the child in a non-Indian environment.[55] Testimony presented to Congress indicated that misunderstanding of Indian family concepts by state social workers prompted many of the removals.[56] Further, lack of understanding of legal concepts by the Indian parents resulted in unknowing waiver of rights.[57] Congress declared that the policy of the United States is to protect the best interests of Indian children and promote the stability and security of Indian tribes and families. This is accompanied by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster and 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.[58] Congress then enacted the Indian Child Welfare Act of 1978 (ICWA).[59]

The Supreme Court of Kansas describes ICWA as "complex federal legislation."[60] Yet the statutory language of ICWA is

52. *Id.* at 1074-75 (emphasis in original; brackets in original).
53. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901(3).
54. *Id.* § 1901(4).
55. *In re* Adoption of D.M.J., 741 P.2d 1386, 1989 (Okla. 1985).
56. H.R. REP. No. 1386, 95th Cong., 2d Sess. 10 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7530.
57. Duncan v. Wiley, 657 P.2d 1212, 1213 (Okla. Ct. App. 1982).
58. Indian Child Welfare Act of 1978, 25 U.S.C. § 1902.
59. *Id.* §§ 1901-1963.
60. *In re* Adoption of Baby Boy L., 643 P.2d 168, 174 (Kan. 1982).

only the beginning. Congress granted the Secretary of the Interior authority to promulgate rules and regulations which are binding on state courts.[61] The purpose of the rules and regulations, as with the ICWA itself, is to protect Indian children from arbitrary removal from their heritage by requiring states to follow procedures designed to prevent the breakup of Indian families.[62]

In addition to ICWA and the Secretary of the Interior's rules and regulations, the Bureau of Indian Affairs (BIA) has promulgated guidelines for state courts.[63] Unlike ICWA and the rules and regulations, the BIA guidelines are the Department of Interior's interpretation of the federal act, and do not have binding legislative effect.[64] Indeed, the Oklahoma Supreme Court has held the guidelines are not binding on Oklahoma courts.[65] The policy of the guidelines is to keep Indian children with their families, defer to tribal judgment on matters concerning the custody of tribal children, and to place Indian children who must be removed from their home within their own families or Indian tribes.[66]

In 1982, the Oklahoma legislature heard testimony regarding ICWA and concluded that it was necessary to provide supplemental procedural safeguards.[67] It did so by enacting the Oklahoma Indian Child Welfare Act (OICWA).[68] Its purpose is to clarify policies and procedures regarding state implementation of ICWA,[69] and to cooperate fully with Indian tribes in Oklahoma to ensure that the intent and provisions of ICWA are enforced.[70] The OICWA applies when the ICWA applies.[71] Finally, in 1984, the Oklahoma Supreme Court promulgated Rule

61. Indian Child Welfare Act of 1978, 25 U.S.C. § 1952; 25 C.F.R. §§ 13.1-13.6, 23.1-23.93 (1988).

62. 25 C.F.R. § 23.3 (1988).

63. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584-67,595 (1979) [hereinafter Guidelines].

64. Guidelines, *supra* note 63, at 67,584.

65. *In re* N.L., 754 P.2d 863, 867 (Okla., 1988).

66. Guidelines, *supra* note 63, at A (policy).

67. *In re* Adoption of Baby Boy D, 742 P.2d 1059, 1076 (Okla. 1985) (Kauger, J., concurring in part and dissenting in part).

68. 1982 Okla. Sess. Laws ch. 107, §§ 1-10 (effective Apr. 6, 1982) (now codified as 10 OKLA. STAT. §§ 40-40.9 (Supp. 1982)).

69. 10 OKLA. STAT. § 40.1 (Supp. 1982); *In re* J.W., 742 P.2d 1171, 1172 (Okla. Ct. App. 1987).

70. 10 OKLA. STAT. § 40.1 (Supp. 1982); *In re* Adoption of D.M.J., 741 P.2d 1386, 1388 (Okla. 1985).

71. *Baby Boy D*, 742 P.2d at 1063; *D.M.J.*, 741 P.2d at 1388.

8.2,[72] which requires all relevant final orders to contain a finding of compliance with the ICWA. Where federal and state law differ, the parent or Indian custodian of an Indian child enjoys the benefit of the higher standard of protection of either federal or state law.[73]

In summary, in order to understand Oklahoma juvenile court proceedings, especially those involving Indian children, one must have a working knowledge of the United States Constitution, the Oklahoma Constitution, ICWA, the Secretary of Interior's mandatory rules and regulations, the BIA-recommended guidelines, the Oklahoma Juvenile Code, OICWA, the general provisions of Title 10 of the Oklahoma Statutes (including the Uniform Child Custody Jurisdiction Act), Rules for the District Courts of Oklahoma, and a plethora of federal and state cases. The Oklahoma Court of Appeals has recognized the heavy burden this places on district judges and implicitly on counsel: "Although the trial court's charge to meld the protections of the ICWA with those of the state statutes to ensure the maximum protection to parents and their children is a heavy one, it is incumbent upon the trial court to provide all constitutional and statutory protections."[74]

The Secret World of Juvenile Court Proceedings

The juvenile court process is shrouded in secrecy. All child abuse records are confidential and are open to inspection only to persons duly authorized by the United States or the State of Oklahoma in connection with the performance of their official duties.[75] Children's cases must be heard separately from the trial of adults.[76]

Juvenile hearings are private unless specifically ordered by the court to be conducted in public.[77] Only persons having a direct interest in the case are admitted. The transcript of the hearing

72. OKLA. DIST. CT. R. 8.2.

73. Indian Child Welfare Act of 1978, 25 U.S.C. § 1921:

> 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.

74. *J.W.*, 742 P.2d at 1177.

75. 21 OKLA. STAT. § 846(A) (Supp. 1987); 10 OKLA. STAT. § 1109(D) (Supp. 1989).

76. 10 OKLA. STAT. § 1111 (1981).

77. *Id.* However, if the juvenile hearing is conducted in public, what transpires cannot be subject to prior restraint. Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 311 (1977).

is not open to inspection except by order of the court.[78] There are restrictions on the disclosure of information by foster care review board members and their staff.[79] The court's records are not open to public inspection except by order of the court, and then only to persons demonstrating a legitimate interest.[80] Records of law enforcement officers on juveniles must be maintained separate from arrest records and are not open to public inspection, nor may their contents by disclosed, except by order of the court.[81] In those counties having juvenile bureaus, all information obtained in discharge of official duty by any officer or other employee of the court is privileged, and cannot be disclosed to anyone other than the judge and those entitled under the Juvenile Code to receive such information, unless otherwise ordered by the court.[82] Even the published opinions of the appellate courts of the State of Oklahoma are limited to disclosing only the initial of the child's surname rather than the child's name.[83]

Pretrial Matters

Jurisdiction

Jurisdictional conflicts arise between courts of different nations, courts of different states, and between state and tribal courts. The Uniform Child Custody Jurisdiction Act (UCCJA) is designed to resolve jurisdictional conflicts between courts of different nations and states.[84] The ICWA is designed to resolve jurisdictional conflicts between state and tribal courts.[85]

The authority of a court to hear and determine a deprived child proceeding is dependent upon competent jurisdiction. The elements of competent jurisdiction are: (1) jurisdiction of the subject matter; (2) jurisdiction over the parties, and (3) jurisdictional power to pronounce the particular judgment rendered,

78. 10 OKLA. STAT. § 1111 (1981).

79. *Id.* § 1116.4.

80. 10 OKLA. STAT. § 1125 (Supp. 1989).

81. 10 OKLA. STAT. § 1127(a) (1981). However, a child's adjudication in juvenile court may be used to show the bias, if any, of the child should the child be a witness in any civil or criminal action, either while a child, or after the child has reached the age of majority. *See* Davis v. Alaska, 415 U.S. 308 (1974).

82. 10 OKLA. STAT. § 1203(b) (1981).

83. *Id.* § 1123.1.

84. *Id.* § 1601-1627.

85. *Id.* §§ 40-40.9.

i.e., the point to be decided must be within the court's power as defined by statutes and raised by the pleadings.[86]

In Oklahoma, the district court has the authority to exercise jurisdiction on any basis consistent with the Constitution of the United States and the Constitution of the State of Oklahoma.[87] The Oklahoma Constitution vests original jurisdiction in the district court.[88] Jurisdiction over the subject matter occurs upon the filing of the petition.[89] Once the district court has obtained jurisdiction over a deprived child, it may be retained until the child becomes 18 years of age.[90]

The Uniform Child Custody Jurisdiction Act

To avoid jurisdictional conflicts between courts of different nations and states in matters of child custody, all 50 states and the District of Columbia have enacted the Uniform Child Custody Jurisdiction Act (UCCJA).[91]

The UCCJA is a long-awaited[92] and much-needed device for resolving a number of troubling problems in the area of domestic relations. The main problems the UCCJA addresses are child snatching and multi-state jurisdictional squabbles.[93] The UCCJA seeks to resolve these problems primarily by limiting the jurisdiction of courts to act in custody matters.[94] The UCCJA has several purposes:

(1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody, which have in the past resulted in the shifting of children from state to state

86. *In re* N.L., 754 P.2d 863, 866 n.2 (Okla. 1988); *Ex parte* Lewis, 188 P.2d 367, 369, 85 Okla. Crim. 322, 338 (1948); Isenhower v. Isenhower, 666 P.2d 238, 241 (Okla. Ct. App. 1983).

87. 12 OKLA. STAT. § 2004(F) (Supp. 1988).

88. OKLA. CONST. art. VII, § 7: "The District Court shall have unlimited original jurisdiction of all justiciable matters, except as otherwise provided in this article, and such power of review of administrative action as may be provided by statute . . . ."

89. 10 OKLA. STAT. § 1102(A) (1981): "Upon the filing of a petition, the District Court shall have jurisdiction of any child who is or is alleged to be . . . deprived, who is found within the county." *See also N.L.*, 754 P.2d at 866 n.2.

90. 10 OKLA. STAT. § 1102(A) (1981). This is referred to as the so-called "maximum age jurisdiction."

91. 10 OKLA. STAT. §§ 1601-1627 (1981). The UCCJA does not apply to purely intrastate controversies. *See* Barnett v. Klein, 765 P.2d 777 (Okla. 1988).

92. The Oklahoma Legislature did not adopt the Uniform Child Custody Act until 1980. 1980 Okla. Sess. Laws ch. 285, §§ 1-27, (effective Oct. 1, 1980).

93. Holt v. District Court, 626 P.2d 1336, 1340 (Okla. 1981).

94. *Id. See also Commissioners Prefatory Note*, UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111, 114 (master's ed. 1979).

with harmful effects on their well-being;
(2) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
(3) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection, and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
(4) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
(5) Deter abductions and other unilateral removals of children undertaken to obtain custody awards;
(6) Avoid relitigation of custody decisions of other states and this state insofar as feasible;
(7) Facilitate the enforcement of custody decrees of other states;
(8) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and
(9) Make uniform the laws of the states which enact it.[95]

There are four alternative prerequisites for jurisdiction under the UCCJA.[96] If the requirements of any one of the four are met, the court has jurisdiction.[97] First, in most instances the proper forum is the "home state" where the child has lived for the preceding six consecutive months.[98] A second alternative

95. 10 OKLA. STAT. § 1602 (1981).
96. *Id.* § 1605(A)(1-4).
97. *Holt*, 626 P.2d at 1341.
98. 10 OKLA. STAT. §1605 (1981) provides:
A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if: (1) this state: (a) is the home state of the child at the time of commencement of the proceeding, or (b) has been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.
"Home state" is defined in *id.* §1604 as:
The state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive

applies when it is "in the best interests of the child" for the forum to take jurisdiction.[99] There must be a "significant connection" under the second alternative by the presence of at least one parent and the child within the forum.[100] There must also be substantial evidence available in that forum concerning the child's care, protection, training and personal relationships. It is not necessary for the child to be physically present within the state.[101] The third alternative jurisdictional basis is where the child is physically present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.[102] Finally, jurisdiction may be exercised if no other state could or would assume jurisdiction.[103]

Even if one or more of the four alternative prerequisites to jurisdiction is satisfied, it may not be proper for the court to exercise its jurisdiction. The appropriate approach for a court in determining whether it should exercise jurisdiction is: First, does the court have jurisdiction under UCCJA, and second, if so, should the court exercise its jurisdiction?[104] The UCCJA sets forth three grounds, one mandatory and two discretionary, where a court must or should decline to exercise jurisdiction.

First, the court must decline to exercise jurisdiction if at the time of the filing of the petition in Oklahoma, a child custody

---

months, and in the case of a child less than six (6) months old, the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the name persons are counted as part of the six-month or other period.

99. 10 OKLA. STAT. § 1605(A)(2) (Supp. 1982).

100. *Id.* § 1605(A)(2)(a).

101. Roundtree v. Bates, 630 P.2d 1299, 1302 n.15 (Okla. 1981). 10 OKLA. STAT. § 1605(A)(2) (1981) provides:

It is in the best interests of the child that a court of this state assume jurisdiction because: (a) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (b) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships . . . .

102. 10 OKLA. STAT. § 1605(A)(3)(a)-(b) (1981).

103. *Id.* § 1605(A)(4) provides:

(a) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs 1, 2 or 3 of this subsection, or, another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (b) it is in the best interest of the child that this court assume jurisdiction.

104. *Holt*, 626 P.2d at 1341.

proceeding was already pending in the court of another state, properly exercising jurisdiction substantially in conformity with the UCCJA.[105] Second, the court may, in its discretion, decline to hear the case on the equitable grounds of forum non conveniens.[106] Third, the court may decline to exercise jurisdiction under the equity doctrine of "unclean hands" where the petitioner has snatched the child, improperly retained custody after visitation, or engaged in other reprehensible conduct.[107]

Jurisdiction Under the ICWA

The determination of whether a state court or tribal court has jurisdiction over an "Indian child"[108] is governed by ICWA.[109] Where an Indian child is a ward of a tribal court, the Indian tribe retains exclusive jurisdiction over the child, regardless of the child's residence or domicile.[110]

105. 10 OKLA. STAT. § 1608(A) (Supp. 1982), provides:

A court of this state shall not exercise its jurisdiction under this act if at the time of the filing of the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

106. 10 OKLA. STAT. § 1609 (1981). The district court may decline to exercise its jurisdiction if it finds that it is "an inconvenient forum to make a custody determination under the circumstances of the case and that the court of another state is a more appropriate forum." Section 1609(C) provides five factors for the court's consideration in determining whether to invoke the doctrine of forum non conveniens. Section 1609(D) requires the Oklahoma district courts to communicate with the courts of its sister states to determine which state should exercise jurisdiction.

107. *Holt*, 626 P.2d at 1341. 10 OKLA. STAT. § 1610 (1981) provides:

(A) If the petitioner for an initial decree has wrongfully taken the chid from another state or has engaged in similar reprehensible conduct, the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(B) Unless required in the interests of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state, the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

108. Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(4) defines an Indian child as "[a]ny unmarried person who is under age 18 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."

109. 25 U.S.C. §§ 1901-1963.

110. *Id.*

The ICWA does not divest state courts of their jurisdiction over children of Indian descent living off the reservation.[111] If the Indian child neither resides nor is domiciled within the Indian tribe's reservation and is not a ward of the tribal court, the state court exercises concurrent jurisdiction. In contrast to the UCCJA's discretionary declination of jurisdiction, the ICWA forbids state courts from exercising jurisdiction where the petitioner has "unclean hands."[112] Title 25 U.S.C. § 1920 provides that where a petitioner in an Indian child custody proceeding in a state court has improperly removed the child from the custody of the child's parents or Indian custodian, or has improperly retained custody after a visit or other temporary relinquishment of custody, the state court has a mandatory duty to decline jurisdiction and must return the Indian child to a parent or Indian custodian, unless the return of the child would subject the child to a substantial and immediate danger or threat of danger.[113]

Due Process

Before a court can exercise personal jurisdiction, due process demands that a method of notification be used which is reasonably calculated to provide knowledge of the proposed exercise of jurisdiction and an opportunity to be heard.[114] Further, due process ordinarily demands that the party have sufficient minimum contacts with the forum state so that traditional notions of fair play and substantial justice are not violated.[115] However, the Oklahoma Supreme Court has held that the status of a child vis-a-vis the child's parents is a proper subject for exercise of

111. H.R. REP. No. 1386, 95th Cong., 2d Sess. 19, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS, 7530, 7541. Indeed, Congress intended the Indian Child Welfare Act to establish minimum procedural standards for state courts handling child custody proceedings involving Indian children. Kiowa Tribe of Oklahoma v. Lewis, 77 F.2d 587, 591 n.4 (10th Cir. 1985). The United States Supreme Court has recently addressed exclusive tribal jurisdiction when Indian children are domiciled in Indian Country. *See* Mississippi Band of Choctaw Indians v. Holyfield, 109 S. Ct. 1597 (1989). The Court found that an Indian child's domicile is the same as the domicile of its parents. As the children were therefore domiciled on the reservation of the Mississippi Band of Choctaw Indians, the state court was without jurisdiction to enter an adoption decree.

112. Indian Child Welfare Act of 1978, 25 U.S.C. § 1920.

113. Guidelines, *supra* note 63, at B.8 (improper removal from custody and accompanying commentary).

114. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Dana P. v. State, 656 P.2d 253, 255 (Okla. 1982); Bomford v. Socony Mobil Oil Co., 440 P.2d 713, 718 (Okla. 1968).

115. International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945).

jurisdiction by the court of the child's domicile.[116] Therefore, personal jurisdiction over a noncustodial parent is not deemed necessary for the state's pursuit of its interests in the child.[117]

Overview of Juvenile Code Deprived Child Proceedings

Before proceeding with a detailed analysis of each stage of a deprived child proceeding, it may be helpful to survey the juvenile court process. First, all contests instituted under the Juvenile Code must be screened to determine whether the interests of the public or child require that court action be taken.[118] The purpose of this screening is to determine whether a deprived child petition should be filed.[119] If formal court action is necessary, a verified petition is filed[120] and the court's jurisdiction is invoked.[121] In an emergency, the court may make a summary determination of the child's custody *pendente lite* (pending the suit).[122] Summons are issued,[123] and the court conducts an adjudicatory hearing to determine whether the allegations of the deprived child petition are supported by the evidence, and whether the child should be adjudged "deprived" and made a ward of the court.[124] The Rules of Evidence apply.[125] A jury trial may be demanded.[126] If the child is adjudged "deprived"[127] and made a ward of the court[128], a "dispositional hearing" is held to determine what disposition ought to be made of the child.[129] The strict Rules of Evidence do not apply at the dispositional hearing. All evidence helpful in determining the proper disposition best serving the interests of the child may be admitted.[130]

In certain extreme cases, the court may hold a hearing to determine whether parental rights should be terminated.[131] Termination goes beyond mere disposition of an adjudicated child.

116. *In re* Adoption of J.L.H., 737 P.2d 915, 918 n.8 (Okla. 1987).
117. Davis v. Davis, 708 P.2d 1102, 1107 (Okla. 1985).
118. 10 OKLA. STAT. § 1101(10) (Supp. 1988).
119. *Id.*
120. 10 OKLA. STAT. § 1103(B) (Supp. 1982).
121. 10 OKLA. STAT. § 1102(A) (1981).
122. 10 OKLA. STAT. § 1107.1 (Supp. 1988).
123. *Id.* § 1104.
124. *Id.* § 1101(8).
125. 10 OKLA. STAT. § 1111 (1981).
126. 10 OKLA. STAT. § 1110 (Supp. 1986).
127. 10 OKLA. STAT. § 1101(4) (Supp. 1988).
128. 10 OKLA. STAT. § 1114 (Supp. 1986).
129. 10 OKLA. STAT. § 1101(9) (Supp. 1988).
130. 10 OKLA. STAT. § 1115 (1981).
131. 10 OKLA. STAT. § 1130 (Supp. 1987).

A termination hearing is itself an adjudication which results in absolute and permanent termination of all a parent's natural and legal rights to a child.[132] The child is then freed for prospective adoption.[133]

Preliminary Inquiry: Screening the Case to Determine Whether Formal Court Action is Necessary

Not every report of suspected child abuse or neglect results in formal court adjudication. There is a screening process, called "preliminary inquiry" or "intake"[134] that determines whether the filing of a petition is necessary. Preliminary inquiry is a mandatory, pre-adjudicatory interview of the child and, if available, the child's parents, legal guardian, or other custodian.[135] Its purpose is to determine: (1) whether the child is deprived; (2) whether nonadjudicatory alternatives are available and appropriate; and (3) whether the filing of a petition is necessary.[136]

The Juvenile Code authorizes the court to designate who shall make the preliminary inquiry.[137] Under Oklahoma Senate Joint Resolution 13,[138] the Oklahoma Department of Human Services provides intake services for the district courts of every county except those counties with duly constituted juvenile bureaus.[139]

132. 10 OKLA. STAT. § 1132 (1981).
133. Davis v. Davis, 708 P.2d 1102, 1112 (Okla. 1985).
134. 10 OKLA. STAT. § 1101(10) (Supp. 1988).
135. *Id.*
136. *Id.*
137. 10 OKLA. STAT. § 1103(A) (Supp. 1982).
138. S.J. Res. 13, 35th Leg., 1975 Okla. Sess. Laws 760-61.
139. 10 OKLA. STAT. § 1103(A) (Supp. 1982) provides in relevant part that where intake is to be provided by the DHS under contract with the Oklahoma Supreme Court, or under the provision of rules issues by the Supreme Court, the preliminary inquiry shall follow the uniform contractual procedures as agreed to by the Supreme Court and the DHS. *See* Okla. Sup. Ct. & Dep't of Human Servs. Intake, Probation and Parole Guideline, Jan. 1983 (published in accordance with 10 OKLA. STAT. § 602(1), (3) (1981)). *See also* 10 OKLA. STAT. § 1141 (1981) ("Intake, Probation and Parole Services Provided by DHS"). For counties with juvenile bureaus, *see id.* § 1204 ("Investigations and Reports"). *Compare* Davis v. Davis, 708 P.2d 1102, 1108-09, where the Oklahoma Supreme Court states, in dicta, that *judges* must determine whether an informal adjustment or diversion is preferable to the institution of juvenile proceedings: "All contests instituted under the [Juvenile] Code must first be judicially examined or 'screened' for 'intake' before they are allowed to proceed. The court, sitting in the administration of the so-called juvenile process, functions as the legally trained discretionary authority charged with the duty of balancing societal interests with those of the child." In making that statement, the Oklahoma Supreme Court relied on a 1977 decision of the Oklahoma Court of Criminal Appeals, State v. Juvenile Division, Tulsa County District Court, 560 P.2d 974, 975-76 (Okla. Crim. App. 1977). At that time, section 1103(A) required

If it is determined that no further action need be taken, the person making the preliminary inquiry, or the court, may make such informal adjustment as is practicable without a petition.[140]

The Deprived Child Petition

If an informal adjustment is not practicable, a petition is filed. Historically, in Oklahoma, any reputable person who knew a child in the county who appeared to be dependent or neglected was authorized to file a petition.[141] By judicial construction, the county attorney was placed in charge of prosecuting the case as dominus litis (master of the suit).[142]

The statutes were amended in 1968 to expressly limit the role of private individuals in initiating proceedings by requiring in each case a preliminary judicial inquiry to determine whether forensic action was warranted. Only by leave of court was a private individual then permitted to file a petition.[143] The county attorney (now district attorney) was still charged with the duty of preparing and prosecuting the case.[144]

In 1977 the direct participatory role of private individuals was completely eliminated when the legislature again amended the Juvenile Code.[145] It now provides that only the district attorney or the person who is authorized to make the preliminary inquiry may file a petition.[146] Regardless of whether the petition is filed

---

the court to make the preliminary inquiry, and further required the court to authorize the filing of a juvenile petition. *See* 10 OKLA. STAT. § 1103(A) (Supp. 1976). Section 1103 was amended after the Court of Criminal Appeals decision. *See* 1977 Okla. Sess. Laws ch. 259, § 3 (effective Oct. 1, 1977). Apparently the Oklahoma Supreme Court did not realize the statute had been amended.

140. 10 OKLA. STAT. § 1103(A) (Supp. 1982).

141. 1909 Okla. Sess. Laws ch. 14 at 187; 10 OKLA. STAT. § 105 (1961).

142. *Ex parte* Lewis, 85 Okla. Crim. 322, 188 P.2d 367, 380 (1948); *Davis*, 708 P.2d at 1107, n.23.

143. 1968 Okla. Sess. Laws ch. 282, § 103 (effective Jan. 13, 1969) (codified as 10 OKLA. STAT. § 1103(A) (Supp. 1988)); *Davis*, 708 P.2d at 1107, n.23.

144. 10 OKLA. STAT. § 1109(C) (Supp. 1986); *Davis*, 708 P.2d at 1107, n.23.

145. 1977 Okla. Sess. Laws ch. 259, § 3 (now codified as 10 OKLA. STAT. § 1103(B) (Supp. 1982)); *Davis*, 708 P.2d at 1107, n.23. In 1977 the legislature expressly authorized employees of a duly constituted juvenile bureau to prepare and file cases. 1977 Okla. Sess. Laws ch. 259, § 10 (effective Oct. 1, 1977). The legislature withdrew that authorization in 1979. *See* 1979 Okla. Sess. Laws ch. 257, § 3 (no Department of Human Services employee is authorized to file a juvenile petition or sign as petitioner, but may verify the petition).

146. *Compare Davis*, 708 P.2d at 1107, where the Oklahoma Supreme Court states in dicta that only the public prosecutor has standing to bring cases under the terms of the Juvenile Code. Apparently the court was unaware of sections 1103(B) and 1141. However, the *Intake, Probation and Parole Guidelines* prohibit any DHS employee from filing a petition, although they are authorized to verify petitions.

by the district attorney or the person who is authorized to make the preliminary inquiry, it is clearly the responsibility of the district attorney to prepare and prosecute any deprived child proceeding.[147]

The petition must conform to certain statutory requirements.[148] Since deprived child proceedings are public law, the private-suit style is procedurally foreign to contests authorized under the Juvenile Code. Lawsuits involving private parties are typically captioned in the adversarial alignment, that is, plaintiff v. defendant. The Juvenile Code[149] directs that the petition be entitled "In the matter of (name of child), an alleged deprived child."[150] The petition must be verified and may be made upon information and belief.[151] It must set forth: (1) with particularity, facts demonstrating that the child is a deprived child; (2) the name, age, and residence of the child; (3) the names and residences of the child's parents; (4) the name and residence of the child's legal guardian, if there is one; (5) the name and residence of the person or persons having custody or control of the child; (6) the name and residence of the nearest known relative, if no parent or guardian can be found; and (7) the relief requested.[152] If termination of parental rights is sought, it must be stated in the petition and summons.[153] If an order for the payment of funds for the care and maintenance of the child is sought, it must also be stated in the petition and summons.[154] If any of the above facts are not known to the petitioner, the petition must so state, along with the reasons why the facts are not known.[155]

The petitioner must also include in its initial pleading (or in an affidavit attached to the pleading) specific information concerning the UCCJA.[156] The petitioner must disclose the child's present address, the places where the child has lived within the

147. 10 OKLA. STAT. § 1109(E) (Supp. 1986).

148. 10 OKLA. STAT. § 1103(B) (Supp. 1982).

149. *Id.*

150. *Davis*, 708 P.2d at 1107.

151. 10 OKLA. STAT. §1103(B) (Supp. 1982).

152. *Id.*

153. If termination of parental rights is requested in the petition, the issue of termination must be deferred until after the initial petition to determine the child's deprived status has been adjudicated if the grounds for termination are 10 OKLA. STAT. § 1130(A) 3, 7, or 8 (Supp. 1987). *See In re* R.J.W., 789 P.2d 233 (Okla. 1990). *Davis*, 708 P.2d at 1106; *In re* J.L., 578 P.2d 349, 351 (Okla. 1978).

154. 10 OKLA. STAT. §1103(B) (Supp. 1982).

155. *Id.*

156. 10 OKLA. STAT. §§ 1601-1627 (1981).

last five years, and the names and present addresses of the persons with whom the child has lived during that period.[157] The petitioner must also disclose: (1) whether the petitioner has participated, as a party, witness, or in any other capacity, in any other litigation concerning the custody of the child in this or any other state; (2) whether the petitioner has information of any custody proceeding concerning the child pending in a court of this state or any other state; and (3) whether the petitioner knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.[158] The court may require the petitioner to provide additional information under oath.[159] Finally, the petitioner has a continuing duty to inform the court of any custody proceedings concerning the child in this or any other state of which the petitioner obtains information during the juvenile court proceedings.[160]

"Custody proceeding," as that term is used in the UCCJA, includes child neglect or dependency proceedings.[161] Child neglect or dependency proceedings are referred to in the Juvenile Code as "deprived child proceedings."[162]

Filing the petition invokes the jurisdiction of the district court over any child alleged to be deprived who is found within the county, and of the parent, guardian, or legal custodian of the child, regardless of where the parent, guardian, or legal custodian is found.[163] Personal jurisdiction over a noncustodial parent is not deemed necessary for the state's pursuit of its interests in the child.[164]

Emergency Proceedings

In an emergency, it may be necessary to immediately remove the child from the home to protect the child from abuse even before a petition is filed. Unfortunately, the Juvenile Code contains no precise statutory procedure on how the child is to be removed from the home. Instead, only scattered sections of the Juvenile Code provide a suggestion of what is to be done.

157. *Id.* § 1611(A).
158. *Id.*
159. *Id.* § 1611(B).
160. *Id.* § 1611(C).
161. *Id.* § 1604(3).
162. 10 OKLA. STAT. § 1101(4) (Supp. 1988).
163. 10 OKLA. STAT. § 1102(A) (1981).
164. Davis v. Davis, 708 P.2d 1102, 1107 (Okla. 1985).

When the Oklahoma Department of Human Services receives a report of suspected child abuse, the county office where the child lives must investigate that report.[165] If the child appears to be in danger, the DHS social worker contacts the police, who have the authority to immediately take the child into custody if the child's surroundings endanger his or her welfare.[166] If a police officer takes a child into protective custody, the officer must immediately report the fact of the child's detention to a judge of the district court in the county in which the child was taken into custody.[167] The social worker may also contact the district attorney requesting that a motion be made to a judge for an emergency order to take the child into protective custody.

If taken into protective custody, the child cannot be detained beyond the next judicial day unless the court so orders after a detention hearing to determine if there exists probable cause to detain the child for the child's own protection.

The parents or guardian of the child are entitled to a "show cause" hearing within 48 hours after the child is taken into custody.[168] Its purpose is to give the parents an immediate post-deprivation hearing where the State must justify why the child was taken into custody and why custody should not be remanded to the parents.[169] The parents may present evidence that the child is not deprived and that the emergency removal was improvident. The rules of evidence do not apply to juvenile emergency "show cause" hearings.[170]

165. 21 OKLA. STAT. § 846(A) (Supp. 1987).

166. 10 OKLA. STAT. § 1107(C) (Supp. 1982).

167. *Id.*

168. 10 OKLA. STAT. § 1104.1(C) (Supp. 1984).

169. The constitutional imperative of an immediate post-deprivation hearing was made clear in York v. Halley, 534 P.2d 363 (Okla. 1975) where the district court removed children from their home based upon an ex parte order. The parents requested a "show cause" hearing, but the request was denied by the trial judge. The parents suffered the removal of their children from their home and custody for a period of two months without a meaningful hearing at which they could present testimony and evidence to support their position that the allegations of the deprived child petition were untrue, and that the order for removal was issued improvidently. The Oklahoma Supreme Court held that the failure of the trial court to schedule a hearing for almost two months after depriving the parents of the custody of their children was an impediment to the continuance of the parent-child relationship, and an unconstitutional denial of due process.

170. 12 OKLA. STAT. § 2103(B) (Supp. 1986) provides: "The rules set forth in this Code [sections 2101-3103 of the Evidence Code], except those that relate to privileges, do not apply in . . . juvenile emergency show cause hearings."

Under the UCCJA, the district courts of Oklahoma possess "emergency jurisdiction" over any child who is physically present in this state if the child has been abandoned, or if it is necessary to protect the child because of real or threatened abuse or the child is otherwise deprived.[171] The emergency jurisdiction provision of the UCCJA is reserved for extraordinary circumstances.[172] While the emergency jurisdiction provision must not be abused, the provision is vital because it reaffirms the state's parens patriae responsibility for children in need of immediate protection.[173] If a genuine emergency exists, there should be evidence demonstrating the gravity of the situation, such as medical reports, or professional testimony from doctors, nurses, police officers or social workers.[174]

Ordinarily, the due process clauses of the United States and Oklahoma Constitutions mandate that a person must be afforded an opportunity to be heard before being deprived of a protected interest.[175] In the parent-child context, due process ordinarily demands that the parent be afforded a hearing before the state interferes with the parent's constitutionally protected interest in the care, custody, control, and companionship of the child. However, due process is a flexible concept and calls for such procedural protections as the particular facts and circumstances demand.[176]

The United States Supreme Court recognizes that there are extraordinary situations in which a valid governmental interest

171. 10 OKLA. STAT. § 1605(A) (Supp. 1982): "A court of this state which is competent to decide child custody has jurisdiction to make a child custody determination by initial or modification decree if . . . (3) the child is physically present in this state, and: (a) the child has been abandoned, or (b) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse, or is otherwise neglected or dependent."

172. Holt v. District Court, 626 P.2d 1336, 1345 (Okla. 1981).

173. *Id.* The Oklahoma Supreme Court cited with approval Professor Brigitte Bodenheimer, the reporter for the Uniform Child Custody Jurisdiction Act, concerning this provision: "This exceptional jurisdiction exists in very few cases. Naturally, there will be attempts to circumvent the Act by 'shouting fire' in every conceivable situation. Emergency jurisdiction must be denied, however, when it is invoked as a pretext in order to reopen a custody controversy. Unless judges and attorneys are constantly alert to the dangers inherent in misuses of emergency jurisdiction to circumvent the Act, the exception could tear such a large hole in the Act that custody decrees made in one state would again be relitigated in other states; and the interstate chaos that the act was intended to remedy could be revised and perhaps intensified." *See Commissioners Note*, UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 123, 124 (master's ed. 1979).

174. Roberts v. District Court of Larimer Cty., 596 P.2d 65, 68 n.1 (Colo. 1979) (en banc).

175. U.S. CONST. amend. XIV, § 1; OKLA. CONST. art. II, § 7.

176. Morissey v. Brewer, 408 U.S. 471, 481 (1972).

is at stake that justify postponing a hearing until after an event.[177] In an emergency removal from the home, the "valid governmental interest" is the interest of the child in a wholesome environment free from abuse and neglect:[178]

> The interest of children in a wholesome environment has a constitutional dimension no less compelling than that the parents have in the preservation of family integrity. In the hierarchy of constitutionally protected values both interests rank as fundamental, and must hence be shielded with equal vigor and solicitude.[179]

Therefore, it is constitutionally permissible, in an emergency, to remove an endangered child from the home if the parents are afforded an immediate post-deprivation hearing.

The police may immediately take into protective custody any child whose surroundings are such as to endanger the child's welfare.[180] The police officer who takes the child must immediately report the child's detention to a judge of the district court in the county where the child was taken into custody.[181] In certain limited circumstances, the police officer has the authority to authorized medical examination and treatment of the child.[182]

177. Smith v. Organization of Foster Families, 431 U.S. 816, 848 (1977) (quoting Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972), and Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

178. *In re* T.H.L., 636 P.2d 330, 334 (Okla. 1981).

179. *In re* Jerry L., 662 P.2d 1372, 1374 (Okla. 1983).

180. 10 OKLA. STAT. § 1107(C) (Supp. 1982):

Nothing in Ch. 51 of this title [the Juvenile Code] shall be construed as forbidding any peace officer or any employee of the court from immediately taking into custody any child who is found violating any law or ordinance, or whose surroundings are such as to endanger his welfare, or who is willfully and voluntarily absent from his home without the consent of his parent or guardian or legal custodian, for a substantial length of time or without intent to return . . . .

181. *Id.*:

In every such case the officer or employee taking the child into custody shall immediately report the fact of his detention to a judge of the district court in the county in which the child was taken into custody. If no judge is available locally, then the detention shall be reported immediately to the presiding judge of the judicial administrative district; but if the later cannot be reached, then any judge regularly serving within the judicial administrative district, and the case shall then proceed with as provided in Ch. 51 of this title [the Juvenile Code] . . . .

182. *Id.* § 1107(D):

When any child is taken into custody pursuant to this title [Title 10] and it reasonably appears to the peace officer or employee of the court that the child is in need of medical treatment to preserve his health, any peace officer or any employee of the

The court's authority to issue an immediate detention order or warrant authorizing the child to be taken into custody is scattered among four sections of the Juvenile Code. First, section 1104 provides that if it appears the child is in such condition or surroundings, and that the child's welfare requires custody be immediately assumed by the court, the court may immediately issue a detention order or warrant authorizing the taking of the child into custody.[183] Second, section 1106 provides that in any case where it appears the child should be taken into immediate custody by the court, a warrant may be issued against the parent or guardian or against the child.[184] Third, section 1130(B) states in relevant part: "Nothing contained herein shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his health or welfare."[185] Finally, section 1131(A) provides in relevant part: "Nothing in this section shall prevent a court from immediately taking custody of a child and ordering whatever action may be necessary to protect his health or welfare."[186]

If the court orders the emergency removal of a child, it must make a specific finding that the continuation of the child at the home is contrary to the child's welfare. The court must also make a finding whether the absence of efforts to prevent removal of the child is reasonable under the circumstances if such removal is due to an alleged emergency and is for the purpose of providing for the safety of the child.[187] The court may also order medical treatment to protect the child's health or welfare.[188]

---

court shall have the authority to authorize medical examination and medical treatment for any child found to be in need of medical treatment as diagnosed by a competent medical authority in the absence of a parent or guardian who is competent to authorize medical treatment. The officer or the employee of the court shall authorize said medical treatment only after exercising due diligence to locate the parent, guardian or other person legally competent to authorize said medical treatment. The parent, guardian or custodian of the child shall be responsible for such medical expenses as ordered by the court. No peace officer or employee of the court authorizing such treatment in accordance with the provisions of this section for any child found in need of such medical treatment shall have any liability, civil or criminal, for giving such authorization.

183. 10 OKLA. STAT. § 1104(D) (Supp. 1988).
184. 10 OKLA. STAT. § 1106 (1981).
185. 10 OKLA. STAT. § 1130(B) (Supp. 1987).
186. 10 OKLA. STAT. § 1131(A) (Supp. 1986).
187. 10 OKLA. STAT. § 1104.1(D)(2) (Supp. 1984).
188. 10 OKLA. STAT. § 1105 (1981); 10 OKLA. STAT. § 1130(B) (Supp. 1987).

The child cannot be detained in protective custody beyond the next judicial day unless the court holds a detention hearing and determines that probable cause exists to detain the child.[189] The child is detained only if detention is necessary to assure the appearance of the child in court or for the protection of the child or the public.[190]

A child taken into custody as a deprived child must be taken to a shelter, hospital, foster home or other appropriate place designated by the court.[191] The child may also be taken immediately before a judge to obtain a temporary order for protective custody.[192] The child cannot be confined in any jail, adult lockup or adult detention facility, nor can the child be placed in a juvenile detention facility or in secured detention.[193] The child must be placed in shelter care or foster care, or be released to the custody of parents or another responsible party.[194]

If a child is taken into custody before a petition is filed, the petition must be filed and summons issued within five judicial days.[195] Otherwise the child must be returned to the child's parent, guardian, or legal custodian.[196] However, if a child is taken into custody upon allegations of cruelty on the part of a parent, guardian or legal custodian, the petition must be filed in a reasonable time, not to exceed thirty days.[197]

Emergency Removal of an Indian Child

State courts have no authority to issue an order for the emergency removal of an Indian child from the child's reservation. The tribe has exclusive jurisdiction over any child custody proceeding involving an Indian child within the tribe's reservation.[198] However, if the Indian child is temporarily located off

189. 10 OKLA. STAT. § 1107(C) (Supp. 1982).
190. *Id.* § 1107.1(A).
191. *Id.* § 1107(B).
192. *Id.*
193. 10 OKLA. STAT. § 1107.1 (Supp. 1988).
194. *Id.* §§ 1107.1(A)(2)-(3); 1107.1(B).
195. 10 OKLA. STAT. § 1104.1(A) (Supp. 1984).
196. *Id.*
197. *Id.* § 1104.1(B).
198. Indian Child Welfare Act of 1978, 25 U.S.C. § 1911(a):
An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

the reservation, the state court has authority to issue an emergency order removing the child from a parent or Indian custodian in order to prevent imminent physical harm to the child.[199] The OICWA requires that if the state court authorizes the emergency removal of an Indian child from a parent or Indian custodian, the order must be accompanied by an affidavit containing information about the parent's offending conduct that has caused the child's removal.[200]

The information contained in the affidavit, which must include a specific and detailed account of the circumstances leading to removal of the child, is the first notice parents ordinarily receive of the grounds for the impending juvenile proceeding. The affidavit's importance is made clear, when, as is often the case, the emergency order is obtained in an ex parte proceeding.[201] The state authority, official or agency involved in remov-

199. *Id.* § 1922:

> Nothing in this subchapter [Indian Child Welfare Act] shall be construed to prevent the emergency removal of an Indian child who is a resident of or 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 . . . .

200. *In re* N.L., 754 P.2d 863, 872 (Okla. 1988) (Opala, J., concurring in part and dissenting in part). Section 40.5 of the OICWA provides:

> A. When a court order authorizes the emergency removal of an Indian child from the parent or Indian custodian of said child in accordance with 25 U.S.C. § 1922, the order shall be accompanied by an affidavit containing the following information:
>
> 1. The names, tribal affiliations, 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 led the agency responsible for the removal of the child to take that action; and
>
> 3. A statement of the specific actions that have been taken to assist the parents or Indian custodian so that the child may safely be returned to their custody.

10 OKLA. STAT. § 40.5(A).

201. *N.L.*, 754 P.2d at 873. Guideline B.7 suggests that whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child. When a court order authorizing continued emergency physical custody is sought, the petition for that order should be accompanied by an affidavit containing the following information: the name, age and last known address of the Indian child; the name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them should be included; facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated; the tribal affiliation of the child and of the

ing the child from the home must ensure that the emergency removal or placement terminates immediately when the removal or placement is no longer necessary to prevent imminent physical harm to the child, and must expeditiously initiate a child custody proceeding subject to the provisions of ICWA, transfer the child

---

parent and/or Indian custodians; a specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action; if the child is believed to reside or be domiciled on a reservation whether the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction; and finally, a statement of the specific actions that have been taken to assist the parents or Indian custodian so the child may safely be returned to their custody. If the Indian child is not restored to the parents or Indian custodian, or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists, or as soon as the tribe exercises jurisdiction over the case — whichever is earlier. Absent extraordinary circumstances, the Guidelines recommend that temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence, and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Guidelines, *supra* note 63, at 67,589-90. The commentary to B.7 suggests that since jurisdiction under the ICWA is based on domicile and residence, rather than simple presence, there may be instances in which action must be taken with respect to a child who is physically located off the reservation, but is subject to exclusive tribal jurisdiction. In such instances the tribe will usually not be able to take swift action to exercise its jurisdiction. For that reason Congress authorized the states to take temporary emergency action. Since emergency action must be taken without the careful advance deliberation normally required, procedures must be established to assure that the emergency actions are quickly subjected to review. Section 1922 of the ICWA provides procedures for prompt review of such emergency actions. It presumes the state already has such review procedures that shall be followed in cases involving Indian children. The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end. State action shall also end as soon as the tribe is ready to take over the case. Subsection (d) refers primarily to the period between when the petition is filed and when the trial court renders its decision. The ICWA requires that, except for emergencies, Indian children are not to be removed from their parents unless a court finds clear and convincing evidence that the child would be in serious danger unless removed from the home. Unless there is some kind of time limit on the length of an "emergency removal" (that is, any removal not made pursuant to a finding by the court that there is clear and convincing evidence that continued parental custody would make serious physical or emotional harm likely), the safeguards of the act could be evaded by use of long-term emergency removals. Subsection (d) recommends what is, in effect, a speedy trial requirement. The courts shall be required to comply with the requirements of the ICWA and reach a decision within 90 days unless there are "extraordinary circumstances" that make additional delay unavoidable.

to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian.[202]

The OICWA further mandates what is, in effect, a speedy trial requirement.[203] No pre-adjudicatory custody order can remain in force for more than thirty days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child.[204] The court may, for good cause shown, extend the effective period of the order for an additional sixty days.[205]

The purpose of the expert testimony is to provide the court with knowledge of the social and cultural aspects of Indian life to diminish the risk of cultural bias.[206] The *Guidelines for State Courts* provide that professional people with substantial education and experience in the area of their specialty may be qualified expert witnesses.[207] The Oklahoma Supreme Court has placed a judicial gloss on the meaning of "a qualified expert witness," holding that where cultural bias is clearly not implicated, expert witnesses who do not possess special knowledge of Indian life may provide the necessary proof that continued custody of the child by the parent will result in serious emotional or physical harm to the child.[208] In the event the trial court errs and misapplies section 1922 of the ICWA or section 40.5 of the OICWA, such misapplication may not defeat the jurisdiction of the trial court.[209]

Oklahoma's district courts are empowered to assume jurisdiction where an emergency exists and a child may be endangered.[210] Further, the court has the duty to take evidence on the issue of abuse to determine whether it should assume emergency jurisdiction.[211] After determining that it has jurisdiction, the court must then decide whether to exercise jurisdiction.[212] This multi-

202. Indian Child Welfare Act of 1978, 25 U.S.C. § 1922.

203. 10 OKLA. STAT. § 40.5(B) (Supp. 1982).

204. *Id.*

205. *Id.*

206. *In re* N.L., 754 P.2d 863, 867 (Okla. 1988) (quoting State *ex rel.* Juvenile Department v. Tucker, 76 Or. App. 673, 710 P.2d 793, 799 (1985)).

207. Guidelines, *supra* note 63, at D.4(b)(iii) (qualified expert witnesses).

208. *N.L.*, 754 P.2d at 868.

209. *Id.* at 866.

210. 10 OKLA. STAT. § 1605(A)(3)(b) (1981).

211. Holt v. District Court, 626 P.2d 1336, 1345-46 (Okla. 1981); Makers v. Makers, 645 P.2d 1039, 1040 (Okla. Ct. App. 1982).

212. Smith v. Smith, 40 Or. App. 257, 594 P.2d 1292, 1294 (1979).

step approach is endorsed by the Supreme Court of Oklahoma.[213]

After the petition has been filed, the district court has the authority to issue any temporary order or grant any interlocutory relief authorized by the Juvenile Code, even if another district court within the state has jurisdiction of the child, or has jurisdiction to determine the custody or support of the child.[214]

After the petition is filed, the court may order the child to be examined and evaluated by a physician or qualified mental health professional to aid the court in making a proper disposition.[215] In an emergency, the court may cause the child to be placed in a public hospital or institution for treatment or special care, or in a private hospital or institution which will receive the child for treatment or special care and consent to emergency treatment or surgery.[216] If the child appears to be in need of nursing, medical or surgical care, the court may order the parent or other person responsible for the child to provide it. If the parent or other person does not provide such care, the court may, after due notice, enter an order that the care be provided. When approved by the court, expenses are a charge upon the county, but the court may adjudge that the person having the duty under the law to support the child pay part or all of the expense of such care.[217]

The OICWA requires that if an Indian child is removed from the home, the state court must follow placement preferences specified in the ICWA.[218] Section 1915 of the ICWA mandates presumptive placement priorities for Indian children among Indians.[219] An Indian child removed from home based on an emergency must be placed in the least restrictive setting which most approximates a family, and in which the child's special needs, if any, may be met. The child must also be placed within reasonable proximity of the home, taking into account any special needs of the child. A preference is given, in the absence of "good cause to the contrary," to placing the child with:

(i) a member of the Indian child's extended family;
(ii) a foster home licensed, approved, or specified by the

213. *Holt*, 626 P.2d at 1341. The policy considerations which the court must take into account when deciding whether to exercise jurisdiction are stated in 10 OKLA. STAT. § 1609 (Supp. 1981).

214. 10 OKLA. STAT. § 1102(B) (1981).

215. 10 OKLA. STAT. § 1120(A) (Supp. 1986).

216. *Id.* § 1120(C).

217. *Id.*

218. 10 OKLA. STAT. § 40.6 (Supp. 1982).

219. Indian Child Welfare Act of 1978, 25 U.S.C. § 1915.

Indian child's tribe;
(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(iv) 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 special needs.[220]

The child's tribe has the option of modifying the presumptive placement priorities and establishing a different order of preference.[221] The standards applied in meeting the placement preference requirements are the prevailing social and cultural standards of the Indian community in which the parent or extended family members maintain social and cultural ties.[222] The state is required to maintain records of each such placement.[223]

A finding of "good cause to the contrary" is predicated upon the court's consideration of the presumptive placement priorities.[224] The "good cause" exception is designed to allow state courts flexibility in rendering Indian child custody decisions.[225] A determination of "good cause" not to follow the presumptive placement priorities may be based on one or more of the following considerations:

The court should give preference to confidentiality requests by parents in making placements: "(i) the request of the biological parents or the child when the child is of sufficient age."[226] The intent is to permit parents to ask that the presumptive placement priorities not be followed because it would prejudice confidentiality. The wishes of an older child are important in making an effective placement. In a few cases the child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live.[227] Therefore, good cause may exist due to "(ii) the extraordinary physical or emotional needs of the child, as established by testimony of a qualified expert witness."[228] A diligent attempt should be made to find a suitable family meeting

220. *Id.* § 1915(b)(i-iv).
221. *Id.* § 1915(c).
222. *Id.* § 1915(d).
223. *Id.* § 1915(e).
224. *In re* N.L., 754 P.2d 863, 870 (Okla. 1988) (Opala, J., concurring in part and dissenting in part).
225. *Id.* at 876.
226. Guidelines, *supra* note 63, at F.3 (commentary).
227. *Id.*
228. *Id.* at F.3(a)(ii).

the presumptive preference criteria before considering a nonpreference placement. If no such family can be found, good cause not to follow the placement preferences may exist: "(iii) the availability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria."[229] A diligent attempt to find a suitable family includes, at a minimum, contact with the child's tribal social services program, a search of all county or state listings of available Indian homes and contact with nationally-known Indian programs with available placement resources.[230]

The burden of establishing the existence of "good cause" not to follow the presumptive placement priorities should be on the party urging that the preferences not be followed.[231]

Amendments to the Petition and Subsequent Pleadings

The court may order amendments to the petition at any time before an order of adjudication is made, as long as the parties are given sufficient time to prepare for the hearing.[232] Juvenile actions are special statutory proceedings.[233] No pleading after the petition is required.[234] The filing of any motion or pleading cannot delay the holding of the adjudicatory hearing.[235] No defensive pleadings are necessary.[236] As the Oklahoma Supreme Court held in *In re Christina T.*:

> Juvenile actions are not, and were never intended to be, the sort of proceeding capable of resolution upon a flurry of pleadings. No answer to the petition is required. The petition is deemed controverted in all respects upon its filing because the legal presumption is that the best interest of children are served by their parents. The burden of proving otherwise is on the petitioner seeking to interrupt and restrict that relationship.[237]

229. *Id.* at F.3(a)(iii).

230. *Id.* at F.3 (commentary).

231. *Id.*

232. 10 OKLA. STAT. § 1103.1(B) (1981).

233. *In re* Christina T., 590 P.2d 189, 192-93 (Okla. 1979): "[J]uvenile actions . . . are special statutory proceedings within the meaning of 12 Okla. Stat. (1971) § 5." Although section 5 was repealed with the adoption of the Oklahoma Pleading Code, (1984 Okla. Sess. Laws ch. 164, § 32 (eff. Nov. 1, 1984)), juvenile actions remain special statutory proceedings. See 12 OKLA. STAT. § 2001 (Supp. 1985) and the accompanying committee comment to § 2001.

234. 10 OKLA. STAT. § 1103.1(A) (1981).

235. *Id.*

236. Davis v. Davis, 590 P.2d 1102, 1107 (Okla. 1985).

237. *Christina T.*, 590 P.2d at 192.

A hearing on the juvenile petition is mandatory.[238] Therefore, summary judgment is not applicable to juvenile court proceedings. Since the purpose of summary judgment is to avoid a useless trial and can be granted as a matter of law only when there is no substantial controversy as to any material fact,[239] "[t]he very nature of juvenile proceedings renders the whole concept of summary judgment inappropriate and impermissible."[240]

A petition is deemed to have been amended to conform to the proof where the proof does not change the substance of the act, omission or circumstance alleged.[241] However, the court cannot amend the adjudicatory category prayed for in the petition.[242] In other words, the court cannot change the nature of the proceedings from a "deprived child" proceeding into a proceeding to determine whether the child is "delinquent,"[243] "in need of supervision,"[244] or "in need of treatment."[245]

238. *Id.* at 191.

239. OKLA. DIST. CT. R. 13.

240. *Christina T.*, 590 P.2d at 192 (district court's sustention of the state's motion for summary judgment deprived the parents and the child of their right to due process of law).

241. 10 OKLA. STAT. § 1103.1(B) (1981).

242. *Id.*

243. 10 OKLA. STAT. § 1101(2) (Supp. 1988) defines "delinquent child," to mean a child who:

> (a) has violated any federal or state law or municipal ordinance, except a traffic statute or traffic ordinance, or any lawful order of the court made pursuant to the provisions of Sections 1101 through 1506 of the title, or (b) has habitually violated the traffic laws or traffic ordinances.

244. 10 OKLA. STAT. § 1101(3) (Supp. 1988) defines "child in need of supervision" to mean a child who:

> (a) has repeatedly disobeyed reasonable and lawful commands or directives that his parent, legal custodian, or other custodian, or
>
> (b) is willfully and voluntarily absent from his home without the consent of his parent, legal guardian or other custodian for a substantial length of time, or without intent to return, or
>
> (c) is willfully and voluntarily absent from school for fifteen (15) or more days or parts of days within a semester or four (4) or more days or parts of days within a four week period without a valid excuse as defined by the local school boards, if said child is subject to compulsory school attendance.

245. 10 OKLA. STAT. § 1101(5) (Supp. 1988) defines "child in need of treatment" to mean:

> any child who is afflicted with a substantial disorder of the emotional processes, thought, or cognition, which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life appropriate to the age of the child. The term "child in need of treatment" shall not mean a child afflicted with epilepsy, mental retardation, organic brain syndrome, physical handicaps, or brief periods of intoxication caused by such substances as alcohol or drugs unless the child also meets the criteria for "child in need of treatment."

Service of Process: Providing Notice to Interested Parties

Personal jurisdiction is based on valid service.[246] Procedural due process requires reasonable steps be taken to give interested parties notice of the pendency of proceedings and an opportunity to be heard.[247] If these fundamental requirements are not met, the court lacks jurisdiction, the judgment is void, and the judgment is subject to direct and collateral attack.[248] Of course, the parties may voluntarily appear before the court and thus confer personal jurisdiction.[249] Otherwise, process must be served.[250]

After the petition is filed, summons must be issued unless the parties voluntarily appear. The summons must recite briefly the nature of the proceeding with the phrase "as described more fully in the attached petition" and require the person who has custody or control of the child to appear personally and bring the child before the court at a time and place stated. The summons must also state the relief requested. If termination of parental rights is sought, it must be stated in the summons. If an order for the payment of funds for the care and maintenance of the child is desired, it must be stated in the summons. The summons must also set forth the rights of the child, parents, and other interested parties to have an attorney present at the hearing on the petition.[251] A copy of the petition must be attached to and delivered with the summons.[252]

The summons must be served on the person who has actual custody of the child and, if the child is at least twelve years old, a copy must be served on the child. If the person who has actual custody of the child is other than a parent or guardian of the child, a copy of the summons must be served on the parent or guardian or both. A copy of the summons must be served on each parent. If no parent or guardian can be found, a summons must be served upon such other person as the court designates.[253]

246. Tammie v. Rodriquez, 570 P.2d 332, 334 (Okla. 1977).

247. *Id.*

248. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 311 (1985); Bomford v. Socony Mobil Oil Co., 440 P.2d 713, 716 (Okla. 1968); *Tammie*, 570 P.2d at 334.

249. 10 OKLA. STAT. § 1104(a) (Supp. 1988); 12 OKLA. STAT. § 2004(C)(5) (Supp. 1988).

250. 10 OKLA. STAT. § 1104(a) (Supp. 1988).

251. *Id.*; 10 OKLA. STAT. § 1103(B) (Supp. 1982).

252. 10 OKLA. STAT. § 1103(D) (Supp. 1982).

253. 10 OKLA. STAT. § 1104(b) (Supp. 1988).

No notice is required to a parent where, after a hearing, the court finds:

> (1) the parent does not have custody of the child and has never established or has not maintained a substantial relationship with the child nor manifested a significant interest in the child for a period of not less than one year preceding the filing of the petition; or
> (2) the parent does not have custody of the child and has willfully failed to contribute to the support of the child as provided in a decree of divorce or in some other court order during the year preceding the filing of the petition, or in the absence of such order, consistent with the parent's means and earning capacity.[254]

The Oklahoma Legislature added these exceptions to the notice provisions of the Juvenile Code in 1988.[255] In order to understand the legislature's decision, one must appreciate the novel context and legal problems arising from the parent-child relationship.

The institution of marriage has played a critical role in defining the legal entitlement of family members. State laws express an appropriate preference for the formal family unit, perhaps the most fundamental social institution of our society.[256]

Of course, not everyone chooses to live the traditional family lifestyle where mother, father and children all live together. Parents of children born outside the traditional family unit may, in fact, have little or no custodial, personal, or financial relationship with the child. The mere existence of a biological link does not merit lofty constitutional protection:[257]

> The importance of the familial relationship, to the individuals involved and to the society extends from the emotional attachment that derives from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children as well as from the fact of blood relationship.[258]

The existence of a substantial relationship between parent and child is a relevant criterion in evaluating the rights of the parent

254. *Id.* § 1104(b)(1), (2).

255. 1988 Okla. Sess. Laws ch. 318, § 2 (emergency effective July 6, 1988).

256. Lehr v. Robertson, 463 U.S. 248, 257 (1983).

257. *Id.* at 261.

258. *Id.* (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977), quoting in turn Wisconsin v. Yoder, 406 U.S. 205 (1972)).

and the best interests of the child.[259] The significance of a biological connection is that it offers natural parents the opportunity to develop a relationship with their offspring. If parents fail to grasp that opportunity and accept some measure of responsibility for their child's future, the United States Constitution does not automatically compel a state to listen to their opinion of where the child's best interests lie.[260]

In a quartet of cases, the United States Supreme court has examined the extent to which a natural, unwed father's biological relationship with his child receives protection under the United States Constitution's due process clause: *Stanley v. Illinois*,[261] *Quillion v. Walcott*,[262] *Cabana v. Mohammed*,[263] and *Lehr v. Robertson*.[264] In *Stanley*, the unwed father had lived with his children for their entire lives and with the children's mother for eighteen years. He "sired and raised" his children and supported them all of their lives. He had the special kind of relationship that is developed by custodial responsibilities. It was his custody of his children, not his biological connection alone, that gave him an interest of the same stature as that of any other custodial parent.[265]

In *Cabana* the unwed father did not have current custody of his children. However, there still existed a developed relationship. The father had lived with his two children, born out of wedlock, and their mother for several years. The natural parents had maintained joint custody of their children from the time of their birth until they were two and four years old respectively. The Court held that the unwed father's current emotional ties with his children created by a past custodial relationship merited constitutional protection.[266]

In contrast, the unwed father in *Quillion* never had or even sought actual or legal custody of his child, nor had he consistently supported the child.[267] Similarly, in *Lehr*, the unwed father never had any significant custodial, personal, or financial relationship with the child. It was only after the child was two years old and only after the natural mother had remarried and filed

259. *Id.* at 266-67.
260. *Id.* at 262 (discussing the rights of the putative father).
261. 405 U.S. 645 (1972).
262. 434 U.S. 246 (1978).
263. 441 U.S. 380 (1979).
264. 463 U.S. 248 (1983).
265. *In re* Adoption of Baby Boy D., 742 P.2d 1059, 1066 (Okla. 1985).
266. *Cabana*, 441 U.S. at 389.
267. *Quillion*, 434 U.S. at 249-51.

a petition for adoption that the father sought visitation rights and filed a petition for legitimation. The Court held that the natural father's rights under the due process and equal protection clauses of the United States Constitution were not violated by failure to receive notice and an opportunity to be heard before the child was adopted.[268]

These cases make it clear that it is constitutionally permissible for the state to decline to notify or allow participation by unwed fathers, under certain circumstances, even though they have never been established officially as being without an interest. Further, the state may even deny them participation in the preliminary stage, determining that they are without an interest.[269]

A similar stance was adopted by the Oklahoma Supreme Court in *In re Adoption of Baby Boy D.*[270] In *Baby Boy D.* the unwed father knew that the mother was pregnant. However, he made no attempt to provide for the mother during pregnancy, nor did he attempt to learn when and where the child was to be born. He did not pay, nor attempt to make any arrangements for the payment of, expenses relating to the birth and care of the child or mother. He abandoned the support and care of the mother and child during pregnancy, at birth and after birth. He failed to assume any parental responsibility. The Oklahoma Supreme Court held that the unwed father did not have the right to notice and opportunity to be heard regarding the subsequent adoption of the child. In so holding the court stated:

> The constitution protects only parent-child relationships of biological parents who have actually committed themselves to their children and have exercised responsibility for rearing their children. This principle has its basis in the theory that the process of defining which relationships are constitutionally significant includes a consideration of how the competing interests are served by protection. Parents who commit themselves to their children and take responsibility for rearing their children share the state's interest in assuming proper care for their children.
>
> However, the paramount interest to be considered is the child's best interest. Children are not static objects. They grow and develop, and their growth and development require

268. *Lehr*, 463 U.S. at 248-49.
269. *Baby Boy D.*, 742 P.2d at 1066-67.
270. *Id.* at 1059.

> more than day-to-day satisfaction of their physical needs. Their growth and development also require day-to-day satisfaction of their emotional needs, and a primary emotional need is for permanence and stability. Only when their emotional needs are satisfied can children develop the emotional attachments that have independent constitutional significance. This Court recognizes that a child's need for permanence and stability, like his or her other needs, cannot be postponed.[271]

The Oklahoma Supreme Court went a step further by holding that a summons need not be served upon a noncustodial parent.[272]

The Juvenile Code authorizes service "by certified mail to the person's last known address, requesting a return receipt from the addressee only."[273] In the alternative the Juvenile Code authorizes service of summons as provided for in service for civil actions.[274] The method of service of process in civil actions is found in the Oklahoma Pleading Code,[275] which authorizes service of process by a sheriff or deputy sheriff, a person licensed to make service of process in civil cases, or a person specially appointed for that purpose.[276] The Oklahoma Pleading Code also authorizes service by certified mail, return receipt requested and delivery restricted to the addressee.[277] If service cannot be made by personal delivery or by mail, the Oklahoma Pleading Code authorizes service by court order upon individuals who are at least fifteen years of age or older "in any manner which is reasonably calculated to give [the individual] actual notice of the proceedings and an opportunity to be heard."[278] This provision gives the court discretion to fashion a method of service appropriate to particular circumstances as long as specified standards are met.[279]

As a last resort, if the address of the person to be summoned is not known, or if the mailed summons is returned, both the Juvenile Code[280] and the Oklahoma Pleading Code[281] authorize

271. *Id.* at 1067.
272. Davis v. Davis, 708 P.2d 1102, 1102 (Okla. 1985).
273. 10 OKLA. STAT. § 1105 (1981).
274. *Id.*
275. 12 OKLA. STAT. § 2001-2027 (Supp. 1984).
276. 12 OKLA. STAT. § 2004(C)(1)(a) (Supp. 1988).
277. *Id.* § 2004(C)(2)(b).
278. *Id.* § 2004(C)(5).
279. *See* Milliken v. Meyer, 311 U.S. 457, 463 (1940).
280. 10 OKLA. STAT. § 1105 (1981).
281. 12 OKLA. STAT. § 2004(C)(3)(a) (Supp. 1988) provides:

service by publication. The Juvenile Code provides: "Where the address of the person to be summoned is not known, or if the mailed summons is returned, the court may order that notice of the hearing be published once in a newspaper of general circulation in the county."[282]

"Actual notice is the preferred method of satisfying due process requirements, but is has long been recognized that actual notice is not always feasible."[283] As the United States Supreme Court said in *Mulane v. Central Hanover Bank & Trust Co.*:

> This Court has not hesitated to approve of resort to publication as a customary substitute . . . where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to the final decree foreclosing their rights.[284]

Oklahoma District Court rules[285] require an inquiry, either in open court or in chambers, to determine judicially whether the petitioner made a diligent and meaningful search of all reasonably available sources at hand to locate the whereabouts or mailing address of the person to be served.[286] This information is often presented to the judge in the form of an affidavit for service by publication. The court may also entertain sworn testimony at the hearing.[287] The court should include a recital

---

281. 12 OKLA. STAT. § 2004(C)(3)(a) (Supp. 1988) provides:
Service of summons upon a named defendant may be made by publication when it is stated in the petition, verified by the plaintiff or his attorney, or in a separate affidavit by the plaintiff or his attorney, filed with the court, that with due diligence service cannot be made upon the defendant by any other method.

282. 10 OKLA. STAT. § 1105 (1981). For the method of publication service authorized by the Oklahoma Pleading Code, see 12 OKLA. STAT. § 2004(C)(4)(c) (Supp. 1988).

283. Dana P. v. State, 656 P.2d 253, 255 (Okla. 1982).

284. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1985).

285. OKLA. DIST. CT. R. 16.

286. *Id.*

287. *See also* 12 OKLA. STAT. § 2004(C)(3)(e) (Supp. 1988):
Before entry of a default judgment or order against a party who has been served solely by publication under this subsection, the court shall conduct an inquiry to determine whether the plaintiff, or someone acting in his behalf, made a distinct and meaningful search of all reasonably available sources to ascertain the whereabouts of any named

of its findings in the journal entry of judgment.[288] As a practical matter, service by publication is the method of notice least calculated to bring a party's attention to the pendency of judicial proceedings.[289] The United States Supreme Court held in *Mulane*, "Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that [everyone] examine[s] all that is published to see if something may be tucked away in it that affects [their] . . . interests."[290] Further, the court said in *McDonald*, "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to the fact."[291] The court has also said what is required is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[292]

A striking example of the abuse of the resort to publication by the Oklahoma Department of Human Services is found in

---

parties who have been served solely by publication under this subsection.

The committee comment to § 2004(C)(3)(e) states:

Subparagraph e of paragraph 3 of subsection C of § 2004 requires a judicial investigation of the sufficiency of the search to ascertain the whereabouts of parties served solely by publication. This incorporates the provisions of Oklahoma District Court Rule 16, the Oklahoma Supreme Court in Bomford v. Socony Mobil Oil Co., 440 P.2d 713 (Okla. 1968) that the due process provision of the United States Constitution requires a hearing on a default judgment after service by publication to include an evidentiary showing of due diligence in attempting to accomplish actual notice to the defendant. Stating that before a plaintiff may resort to publication process, he must make a diligent search of all available sources, the court indicated that due diligence requires at least a search of local tax rolls, deed records, judicial and other official records, telephone directories, city directories, and the like. The facts of such hearing need not be set out in the affidavit, but must be proved at the hearing on a default judgment. Implicit in the hearing requirement is the provision that where a search reveals the identity and location of a defendant, publication will no longer be an acceptable form of service. The Supreme Court in Mulane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950), stated that in order to meet the due process requirement of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . . the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." The court held that publication service did not meet that standard with respect to parties with known residences.

288. Dana P. v. State, 656 P.2d 253, 257 n.4 (Okla. 1982); OKLA. DIST. CT. R. 16.

289. Boddie v. Connecticut, 401 U.S. 371, 382 (1971); *In re* Del Moral Rodriguez, 552 P.2d 397, 400 (Okla. 1976).

290. Mulane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 320 (1950).

291. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

292. *Mulane*, 339 U.S. at 314.

Kickapoo Tribe of Oklahoma v. Rader.[293] In *Rader*, Mark Litke, an agent of the Oklahoma Department of Human Services, filed an affidavit for service by publication with the District Court of Oklahoma County. The affidavit recited: "That the present whereabouts of the father of said child is unknown to your petitioner; that after due search and diligent inquiry your affiant has been unable to ascertain an address at which personal service may be given, and that affiant wishes to obtain service by publication."[294]

Notice to the father was given solely by publication. In fact, no diligent efforts were made to locate the father. Litke did not gather the information in the praecipe or the petition filed in the Oklahoma County District Court. He did not talk to any caseworker on the case. His affidavit was not based on any independent information gathered by him. He did not know what efforts, if any, were made by the protective service office or the caseworker to locate the father. Instead Litke relied on an investigative report from an intake worker in preparing the praecipe, petition and affidavit for service by publication.

The intake worker testified his job was to determine if there had been child abuse. He was not involved in preparation of the affidavit for publication. He said that the natural mother told him that the father's home was "Mexico" and no other whereabouts were given. He asked if she knew a specific address and she said that she did not, just that the father was in Mexico. He did not ask the mother if she still communicated with the father, or he with her. The mother did not tell the intake worker where the father's family or relatives were. The intake worker said that the whereabouts of a person were unimportant to him if the person was not involved in child abuse, and in this case he would not look further beyond what he learned from his conversation with the mother. The person who prepared the petition for the Oklahoma County District Court did not contact the intake worker.

In fact, the father's identity, at least as the putative father, was known to the DHS. One month before the father's parental rights to his child were terminated, DHS knew that the father's sister lived next door to the mother. The DHS case worker assigned to the child testified that although she was aware that the father's sister lived next door to the mother, she never asked the sister where he could be found. More troubling, the case

293. 822 F.2d 1493 (10th Cir. 1987).
294. *Id.* at 1494.

worker did not inform the court that the father's sister could be easily located or that the father had recently called the natural mother wanting to see his son. The case worker's own case status report noted that approximately one month before the father's rights were terminated, the mother stated that the father had called from Texas wanting to see his child, and that the father's sister lived next door. Finally, shortly before the termination hearing, DHS knew the whereabouts of the paternal grandparents.

In affirming the United States district court's ruling that the father's parental rights to his child were terminated in violation of the due process clause, and that there must be a redetermination on the custody and placement of the child by the state courts, the Tenth Circuit stated:

> We are cognizant of the cautionary note sounded by Justice Jackson in Mulane that "[a] construction of the due process clause which would place impossible or impractical obstacles in the way could not be justified. But when notice is a person's due, process which is mere gesture is not due process." We do not hold that the due process clause requires DHS to make extreme efforts to ascertain the whereabouts of parents. Nevertheless, in light of the critical parental rights at stake, we are convinced that due process clearly requires that DHS exert diligent efforts to locate parents before their rights are terminated. . . . Here, the efforts expended to locate [the father] to ascertain his whereabouts or address were manifestly insufficient to satisfy the demands of the due process clause.[295]

Therefore, publication must be used only as a last resort. Otherwise, the state court proceeding will be invalidated.

Additional Notice Requirements Under the UCCJA

In addition to the service of process requirements of the Juvenile Code, the UCCJA provides certain persons with the right to notice and opportunity to be heard:

> Before making a decree under this act [UCCJA], reasonable notice and an opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of the child. If any of these persons is outside this state,

295. *Id.* at 1499-1500 (citations omitted).

notice and opportunity to be heard shall be given pursuant to Section 7 of this act [§ 1607].[296]

Furthermore, the UCCJA states:

If the court learns . . . that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of his joinder as a party. If the person joined as a party is outside [the State of Oklahoma], he shall be served with process or otherwise notified in accordance with Section 6 of this act [§ 1606].[297]

Special Notice Requirements for State Court Proceedings Involving Indian Children

To determine the applicability of ICWA and OICWA two questions must be answered: (1) What type of proceeding is being conducted in state court?[298] and (2) Is the child an "Indian child"?[299] ICWA applies to state court proceedings for foster care placement, termination of parental rights, preadoptive placement, and adoptive placement of an Indian child.[300]

ICWA defines "foster care placement" to mean any action removing an Indian child from a parent or Indian custodian for temporary placement in a foster home or institution, or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.[301] ICWA defines "termination of parental rights" as any action resulting in the termination of the parent-child relationship.[302]

Given a purely technical reading, ICWA does not apply to Oklahoma state court public law deprived child proceedings unless and until a party either seeks to remove an Indian child involuntarily from a parent or Indian custodian, or requests the

296. 10 OKLA. STAT. § 1607 (1981).

297. *Id.* §§ 1606, 1612.

298. Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(17).

299. *Id.* § 1903(4).

300. *Id.* § 1903(1)(i). Excluded are juvenile delinquency proceedings and divorce proceedings where custody of the Indian child is awarded to one of the parents. In contrast, the OICWA includes juvenile delinquency proceedings if a request is made to terminate parental rights. See 10 OKLA. STAT. § 40.3(A)(2) (Supp. 1982).

301. Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(1)(i).

302. *Id.* § 1903(1)(ii).

court to terminate the parent-child relationship. Accordingly, there may be significant state involvement and interaction with the Indian child and parent or Indian custodian without ever triggering the protections afforded under ICWA. For example, state agents may receive a report of abuse, investigate the child's home environment, make an initial determination whether the report of abuse is substantiated, and, if substantiated, attempt an informal adjustment by offering relevant services to the family such as parenting classes or assistance in obtaining food, clothing, shelter, job training, education, medical care or mental health services. If an informal adjustment is not practicable, the district attorney may even file a deprived child petition on behalf of the Indian child in state court without triggering ICWA's protections as long as no request is made to remove the Indian child from the home.

However, such a technical reading of ICWA is neither necessary nor desirable. The public policy of the State of Oklahoma is to keep families together when possible. Invocation of ICWA's protections may assist in attaining that goal. Therefore, the filing of a petition to adjudicate the child's deprived status should trigger the applicability of both ICWA and OICWA. The involvement of the Indian child's parent or Indian custodian and the Indian child's tribe at the earliest possible stage of a deprived child proceeding may prevent the need to remove the child from the home. Even if it is necessary to temporarily remove the child, the early involvement of the parent or Indian custodian and the Indian child's tribe will assist the state court in properly placing the child. Therefore, the notice required under the ICWA and OICWA should be sent by the petitioner no later than the filing of the deprived child petition.

ICWA requires that in any involuntary proceeding in a state court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child must notify the parent or Indian custodian and the child's tribe by registered mail with return receipt requested, of the pending proceedings and their right of intervention.[303] ICWA's notice requirements are mandatory in involuntary actions.[304] Further, OICWA applies when ICWA applies.[305]

303. *Id.* § 1912(a).

304. Duncan v. Wiley, 657 P.2d 1212, 1213 (Okla. Ct. App. 1982).

305. 10 OKLA. STAT. § 40.3 (Supp. 1982); *In re* Adoption of D.M.J., 741 P.2d 1386, 1388 (Okla. 1985).

OICWA requires that in any involuntary Indian child custody proceeding, including review hearings, the court must "send notice to the parents or to the Indian custodians, if any, to the tribe that may be the tribe of the Indian child, and to the appropriate BIA area office, by registered mail, return receipt requested."[306] The notice requirements mandated by the OICWA differ from those mandated by ICWA. In some respects they are duplicative and potentially confusing. For example, OICWA and ICWA differ as to who has the responsibility of giving notice of the pendency of the proceedings, the persons or entities entitled to receive notice, content of the notice and the minimum time limit granted the parties to prepare for the hearing.

Recognizing that the parent or Indian custodian of an Indian child is entitled to the protection afforded under federal or state law, whichever provides the higher standard of protection, this article will first address the notice requirements under ICWA and then discuss the notice requirements under OICWA.

Notice Requirement Under the ICWA

Section 1912 of the ICWA provides in relevant part:

> In any involuntary proceeding in state court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe by registered mail with return receipt requested, of the pending proceedings and of their right of intervention . . . .[307]

As previously discussed, a technical reading of the ICWA would require that notice be given only when a request is made to involuntarily remove an Indian child from a parent or Indian custodian. However, in keeping with the spirit and intent of the ICWA, the party who initiates the state court proceedings should give the required notices at the time of the filing of the deprived child petition. In Oklahoma, this means that the district attorney should give the notices required under the ICWA at the time the deprived child petition is filed.

Congress did not define precisely what it meant in section 1912 when it mandated notice "where a court knows or has reason to know that an Indian child is involved."[308] However,

306. 10 OKLA. STAT. § 40.4 (Supp. 1982).
307. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912.
308. *Id.* § 1912(a).

the *Guidelines for State Courts* recommend that state courts routinely inquire whether (1) the child involved is a member of an Indian tribe, or (2) a parent of the child is a member of an Indian tribe and the child is eligible for membership.[309] That inquiry should be made of all participants in all involuntary child custody proceedings.

The *Guidelines* list circumstances where a court may have reason to believe the child is Indian:

> (i) Any party to the case, Indian tribe, Indian organization, or public or private agency informs the court that the child is an Indian child.
> (ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.
> (iii) The child who is the subject of the proceedings gives the court reason to believe he or she is an Indian child.
> (iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.
> (v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.[310]

While this listing is not intended to be complete, it does suggest the most common circumstances giving rise to a reasonable belief that the child may be an Indian.

When a state court has reason to believe a child involved is an Indian, the *Guidelines* recommend the court seek verification of the child's status from either the child's tribe or the BIA.[311] The *Guidelines* also note that "the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets those criteria."[312] One should not equate membership in an Indian tribe with enrollment in that tribe:

> Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of estab-

309. Guidelines, *supra* note 63, at B.5 and accompanying commentary.
310. *Id.* at B.1(c).
311. *Id.* at B.1(a).
312. *Id.* at B.1 (commentary).

> lishing Indian status, but it is not the only means, nor is it necessarily determinative.[313]

The tribe's determination that a child is a member of the tribe, or is eligible for membership in the tribe, or that the biological parent is a member of the tribe, is conclusive.[314]

The court may also contact the BIA, which has extensive experience in determining who is an Indian for a variety of purposes. The determination of the BIA is entitled to great deference.[315] Absent a contrary determination by the tribe, the BIA's determination is conclusive.[316]

The ICWA defines an "Indian child" as "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 and Indian tribe and is the biological child of a member of an Indian tribe."[317] The ICWA defines an "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians, including any Alaskan native village as defined in [43 U.S.C. § 1602(c)]."[318]

The ICWA defines "parent" as "any biological parent or parents of an Indian child, or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom."[319] Congress specifically excluded from the definition of "parent" unwed fathers whose "paternity has not been acknowledged or established."[320] Such unwed fathers are not entitled to the notice provisions contained in the ICWA.[321]

The Oklahoma Supreme Court addressed this precise issue in *In re Adoption of Baby Boy D.*[322] in which the Court held the ICWA is not applicable until such time as the unwed father acknowledges or establishes paternity:

313. *Id. See also* United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979).

314. Guidelines, *supra* note 63, at B.1(b)(i).

315. United States v. Sandoval, 231 U.S. 27, 28 (1913); Guidelines, *supra* note 63, at B.1 (commentary).

316. Guidelines, *supra* note 63, at B.1(b)(ii).

317. Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(4).

318. *Id.* § 1903(8).

319. *Id.* § 1903(9). The ICWA defines "Indian" as any person who is a member of an Indian tribe, or who is an Alaska native and a member of a regional corporation (as defined in 43 U.S.C. § 1606). 25 U.S.C. § 1903(3).

320. *Id.* § 1903(9).

321. *In re* Adoption of Baby Boy D., 742 P.2d 1059, 1064 (Okla. 1985).

322. 742 P.2d 1059 (Okla. 1985).

> Congress has by this language evidenced its intent not to extend the ICWA to the child born out of wedlock, as in the instant case, whose father has never had custody and has not acknowledged or established paternity. We take this to mean acknowledged or established through the procedures available through the tribal courts consistent with tribal customs, or through procedures established by state law. Until paternity is acknowledged or established, an unwed Indian father has failed to lay legal claim to the child, and the ICWA is not applicable.[323]

The ICWA defines an "Indian custodian" as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child."[324] Finally, the ICWA defines an "Indian child's tribe" as:

> (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the child has the more significant contacts.[325]

Notice Where the Child May Be a Member of More Than One Tribe

The state court should notify all tribes that are potentially the "Indian child's tribe" so that each tribe may assert its claim to that status.[326] The *Guidelines* suggest that Congress, in defining the term "Indian child's tribe," provided a criterion for determining which tribe is *the* tribe, indicating Congressional intent that there be only one such tribe for each child in state court proceedings.[327] Notification of all the tribes is also necessary so the state court can consider the views and comparative interest of each tribe in the child's welfare in making its decision.[328]

> Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is

323. *Id.* at 1064.
324. Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(6).
325. *Id.* § 1903(5).
326. Guidelines, *supra* note 63, at B.2 (commentary).
327. *Id.*
328. *Id.*

> not a member of any of them, the [state] court is called upon to determine with which tribe the child has more significant contacts.[329]

Of course, a state court may, "if it wishes and state law permits, permit intervention by more than one tribe."[330]

Notice should be sent to each potential tribe. The notice should identify the other tribe or tribes that are being considered as the child's tribe, and invite each tribe to submit its view on which tribe should be designated as "the Indian child's tribe."[331]

The court's determination of which tribe shall be designated the "Indian child's tribe" should be set out in a written document stating the reasons for the decision and the reasons should be made a part of the record of the proceedings.[332] Copies of the decision should be sent to all parties and to each person or government agency that received notice of the proceedings.[333]

If the child is a member of only one tribe, that tribe should be designated the "Indian child's tribe" even though the child is eligible for membership in another tribe.[334] If a child becomes a member of one tribe during or after the proceeding, that tribe should be designated as the "Indian child's tribe" with respect to all subsequent actions related to the proceeding.[335] If the child becomes a member of a tribe other than the one designated by the state court as the "Indian child's tribe," actions taken based

329. *Id.* at B.2.
330. *Id.* at B.2 (commentary).
331. *Id.* at B.2. The guidelines further suggest:
In determining which tribe shall be designated the Indian child's tribe, the court should consider, among other things, the following factors:
(i) length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
(ii) child's participation in activities of each tribe;
(iii) child's fluency in the language of each tribe;
(iv) whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
(v) residence on or near one of the tribe's reservations by the child's relatives;
(vi) tribal membership of custodial parent or Indian custodian;
(vii) interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these Guidelines; and
(viii) the child's self-identification . . . .
332. *Id.* at B.2(d).
333. *Id.*
334. *Id.* at B.2(e).
335. *Id.*

upon the state court's determination prior to the child's becoming a tribal member continue to be valid.[336]

The ICWA requires notice be sent by registered mail with return receipt requested.[337] If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice must be given to the Secretary of the Interior who then has fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe.[338] The notice should be sent to the appropriate BIA area office by registered mail with return receipt requested.[339] Notice to the BIA must include the following information, if known:

(1) the name of the Indian child, birth date, and birth place,
(2) the Indian child's tribal affiliation,
(3) the names of the Indian child's parents or the Indian mother's maiden name, and
(4) a copy of the petition, complaint, or other document by which the proceeding was initiated.[340]

Upon receipt of the notice, the BIA must make a diligent effort to locate and notify the Indian child's tribe and the Indian child's parents or Indian custodian.[341] The BIA may send the notice by registered mail with return receipt requested or by personal service.[342] The notice from the BIA to the tribe and parents must include: (1) the name of the Indian child, the Indian child's birth date and birth place, the Indian child's tribal affiliation; (2) the names of the Indian child's parents or Indian custodians, including the mother's birth date, birth place, and maiden name; (3) a copy of the petition, complaint, or other document by which the proceeding was initiated; (4) a statement of the right of the biological parents, Indian custodians, and

336. *Id.*

337. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(a).

338. *Id.*

339. 25 C.F.R. § 23.11(a) (1988). For proceedings in the western Oklahoma counties of Alfalfa, Beaver, Beckham, Blaine, Bryan, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods, and Woodward notice should be sent to: Anadarko Area Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, OK 73005. *Id.* § 23.11(b)(4). For proceedings in all other Oklahoma counties, notice should be sent to: Muskogee Area Director, Bureau of Indian Affairs, Federal Building, Muskogee, OK 74404. *Id.* § 23.11(b)(8).

340. *Id.* § 23.11(c).

341. *Id.* § 23.11(d).

342. *Id.*

the Indian tribe to intervene in the proceedings; (5) a statement that if the parents or Indian custodian are unable to afford counsel, counsel will be appointed to represent them; (6) a statement of the right of the parents, the Indian custodian, and the child's tribe to have, upon request, up to twenty additional days to prepare for the proceedings; (7) the location, mailing address, and telephone number of the state court in which the proceedings are pending; (8) a statement of the right of the parents, Indian custodians, and the Indian child's tribe to petition the state court for transfer of the proceedings to the child's tribal court, and their right to refuse to permit the case to be transferred; (9) a statement of the potential legal consequences of the proceedings on the future custodial and parental rights of the parents or Indian custodian; and (10) a statement that, since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the ICWA.[343]

The BIA has only ten days after receipt of the notice from the person initiating the state court proceeding to notify the child's tribe and parents or Indian custodian and to send a copy of the notice to the state court.[344] If within the ten-day time period the BIA is unable to verify that the child is in fact an Indian, or meets the criteria of an Indian child,[345] or is unable to locate the parents or Indian custodian, the BIA must so inform the state court prior to initiation of the proceeding and specify how much more time, if any, it will need to complete the search.[346] The BIA must complete its search efforts even if those efforts cannot be completed before the state child custody proceedings begin.[347] Upon request from a potential participant in an anticipated Indian child custody proceeding, the BIA must attempt to identify and locate for the person making the request the Indian child's tribe, parents or Indian custodians.[348]

Any Indian tribe entitled to notice may designate a service agent.[349] The name and address of designated service agents for

343. *Id.*
344. *Id.* § 23.11(e).
345. *Id.* § 1903(4).
346. *Id.*
347. *Id.*
348. *Id.* § 23.11(f).
349. *Id.* § 23.12.

Indian tribes is published annually in the Federal Register.[350] A current listing of service agents is also available through the BIA area office.[351]

The ICWA requires that persons entitled to receive notice be advised that (1) state court proceedings are pending and (2) they have the right to intervene.[352] The notice should contain the following information:

(i) The name of the Indian child.
(ii) His or her tribal affiliation.
(iii) A copy of the petition, complaint or other document by which the proceeding was initiated.
(iv) The name of the petitioner and the name and address of the petitioner's attorney.
(v) A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.
(vi) A statement that if the parent or Indian custodians are unable to afford counsel, counsel will be appointed to represent them.
(vii) A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.
(viii) The location, mailing address and telephone number of the court.
(ix) A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.
(x) The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.[353]
(xi) A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information

350. *Id.*
351. *Id.*
352. *Id.* § 1912(a).
353. Guidelines, *supra* note 63, at B.5. The guidelines recommend that parents "be notified if termination of parents rights is a potential outcome since it is their relationship to the child that is at stake. . . . Indian custodians must be notified of any action that could lead to the custodian's losing custody of the child." *Id.* at B.5 (commentary).

in order to exercise the tribe's rights under the Indian Child Welfare Act.[354]

A copy of each notice sent should be filed with the state court, together with any return receipts or other proof of service.[355] Personal service may be substituted for service by mail.[356] If there is "reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English," the petitioner should send a copy of the notice to the BIA area office nearest to the residence of that person requesting BIA personnel "arrange to have the notice explained to that person in the language that he or she best understands."[357] While "notice to both parents and Indian custodians may not be required in all instances" under a literal reading of the ICWA or the due process clause of the fourteenth amendment, "providing notice to both is in keeping with the spirit of the Act."[358]

Section 1912 of the ICWA guarantees the parent, Indian custodian, and tribe a minimum time period to prepare for the deprived child proceeding.[359] What the section is trying to say is that each of these parties is entitled to a minimum of ten days to prepare. An additional twenty days is available upon their request. Unfortunately, the section was drafted in such a way that a potential inconsistency exists. For example, if the state court petitioner does not know the name or location of the parent, Indian custodian or tribe, the petitioner can fulfill the notice obligation under the ICWA by simply serving the Secretary of Interior, who then has fifteen days to give the requisite notice to the parent, Indian custodian, and tribe.[360] At the same time, section 1912 permits the state court to proceed with the foster care placement or termination of parental rights hearing after the expiration of only ten days in the event that no request for an extension of time is made.[361] Therefore, it is possible that the state court proceedings can be concluded even before the parent, Indian custodian, or tribe receive notice.

354. *Id.* at B.5(b).
355. *Id.* at B.5(d).
356. *Id.* at B.5(e).
357. *Id.* at B.5(g).
358. *Id.* at B.5 (commentary).
359. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912.
360. *Id.* § 1912(a).
361. *Id.*

Notice Requirements Under the OICWA

The OICWA mandates additional notice in deprived child proceedings. First, the OICWA applies to "any involuntary Indian child custody proceeding . . . including review hearings."[362] Unfortunately, the OICWA defines neither the term "involuntary Indian child custody proceeding" nor the term "review hearings." However, because the purpose of the OICWA is to clarify state policies and procedures regarding implementation of the ICWA,[363] the term "involuntary Indian child custody proceeding" is probably a reference to "child custody proceeding" as that term is defined in the ICWA.[364] Therefore, the OICWA is triggered when a party seeks the involuntary removal of an Indian child from a parent or Indian custodian, on either a temporary or permanent basis. The term "review hearing" is probably a reference to the Oklahoma Juvenile Code,[365] which requires the district court to conduct a review hearing in every deprived child case in which the child is removed from the custody of parents. The better practice is simply for the district court to inquire of participants in all deprived child proceedings whether the child is an Indian.

The OICWA requires the district court to seek a determination of the Indian status of a child under the following circumstances:

> 1. The court has been informed by an interested party, an officer of the court, the tribe, an Indian organization, or a public or private agency that the child is Indian; or
> 2. The child who is the subject of the proceeding gives the court reason to believe he [or she] is an Indian child; or
> 3. The court has reason to believe the residence or domicile of the child is a predominantly Indian community.[366]

The district court must then seek verification of the Indian status of the child from the Indian tribe or the BIA.[367] A determination of membership by an Indian tribe is conclusive.[368] A determination of membership by the BIA is conclusive in the

362. 10 OKLA. STAT. § 40.4 (Supp. 1982).

363. *Id.* § 40.1.

364. Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(1).

365. 10 OKLA. STAT. § 1116.1 (Supp. 1983).

366. *Id.* § 40.3(C)(1-3) (Supp. 1982). *Compare* Guidelines, *supra* note 63, at B.1(c)(i),(iii), (iv). The Oklahoma Legislature has made these suggested guidelines mandatory in Oklahoma state district court proceedings.

367. 10 OKLA. STAT. § 40.3(D) (Supp. 1982).

368. *Id.*

absence of a contrary determination by the Indian tribe.[369] The determination of the Indian status of a child must be made as soon as practicable to ensure compliance with the notice requirements of the OICWA.[370]

The OICWA imposes on the district court the duty of sending notice.[371] In addition, the ICWA imposes the duty of sending notice on the party seeking foster care placement of the Indian child or termination of parental rights to the Indian child.[372] This "double notice" is unfortunate, duplicative, and potentially confusing. It places an unnecessary burden on an already overburdened state court system, and it places the court in the position of being an advocate. The OICWA notice provision should be revised to conform with the ICWA.

The OICWA, like the ICWA, requires notice by registered mail, return receipt requested.[373] However, the OICWA simplifies who is to receive notice by requiring that the following persons receive notice:

1. The parents or Indian custodians, if any;
2. The tribe that may be the tribe of the Indian child; and
3. The appropriate BIA area office.[374]

The OICWA notice procedure is superior to that provided in the ICWA in that all parties are given notice at once.[375] The OICWA mandates that the notice be written in clear and understandable language and that the notice include the following information:

1. The name and tribal affiliation of the Indian child;
2. A copy of the petition by which the proceeding was initiated;
3. A statement of the rights of the biological parents of Indian custodians, and the Indian tribe:
   a. to intervene in the proceeding,
   b. to petition the court to transfer the proceeding to the tribal court of the Indian child, and

369. *Id. Compare* Guidelines, *supra* note 63, at B.1(a), (b)(i)-(ii). Here again, the Oklahoma Legislature has made the suggested guidelines mandatory state law.

370. 10 OKLA. STAT. § 40.3(E) (Supp. 1982). The inquiry should be made by the court at the initial appearance.

371. *Id.* § 40.4.

372. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(a).

373. 10 OKLA. STAT. § 40.4 (Supp. 1982).

374. *Id.*

375. *Compare* Indian Child Welfare Act of 1978, 25 U.S.C. § 1912.

c. to request an additional twenty (20) days from receipt of notice to prepare for the proceeding; further extensions of time may be granted with court approval;
4. A statement of the potential legal consequences of an adjudication on the future custodial rights of the parent or Indian custodians;
5. A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them; and
6. A statement that tribal officials should keep confidential the information contained in the notice.[376]

OICWA grants the biological parents or Indian custodians and the Indian tribe the right to an additional twenty days from receipt of the notice of hearing to prepare for the proceeding.[377] They may request further extensions of time which are granted at the court's discretion.[378]

Judicially-Created Exception to the Applicability of the ICWA

Congress clearly anticipated that state courts might have to determine, in the first instance, whether ICWA applies in a given case.[379] For example, assume that a child is born out of wedlock to a non-Indian mother, the child has never been a resident or domiciliary of any Indian reservation, and the child has never been a member of any Indian home or culture. Also assume that the biological father of the child is a member of an Indian tribe and that the child is eligible for membership in that tribe.

Do the provisions of ICWA apply? State courts are divided on this issue. Some states reject the notion of a judicially-created exception to ICWA.[380] They reject the suggestion that there must be an "existing Indian family unit" to trigger the applicability of ICWA.[381] However, in *In re Adoption of Baby Boy L.*,[382]

376. 10 OKLA. STAT. § 40.4(1-6) (Supp. 1982). *Compare* Guidelines, *supra* note 63, at B.5(b) (i), (ii), (iii), (v), (vi), (vii), (ix), (x), (xi). The Oklahoma Legislature has codified these recommended guidelines and made them mandatory state law.

377. 10 OKLA. STAT. § 40.4(3)(c) (Supp. 1982).

378. *Id.*

379. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912.

380. Kiowa Tribe of Oklahoma v. Lewis, 777 F.2d 587, 591 (10th Cir. 1985); A.B.M. v. M.H., 651 P.2d 1170, 1173 (Alaska 1982); *In re* Junious M., 144 Cal. App. 3d 786, 796, 193 Cal. Rptr. 40 (Cal. App. Dist. 1983); *In re* Custody of S.B.R., 43 Wash. App. 622, 719 P.2d 154, 156 (1986).

381. *Id.*

382. 231 Kan. 199, 643 P.2d 168 (Kan. 1982).

the Kansas Supreme Court held ICWA does not apply unless a state court or agency attempts to remove an Indian child from the child's existing family unit.[383] According to the Kansas court, "The overriding concern of Congress and the proponents of the Indian Child Welfare Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment."[384] The Kansas Supreme Court reasoned:

> [In adopting the Indian Child Welfare Act, it was not the intent of Congress] to dictate that [a child born out of wedlock] who has never been a member of an Indian home or culture, and probably never would be, should be removed from his primary cultural heritage and placed in an Indian environment over the express objection of its non-Indian mother.[385]

The Kansas Supreme Court also stated:

> [T]he underlying thread that runs throughout the entire [Indian Child Welfare] Act [is] . . . that the Act is concerned with the removal of Indian children from an existing Indian family unit and the resultant break-up the Indian family. . . . The [Federal Indian Child Welfare] Act principally applies to cases where a state court or agency attempts to remove an Indian child from his or her Indian home on grounds of the alleged incompetence or brutality of the parents.[386]

While Kansas may have been the first state to create an exception to ICWA, it has not been the last. In 1985, a sharply divided Oklahoma Supreme Court adopted the Kansas view in a pair of cases handed down on the same day: *In re Adoption of D.M.J.*[387] and *In re Adoption of Baby Boy D.*[388] D.M.J. was a ten-year-old, half-Indian girl whose custody was awarded to her non-Indian mother in the 1976 divorce of her parents. Her father is a fullblood Cherokee Indian. In 1982, with the consent of the mother, an adoption was arranged with a married couple

383. *Id.*

384. *Id.* at 175.

385. *Id.*

386. *Id.* at 175-76. The decision of the Kansas Supreme Court in *In re Adoption of Baby Boy L.* was collaterally attacked in federal court. *See* Kiowa Tribe of Oklahoma v. Lewis, 777 F.2d 587 (10th Cir., 1985).

387. 741 P.2d 1386 (Okla. 1985).

388. 742 P.2d 1059 (Okla. 1985).

who were also non-Indian. Both the father and the Cherokee Nation of Oklahoma objected to the adoption and demanded that the state court follow the provisions of ICWA and OICWA. The Oklahoma Supreme Court held that neither ICWA nor OICWA applied because the child was not being removed from the custody of an Indian parent, and was not being removed from an Indian environment. The court reasoned that the underlying concerns of the ICWA are the removal of Indian children from existing Indian family units and the resultant breakup of Indian families. The court emphasized that pursuant to the decree of divorce, the custodian of the child was the non-Indian mother and the child was not being removed from a home practicing the Indian lifestyle or the Indian culture. The court therefore reasoned that there was no breakup of the Indian family or interruption of the continued custody of the child by an Indian parent. The court stated:

> Congress appreciated, as do we, the culture shock and underlying trauma in yanking a child from an Indian environment and placing the child in a non-Indian one. In like manner, it provided no mandate that a child such as D. be uprooted from a non-Indian environment and placed in an Indian one . . . . The Indian Child Welfare Act applies only in those situations where Indian children are being removed from existing Indian family environments.[389]

The same day the Oklahoma Supreme Court decided *D.M.J.*, it also handed down its decision in *In re Adoption of Baby Boy D.*[390] Baby Boy D was born out of wedlock to a seventeen-year-old non-Indian girl. The father was alleged to be a member of the Seminole Nation of Oklahoma. Even though the father knew that his girlfriend was pregnant, he made no commitment to the mother or the baby. He made no attempt to provide for the mother during pregnancy. He offered neither financial support nor marriage. The father knew the approximate date when the baby was to be born. The mother specifically told the father that once the baby was born she was going to put the baby up for adoption. The father made no objection or response nor did he attempt to learn when and where the baby was to be born. He did not pay nor attempt to make any arrangements for the payment of expenses related to the birth, nor the care of either the mother or the child. Even after the baby's birth, the father

389. *In re* Adoption of D.M.J., 741 P.2d 1386, 1389 (Okla. 1985).
390. 742 P.2d 1059 (Okla. 1985).

did not assume any parental responsibilities. He did not telephone the mother until weeks after the child was born.

The mother consented to the baby's adoption by a married couple. No notice of the adoption was given to the father, nor was his consent obtained. The mother first learned that the father wanted the baby when he filed suit to vacate the adoption.

The Oklahoma Supreme Court held that the putative father did not have standing under ICWA or OICWA to vacate the decree of adoption. The court found that the purpose of ICWA is to protect Indian children from the destruction of Indian family units by child welfare agencies and courts. ICWA emphasized congressional intent to protect Indian children by setting minimum federal standards for their removal from existing Indian family units. In the instant case, the court reasoned, the child's mother was a non-Indian and the child had never resided with an Indian family. The court concluded the father lacked standing to invoke the provisions of ICWA and OICWA.

The creation of a judicial exception by Kansas, Oklahoma, and other states[391] is most unfortunate. They misinterpret ICWA and its legislative history. Their interpretation deprives Indian children of their Indian heritage. The exception also deprives the tribe of a potentially useful and productive member and threatens the very existence of the tribe.

Congress was very specific in defining exactly when ICWA applies.[392] The act applies to all "child custody proceedings." The act does not apply to divorce proceedings where custody of the child is awarded to one of the parents, or to juvenile delinquency proceedings. Further, even assuming an ambiguity exists, that ambiguity should be interpreted for the benefit of Indians.[393] Indeed, the four dissenters in *Adoption of D.M.J.* would extend the coverage of ICWA to the Indian child's extended family members—aunts, uncles, grandparents, nieces, nephews, sisters or brothers-in-laws, step-parents, and first or second cousins.[394] The creation of this exception amounts to

391. *See, e.g., In re* Adoption of T.R.M., 525 N.E.2d 298, 303 (Ind. 1988); *In re* S.A.M., 703 S.W.2d 603, 609 (Mo. App. 1986); Claymore v. Serr, 405 N.W.2d 650, 654 (S.D. 1987).

392. Indian Child Welfare Act of 1978, 25 U.S.C. 1903(1).

393. *Ahboah v. Housing Authority of the Kiowa Tribe*, 660 P.2d 625, 631 (Okla. 1983); *D.M.J.*, 741 P.2d at 1391 (Okla. 1985) (Hodges, Lavender, Opala & Kauger, JJ., dissenting).

394. *D.M.J.*, 741 P.2d at 1390; Indian Child Welfare Act of 1978, 25 U.S.C. 1903(2); H.R. REP. No. 1386, 95th Cong., 2nd Sess. 20 (1977).

judicial legislation. Congress, not the courts, has the responsibility to legislate.

Indian's Right to Intervene in State Court Proceedings

The ICWA provides that the Indian custodian of an Indian child and the Indian child's tribe have the right to intervene at any point in state court proceedings for the foster care placement[395] of or termination of parental rights[396] to an Indian child.[397]

Transfer of the Case from State Court to Tribal Court

As previously discussed, the Indian tribe has exclusive jurisdiction as to any state over any Indian child who is a ward of the tribal court.[398] In addition, the Indian tribe has exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled on the tribe's reservation, except where such jurisdiction is otherwise vested in the state by existing federal law.[399] However, in those cases where the Indian child is not a ward of the tribal court or a resident or domicile within the tribe's reservation, the state court exercises concurrent jurisdiction with the tribal court.[400]

While recognizing this concurrent jurisdiction, the ICWA grants Indian tribes the prerogative of presumptive jurisdiction over nondomicilary Indian children[401] and provides a procedure for

395. Indian Child Welfare Act of 1978, 25 U.S.C. 1903(1)(i). "Foster care placement" means any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.

396. *Id.* 1903(1)(i). "Termination of parental rights" means any action resulting in the termination of the parent-child relationship.

397. *Id.* 1911(c).

398. *Id.* 1911(a).

399. *Id.*

400. The Guidelines recommend that in any Indian child custody proceeding in state court, the state court should determine the residence and domicile of the child. If either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court should be immediately dismissed due to lack of subject matter jurisdiction, except in emergency situations. If the Indian child has previously resided or been domiciled on the reservation, the state court should contact the tribal court to determine whether the child is a ward of the tribal court. Again, if the child is a ward of a tribal court, the state court proceedings should be immediately dismissed for lack of subject matter jurisdiction, except in emergency situations. *See* Guidelines, *supra* note 63, at B.4 and accompanying commentary.

401. Mississippi Band of Choctaw Indians v. Holyfield, 109 S. Ct. 1597 (1989).

transferring cases from state court to tribal court. Title 25 U.S.C. § 1911(b) provides:

> In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, provided that such transfer shall be subject to declination by the tribal court of such tribe.[402]

ICWA authorizes only a parent, Indian custodian, or the Indian child's tribe to petition the state court to transfer.[403] The request should be made promptly after receiving notice of the pendency of the state court proceeding.[404] If the petition to transfer is made orally it should be reduced to writing by the state court and made a part of the record.[405]

Upon receipt of a petition to transfer the case, the state court must transfer unless: (1) either parent objects to the transfer, (2) the tribal court declines to accept the transfer, or (3) the state court finds "good cause" to deny the transfer exists.[406]

In effect, ICWA grants parents and the tribal court an absolute veto over transfers. When a state court receives a petition to transfer, it should notify the tribal court in writing of the proposed transfer.[407] The tribal court should be afforded at least twenty days from the date of receipt of the notice of the proposed transfer to make its decisions.[408]

Parties should file with the tribal court any arguments they wish to make regarding whether the tribal court should accept or decline transfer.[409] If the tribal court accepts transfer, "the state court should provide the tribal court with all available information on the case."[410] If the tribal court declines transfer, or if either parent objects to the transfer, the state court cannot transfer the case.[411]

402. Indian Child Welfare Act of 1978, 25 U.S.C. 1911(b).
403. *Id.* 1911(b).
404. *Id.*
405. Guidelines, *supra* note 63, at C.1.
406. *Id.* at C.2(a).
407. *Id.* at G.4(b).
408. *Id.* at C.5(b).
409. *Id.* at C.4(c).
410. *Id.* at C.4(d).
411. *Id.* at C.2 (commentary).

Good Cause Not To Transfer

Even if the tribal court is willing to accept transfer and neither parent objects, the state court may deny the petition to transfer if there is "good cause" to retain the case.[412] If the state court believes or any party asserts that "good cause" exists, the reasons for such belief should be stated in writing and made available to the parties. The petitioners should then have an opportunity to present the state court with their views on whether "good cause" to deny transfer exists.[413] "Good cause" exists if the Indian child's tribe does not have a tribal court as defined in 25 U.S.C. § 1903(12).[414] "Good cause" may also exist if the state court proceeding is "at an advanced state when the petition to transfer [is] received and the petitioner did not file the petition promptly after receiving notice of the hearing."[415]

"Good cause" to deny the transfer may occur where the Indian child is over twelve years of age and objects to the transfer.[416] or where the Indian child is over five years of age, the child's parents are unavailable, and the child has had little or no contact with his or her tribe.[417] The guidelines

> encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays. Long periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings.[418]

The burden rests upon the state to show "good cause" why the proceeding should not be transferred to the tribal court.[419]

412. Indian Child Welfare Act of 1978, 25 U.S.C. 1911(b).

413. Guidelines, *supra* note 63, at C.2(b).

414. *Id.* at C.3(a).

415. *Id.* at C.3(b)(i). When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court, and retried, good cause exists to deny the request. *See id.* at C.1 (commentary). If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court, and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The ICWA was not intended to authorize such tactics, and the "good cause" provision is ample authority for the state court to prevent such action. *Id.*

416. *Id.* at C.3(b)(ii).

417. *Id.* at (iv).

418. *Id.* at C.3 (commentary).

419. *In re* Adoption of R.R.R., 763 P.2d 94 (Okla. 1988); *In re* N.L., 754 P.2d 863, 869 (Okla. 1988); *In re* GLOC, 205 Mont. 352, 668 P.2d 235, 237 (1983); *In re* M.E.M., 195 Mont. 329, 635 P.2d 1313, 1317 (1981).

ICWA's legislative history indicates that the "good cause" exception was also designed to allow state courts to apply a "modified doctrine of forum non conveniens."[420] As modified for the Indian child custody context, forum non conveniens requires the state court to determine whether the tribal court is a less convenient forum. The state court should consider the rights of the Indian parents, the Indian custodian (if any), the Indian child, and the tribe.[421] The state courts have uniformly applied forum non conveniens when deciding whether "good cause" to deny a transfer exists.[422] If virtually all the witnesses and parties reside in the county of a state court and have no contact with the tribal court, then transfer may be denied for "good cause."[423]

The state court may also deny transfer for "good cause" if the state has proven by clear and convincing evidence that the best interests of the child would be injured by the transfer.[424] In *In re N.L.*,[425] the mother sought to transfer the proceedings from the state court of Okmulgee County, Oklahoma, to the tribal court located in Kay County, Oklahoma. All of the witnesses and the child resided in Okmulgee County. The mother resided in Oklahoma County, Oklahoma.

The court held that the presence of witnesses and parties in Okmulgee County constituted "good cause" to deny the transfer. The court also held that "good cause" to deny transfer exists where all of the parties and witnesses reside in the county of the state court and have no contact with the tribal court.[426] Finally, the court held that the best interests of the child may prevent transfer of jurisdiction to a tribal court.[427] The court found that "good cause" to deny the transfer existed because the child was well cared for under the supervision of the state court, the child had established "roots" in Okmulgee County, and the state court was working hard towards the goal of getting

420. *See* H.R. REP. No. 1386, 95th Cong., 2d Sess. 21 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7543; *see generally In re* N.L., 754 P.2d 863 (Okla. 1988) (Opala, J. concurring in part and dissenting in part).

421. *N.L.*, 754 P.2d at 876 (Opala, J., concurring in part and dissenting in part).

422. *Id. See also In re* J.R.H., 358 N.W.2d 311, 317 (Iowa 1984).

423. *Id. See also In re* Adoption of Baby Boy L., 231 Kan. 199, 643 P.2d 168, 178 (1982).

424. *Id., See also In re* M.E.M., 195 Mont. 319, 635 P.2d 1313, 1318 (1981).

425. 754 P.2d 863 (Okla. 1988).

426. *Baby Boy L.*, 231 Kan. at 210, 643 P.2d at 171; *In re* Bird Head, 213 Neb. 741, 331 N.W.2d 785, 790 (1983).

427. *M.E.M.*, 195 Mont. at 329, 635 P.2d at 1317.

the mother back with the child. The court therefore held that the best interests of the child prevented transfer of jurisdiction to the tribal court.[428]

Reasonable Efforts to Keep the Child in the Home

Every reasonable effort should be made to keep the child safely in the home pending further court proceedings. The Juvenile Code provides that no order of the court removing an alleged or adjudicated deprived child from home shall be entered unless the court finds that the continuation of the child in the home is contrary to the child's welfare.[429] The court's order removing the child must contain either:

> (1) a determination as to whether reasonable efforts have been made to prevent the need for the removal of the child from its home and, as appropriate, reasonable efforts have been made to provide for the return of the child to home; or
> (2) a determination as to whether or not an absence of efforts to prevent the removal of the child from home is reasonable under the circumstances, if the removal is due to an alleged emergency and is for the purpose of providing for the child's safety.[430]

If the child is an "Indian child," the party seeking to remove the child from home bears the burden of proving to the state court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proven unsuccessful.[431] As discussed in more detail later, no foster care placement may be ordered for an Indian child unless the state court finds, by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in the serious emotional or physical harm to the child.[432]

428. *N.L.*, 754 P.2d at 869.

429. 10 OKLA. STAT. § 1104.1(D) (Supp. 1984).

430. *Id.* Under federal law the DHS cannot be reimbursed for the cost of the child's out-of-home placement unless the "reasonable efforts" requirement is met. *See* 42 U.S.C. §§ 671(a)(15), 672(a)(1).

431. 25 U.S.C. § 1912(d). The reasonable efforts made in order to prevent the need for removal of the child from home should take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They should also involve and use the available resources of the extended family, the tribe, Indian social service agencies and the individual Indian care givers. *See* Guidelines, *supra* note 63, at D.2.

432. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(e).

Guardian Ad Litem and Court Appointed Special Advocates

When a petition is filed alleging that a child is deprived, the court may appoint a guardian *ad litem* for the child and the court must appoint a guardian *ad litem* upon the request of the child or the child's attorney.[433] The court may also appoint a "court appointed special advocate," also known as a CASA volunteer.[434] A CASA volunteer is a responsible adult, other than an attorney for the parties, who represents a child where a juvenile petition has been filed until discharged by the court. It is the duty of the CASA volunteer to be an advocate for the best interests of the child and to assist the child in obtaining a permanent, safe homelike placement.[435]

Adjudication

The Deprived-Status Adjudicatory Hearing

The Juvenile Code recognizes two types of hearings: adjudicatory and dispositional.[436] The adjudicatory hearing is the heart of the deprived child proceeding. Its purpose is to determine whether the allegations of the deprived child petition are supported by the evidence and whether the child should be adjudged a ward of the court.[437] If the child is adjudged "deprived" the court holds a separate dispositional hearing.[438]

Time for Holding the Adjudicatory Hearing

The Juvenile Code provides a minimum time period that must be observed before the adjudicatory hearing is held. The court may not hold the adjudicatory hearing until at least forty-eight hours after service of summons, except with the consent of the parent or guardian; until at least five days if served out of state;

433. 10 OKLA. STAT. § 1109(C) (Supp. 1988). The guardian *ad litem* cannot be the district attorney, an employee of the office of the district attorney, an employee of the court, an employee of a juvenile bureau, or an employee of any public agency having duties or responsibilities towards the child, but the guardian *ad litem* may be a court appointed special advocate.

434. *Id.* § 1109(D).

435. *Id.* The CASA volunteer serves without compensation, enjoys a statutory prima facie presumption of acting in good faith, and is immune from civil liability. The CASA volunteer is entitled to access to the court file and all records, reports, and examinations.

436. A.E. v. State, 743 P.2d 1041, 1047 (Okla. 1987).

437. 10 OKLA. STAT. § 1101(8) (Supp. 1988).

438. *Id.* § 1101(9).

and until at least ten days if served by publication.[439] The purpose of the waiting period is to give parties time to prepare for the adjudicatory hearing and to prevent a hearing that does not comport with due process.[440] However, the hearing must be conducted timely.[441]

Trial Court's Duty to Inquire Under the UCCJA

Before conducting the adjudicatory hearing, the court must examine the pleadings and other information supplied by the parties, including each party's mandatory UCCJA pleading or affidavit,[442] consult the child custody registry maintained by the court clerk[443] to determine if there is a case concerning the child pending in another state, and determine if other juvenile proceedings alleging the child to be deprived, in need of supervision, or delinquent are pending or have been adjudicated.[444] If the court has reason to believe that proceedings may be pending in another state, the Oklahoma court directs an inquiry to the state court administrator or other appropriate official of the other state.[445] If the Oklahoma court is advised that a proceeding concerning the custody of the child was pending in another state before the Oklahoma court assumed jurisdiction, the Oklahoma court stays its proceedings and communicates with the court in

439. 10 OKLA. STAT. § 1105 (1981). If one or more persons must be served by publication, and if it appears that the court must order the child to be held in a place of detention in order to meet the requirement of section 1105 with respect to the time for holding the adjudicatory hearing, when a party can be served only by publication, the court, may advance the date of the hearing, with reasonable notice to the other persons who have been served or are properly and legally notified, to any date that the court determines to be reasonable and may proceed with the action. However, an order determining that a child is deprived shall not become final until 30 days after the date of publication of the notice.

440. York v. Halley, 534 P.2d 363, 365 (Okla. 1975).

441. *York*, 534 P.2d at 365.

442. 10 OKLA. STAT. § 1611 (1981).

443. *See id.* § 1618:

The clerk of each district court shall maintain a registry in which he shall enter the following:

1. certified copies of custody decrees of other states received for filing;

2. communications as to the pendency of custody proceedings in other states;

3. communications concerning a finding of inconvenient forum by a court of another state; and

4. other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this state or the disposition to be made by it in a custody proceeding.

444. 10 OKLA. STAT. § 1608(B) (Supp. 1982).

445. *Id.*

which the other proceeding is pending so that the child custody proceeding may be litigated in the more appropriate forum, and exchange information.[446] If the Oklahoma court has made a custody decree before being informed of a pending proceeding in a court of another state, the Oklahoma court immediately informs the court of the fact.[447] If the Oklahoma court is informed that a proceeding was commenced in another state after Oklahoma assumed jurisdiction, it informs the other court so that the issue may be litigated in the more appropriate forum.[448]

Right to Assistance of Counsel

In Oklahoma, the child, parents, and other interested parties have the right to be represented by counsel.[449] However, the reality of deprived child proceedings is that few of the parties have the financial resources to hire their own lawyer. The question then becomes whether a poor litigant is entitled to court-appointed counsel. In *Lassiter v. Department of Social Services*,[450] the United States Supreme Court addressed this question in the context of a parent's right to counsel in a proceeding to terminate parental rights. In analyzing the sixth amendment right to counsel[451] and the fourteenth amendment due process right to "fundamental fairness,"[452] the Court stated that an indigent's right to appointed counsel exists only where the litigant may lose physical liberty. It is the defendant's interest in personal freedom which triggers the right to appointed counsel.[453]

In the context of a deprived child proceeding, it is not the parents' personal freedom that is at risk, but rather the parents' right to the companionship, care, custody and management of their child.[454] Deprived child proceedings infringe upon that right; proceedings to terminate parental rights threaten to end it. Nevertheless, the Court declined to find a federal constitu-

446. *Id.* § 1608(C); *see also* 10 OKLA. STAT. § 1621 (1981).

447. 10 OKLA. STAT. § 1608(C) (Supp. 1982).

448. *Id.*

449. 10 OKLA. STAT. § 1104(a) (1981).

450. Lassiter v. Dep't. of Social Services, 452 U.S. 18 (1981).

451. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defense."

452. *Id.* amend. XIV: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

453. *See also In re* Gault, 387 U.S. 1, 36 (1967). In juvenile delinquency proceedings in which the juvenile's freedom may be curtailed, the due process clause of the fourteenth amendment requires that the juvenile have the right to appointed counsel.

454. *Lassiter*, 452 U.S. at 27 (1981).

tional right to court appointed counsel. Instead, the Court left the decision to state courts to be decided on a case-by-case basis. The Court suggested that wise public policy might require higher standards than the minimally tolerable ones found in the United States Constitution.[455]

Oklahoma shows a high degree of sensitivity to the plight of impoverished litigants involved in deprived child proceedings.[456] In 1968 the Oklahoma Legislature enacted statutes providing for appointment of counsel in juvenile proceedings.[457] Concerning the child, the legislature made no requirement that the child or the child's parents be indigent for counsel to be appointed. The court must appoint separate and independent counsel, other than a district attorney, to be counsel for the child and represent the interests of the child.[458] Counsel for the child must be appointed, regardless of any attempted waiver by the parents or other legal custodian of the child of the right of the child to be represented by counsel, unless the child is already represented by counsel.[459] The policy favoring independent counsel for the child is sup-

455. *Id.* at 33.

456. *In re* Rich, 604 P.2d 1248, 1251 (Okla. 1979).

457. *See* 1968 Okla. Sess. Laws ch. 163, § 1 (now codified as 10 OKLA. STAT. § 24 (Supp. 1989)); 1968 Okla. Sess. Laws ch. 282, § 109 (effective Jan. 13, 1969) (now codified as 10 OKLA. STAT. § 1109(B) (Supp. 1986)). Title 10 OKLA. STAT. § 24(A) (Supp. 1989) provides:

> When it appears to the court that the minor or his parent or guardian desires counsel but is indigent and cannot for that reason employ counsel, the court shall appoint counsel. In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and the child that one attorney could not properly represent both, the court may appoint counsel, in addition to counsel already employed by a parent or a guardian or appointed by the court to represent the minor or parent or guardian, provided that in all counties having public defenders, said public defender shall assume the duties of representation in proceedings such as above.

10 OKLA. STAT. § 1109(B) (Supp. 1986) provides:

> If the parents, guardian or other legal custodian of the child requests an attorney, and if found to be without sufficient financial means, counsel shall be appointed by the court if a petition has been filed alleging the child is a deprived child. . .or if termination of parental rights is a possible remedy, provided that the court may appoint counsel without such request if it deems representation by counsel necessary to protect the interests of the parents, guardian or other legal custodian. If the child is not otherwise represented by counsel whenever a petition is filed pursuant to the provisions of section 1103 of this Title, the court shall appoint a separate attorney, who shall not be a district attorney, for the child regardless of any attempted waiver by the parent or other legal custodian of the child of the right of the child to be represented by counsel.

458. 10 OKLA. STAT. § 1109(B) (Supp. 1986).

459. *Id.*

ported by the Uniform Juvenile Court Act adopted by the American Bar Association in 1968, which provides in Rule 26(a) for separate counsel in juvenile proceedings if the interests of two or more parties conflict:[460]

> The matter of independent representation by counsel, so that a child may have his own attorney when his welfare is at stake, is the most significant and practical reform that can be made in the area of children and the law. The rights and sometimes the interest of children are frequently jeopardized in court proceedings because of the best interests of a child are determined without the resort to an independent advocate for the child. Courts may fail to perceive children and the interests of other parties require that the child have separate counsel. Too often the judge assumes the child's interests are adequately protected by the DHS. This position is undermined when DHS is challenged and as such it becomes an interested part, the source of the inquiry.[461]

The Oklahoma Supreme Court has interpreted the Juvenile Code to require the state to be responsible for assuring that the child is adequately represented, and that such representation not depend upon financial ability.[462]

While the Juvenile Code guarantees the parent, guardian or other legal custodian the right to counsel, their right to court-appointed counsel is expressly predicated upon financial need.[463] Implicit in the right to counsel is the indigent's right to notice that counsel will be provided without expense.[464] Parties are first advised of their right to counsel in the summons.[465] Unfortunately, the Juvenile Code does not require the summons to state on its face that if a party is financially unable to hire an attorney, one will be appointed by the court at no expense. However, the Oklahoma Supreme Court recommends that judges advise all parties of their right to counsel and the procedure for requesting court-appointed counsel.[466] Counsel must be appointed for indigents unless knowingly and intelligently waived.[467]

460. *In re* T.M.H., 613 P.2d 468, 470 (Okla. 1980).

461. *Id.* at 470.

462. A.E. v. State, 743 P.2d 1041, 1044 n.6 (Okla. 1987); *In re* Christopher W., 626 P.2d 1320, 1322-23 (Okla. 1980).

463. *A.E.*, 743 P.2d at 1044 n.6; *Christopher W.*, 626 P.2d at 1322.

464. *In re* Chad S., 580 P.2d 983, 986 (Okla. 1978).

465. 10 OKLA. STAT. § 1104(a) (1981) provides in relevant part: "[T]he summons shall . . . set forth the right of the child, parents, and other interested parties to have an attorney present at the hearing on the petition."

466. *In re* F.K.C., 742 P.2d 774, 776 (Okla. 1980).

467. *In re* J.W., 742 P.2d 1171, 1173 (Okla. Ct. App. 1987).

Right to Assistance of Counsel for Indian Children

There are special rights to counsel in deprived Indian child proceedings. ICWA provides that if the state court determines indigency, the parent or Indian custodian has the right to court-appointed counsel in removal, placement and termination proceedings.[468] The state court may, in its discretion, also appoint counsel to represent the child if the court finds it is in the best interests of the child.[469] In states having no law for the appointment of counsel, the state court must promptly notify the Secretary of Interior upon the appointment of counsel, and the Secretary, upon certification of the state court presiding judge, must pay reasonable fees and expenses.[470]

The *Guidelines* recommend that if a parent or Indian custodian appears in court without an attorney, the state court should immediately inform them of the right to appointed counsel, the right to request the proceedings be transferred to tribal court (or to object to such transfer), the right to request additional time to prepare for the proceeding, and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.[471] The Oklahoma Court of Appeals has held that the right to counsel is an element of procedural due process[472] as well as a mandate of the ICWA.[473] Counsel must be appointed unless knowingly and intelligently waived.[474] The assistance of counsel is a statutory requisite under ICWA.[475] As such, the right does not depend on a specific request.[476]

ICWA—Right of Access to Reports

Each party to a foster care placement or termination of parental rights proceedings under state law involving an Indian

468. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(b).

469. *Id.*

470. *See* Indian Child Welfare Act of 1978, 25 U.S.C. § 1912 (b) and mandatory rules promulgated by the Secretary of Interior in 25 C.F.R. § 23.13 (1988) (payment for appointed counsel in state Indian child custody proceedings). Funds may be appropriated under 25 U.S.C. § 13.

471. Guidelines, *supra* note 63, at B.5(f).

472. *J.W.*, 742 P.2d at 1174. The court of appeals did not specify whether it was referring to the due process clause of the United States Constitution, or the Oklahoma Constitution's counterpart, found in OKLA. CONST. art. II, § 7. However, a fair reading of the United States Supreme Court decision in *Lassiter* would suggest that the court of appeals was referring to the Oklahoma Constitution.

473. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(b).

474. *J.W.*, 742 P.2d at 1174.

475. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(b).

476. *J.W.*, 742 P.2d at 1174.

child has the right to examine all reports or other documents filed with the court, upon which any decision with respect to such action may be based.[477] The *Guidelines* recommend that no decision of the state court be based on any report or document not filed with the court.[478]

Referees

Judges with juvenile docket responsibility in the larger counties in Oklahoma (population greater than 100,000) may appoint specially-qualified lawyers to act as referees.[479] The referee hears the case in the first instance in the same manner provided for the hearing of cases by the court. At the conclusion of the hearing, the referee transmits to the court all papers relating to the case, along with the referee's written findings of fact, conclusions of law, and recommendations.[480] Notice of the referee's findings, conclusions and recommendations must be given to the parent, guardian or custodian of the child, or to any other person concerned whose case has been heard by the referee.[481] A hearing by the district court must be allowed upon the filing of a request for such hearing with the court within three days after service of notice of the referee's findings and recommendations. The purpose of the hearing is to object to all or parts of the referee's findings and conclusions, and to determine those objections. Where objections are made to the referee's report, the court may reopen the matter for further evidence.[482] However, if the only questions before the court are matters of law, no evidentiary hearing is required.[483] If no hearing is requested, the referee's findings and recommendations, when confirmed by court order, become the decree of the court.[484]

Right to Jury Trial

The United States Constitution does not mandate a trial by jury in juvenile proceedings.[485] While the sixth amendment right

477. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(c).

478. Guidelines, *supra* note 63, at D.1 and accompanying commentary. The guidelines suggest that it was Congress' implicit assumption that the state courts would limit their consideration to those documents and reports that have been filed with the court.

479. 10 OKLA. STAT. § 1126 (1981).

480. *Id.* § 1126(a).

481. *Id.* § 1126(b).

482. *In re* Ernest James C., 578 P.2d 352, 355 (Okla. 1978).

483. *Id.*

484. 10 OKLA. STAT. § 1126 (1981).

485. A.E. v. State, 743 P.2d 1041, 1049 (Okla. 1987) (Opala, J., concurring in part and dissenting in part.

to a jury trial in criminal proceedings[486] is binding on the states,[487] juvenile proceedings to determine a child's deprived status are civil in nature and hence are outside the ambit of the sixth amendment.[488] The right to jury trial in suits at common law preserved by the seventh amendment[489] applies only to civil suits filed in federal court, not state court.[490] As for due process under the fourteenth amendment, the United States Supreme Court held in *McKeiver v. Pennsylvania*[491] that the due process clause does not mandate trial by jury in the adjudicatory phase of state juvenile delinquency proceeding.[492] The rationale of *McKeiver* applies with even greater force to deprived-status proceedings. Therefore, the question of trial by jury is one of state law.[493]

Oklahoma is one of the few states which provides, by constitution and statute, greater safeguards for the rights of juveniles than required by the United States Constitution.[494] In 1909, the Oklahoma Legislature enacted a statutory right to trial by jury in juvenile cases.[495] In a 1968 election, the right was incorporated into Oklahoma's Constitution.[496] Today, the child or

486. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

487. Duncan v. State of Louisiana, 391 U.S. 145, 149 (1968); Bloom v. State of Illinois, 391 U.S. 194, 200 (1968).

488. *A.E.*, 743 P.2d at 1049 (Opala, J., concurring in part and dissenting in part).

489. U.S. CONST. amend. VII: "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

490. Pearson v. Yewdall, 95 U.S. 294, 296 (1877); Maryland National Insurance Co. v. District Court, 455 P.2d 690, 692 (Okla. 1969).

491. 403 U.S. 528 (1971).

492. *Id.* at 545-50.

493. *A.E.*, 743 P.2d at 1045.

494. Alfrod v. Carter, 504 P.2d 436, 439 (Okla. Crim. App. 1972).

495. 1909 Okla. Sess. Laws ch. 14 at 186 (now codified as amended at 10 OKLA. STAT. § 1110 (Supp. 1986)).

496. The Oklahoma Constitution provides:

> The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not exceed $100, or in criminal cases wherein punishment for the offense charged is by fine only, not exceeding $100.00 . . . . Juries for the trial of . . . juvenile proceedings . . . shall consist of 6 persons. In civil cases and in criminal cases less than felonies, three-fourths of the whole number of jurors concurring shall have power to render a verdict . . . . In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein.

OKLA. CONST. art. II, § 19.

any person entitled to service of summons has the right to demand a trial by jury or the court may call a jury on its own motion.[497] The right to jury trial applies to two types of adjudicatory hearings: the hearing to determine the child's deprived status, and the hearing to terminate parental rights.[498]

Demand for Jury Trial and Peremptory Challenges

Before 1968, the Oklahoma Court of Criminal Appeals interpreted Oklahoma's statutory right to jury trial as requiring a party who wanted a jury trial to demand it. Otherwise, the right was considered waived.[499] However, now that right to jury trial has been elevated to constitutional importance, it cannot be surrendered except by voluntary consent or waiver.[500]

Deprived child proceedings affect three distinct interests: a parental claim to the child, the state's responsibility to afford protection to underage citizenry, and the child's claim to a wholesome milieu free from harm of abuse and neglect.[501] Therefore, each of the three sides is entitled to three peremptory jury challenges.[502]

The Rules of Evidence

Adjudicatory hearings are conducted according to the rules of evidence.[503] A decision that the child is deprived must be based on sworn testimony.[504] The child must have the opportunity to cross-examine unless the facts are stipulated.[505]

Of course, applying the rules of evidence in the context of a deprived child proceeding may present practical problems of proof. Child abuse often occurs at home behind closed doors. The child may be the only witness to the abuse, and the child's testimony is usually crucial to the case. While the child may be competent to give in-court testimony,[506] the trauma of in-court testimony, including face-to-face confrontation with the alleged

497. 10 OKLA. STAT. § 1110 (Supp. 1986).

498. *A.E.*, 743 P.2d at 1046.

499. *Ex parte* Norris, 268 P.2d 302, 303 (1954) (Syllabus by the Court No. 4); *Ex parte* Baeza, 85 Okla. Crim. 76, 185 P.2d 242, 243 (1947) (Syllabus by the Court No. 2).

500. *A.E.*, 743 P.2d at 1048.

501. *In re* T.R.W., 722 P.2d 1197, 1200 (Okla. 1985) (quoting *In re* T.H.L., 636 P.2d 330, 332 (Okla. 1981)).

502. 12 OKLA. STAT. § 575.1 (1981); *T.R.W.*, 722 P.2d at 1197.

503. 10 OKLA. STAT. § 1111 (1981).

504. *Id.*

505. *Id.*

506. 12 OKLA. STAT. § 2601 (1981).

abuser and the rigors of cross examination, may further injure the child. In an effort to protect the child from being injured by the search for truth, the Oklahoma Legislature has enacted three alternatives to in-court testimony for children twelve years of age or younger.

First, the legislature amended the Oklahoma Evidence Code to provide an exception to the hearsay rule, under specified conditions, for statements describing an act of sexual contact performed with or on a child.[507] Second, the legislature amended the Juvenile Code to provide for closed circuit television testimony of an alleged abused child.[508] Finally, the Legislature amended the Juvenile Code to permit the admissibility of a video taped deposition of a child alleged to be abused.[509] In addition to these special provisions, the trial court retains its discretion to allow hearsay under the "catch-all" exceptions under the Oklahoma Evidence Code, sections 2803(24)[510] and 2804(5).[511]

In *In re W.D.*,[512] the state brought an action to adjudicate a child to be deprived on the ground of sexual abuse by the father. The petition set forth explicit sexual acts which the father allegedly committed on the child. Although the child disclosed the sexual contact to a DHS social worker and a psychologist, the child expressed fear in talking about the incident because the child believed it was a secret and was afraid of getting himself or his father in trouble. Pursuant to title 12, section 2803.1 of the Oklahoma Statutes,[513] the social worker and the psychologist related the child's statements during their testimony at trial.[514] The Oklahoma Supreme Court upheld the validity of the statute against a constitutional attack. The court stated that the purpose of the statute was to protect wholly dependent sexually abused children.

In proceedings involving the care and custody of abused children, the state is vitally interested and is regarded as in the

507. 12 OKLA. STAT. § 2803 (Supp. 1986).

508. 12 OKLA. STAT. § 1148 (Supp. 1984).

509. *Id.* § 1147, *but see* Coy v. Iowa, 108 S. Ct. 2798, 2802 (1988) (holding that a criminal defendant has a sixth amendment right to face-to-face confrontation with an accuser). *Coy* may seriously limit alternatives to in-court testimony even in civil deprived child proceedings.

510. 12 OKLA. STAT. § 2303(24) (1981).

511. *Id.* § 2804(5).

512. 709 P.2d 1037 (Okla. 1985).

513. 12 OKLA. STAT. § 2803.1 (Supp. 1986).

514. *See also* L. WHINERY, OKLAHOMA EVIDENCE: GUIDE TO THE OKLAHOMA EVIDENCE CODE 91 (Supp. 1988).

position of parens patriae. The state's duty to protect children within its borders is neither arbitrary nor capricious, and bears a substantial rational relationship to an important government interest.[515] The court further held that the out-of-court statements of the child are not conclusive upon the trier of fact and any adversely affected parties may testify and present evidence in their own behalf, cross-examine any witnesses to whom the child made statements, deny and refute the accuracy of the statements, and advance whatever arguments that can be made to support the party's position. Under these circumstances, the sensitive and practical considerations involved in confronting a child of tender years[516] on a courtroom witness stand mitigate heavily against stringent notions of procedural importunity, especially so where the statements complained of bear sufficient indicia of reliability.[517]

The district courts are admonished to carefully apply these evidentiary exceptions. For example, in *In re J.J.J.*[518] the Oklahoma Court of Appeals reversed the district court, instructing on remand that the district court meticulously follow the procedural requirements of title 12, section 2803.1, and title 10, sections 1147 and 1148 of the Oklahoma Statutes.[519]

Standard of Proof

In litigation, there is always a margin of error representing error in fact finding, which all parties must take into account.[520] At the adjudicatory hearing to determine a child's deprived status, the state bears the burden of proof.[521] The standard of proof is by a preponderance of the evidence.[522]

Special Standard of Proof and Evidentiary Requirements for Indian Child Proceedings

ICWA provides that no foster care placement may be ordered by the state court in the absence of a determination, supported

515. *In re* W.D., 709 P.2d 1037, 1042 (Okla. 1985).

516. The statute was amended in 1986 to increase the age limit from 10 to 12 years. *See* 1986 Okla. Sess. Laws ch. 87, § 1 (effective July 1, 1986).

517. *W.D.*, 709 P.2d at 1043.

518. 741 P.2d 491 (Okla. Ct. App. 1987).

519. *In re* J.J.J., 741 P.2d 491, 492 (Okla. Ct. App. 1987) (citing 12 OKLA. STAT. § 2803.1 (Supp. 1986) and 10 OKLA. STAT. §§ 1147, 1148 (Supp. 1984)).

520. *In re* Winship, 397 U.S. 358, 364 (1970) (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).

521. *See* 10 OKLA. STAT. § 1114(A) (Supp. 1986); *In re* Christopher H., 577 P.2d 1292, 1293 (Okla. 1987).

522. *In re* J.B., 643 P.2d 306, 308 (Okla. 1982).

by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child.[523] Evidence showing only the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical harm to the child.[524] To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical harm to the particular child who is the subject of the proceeding.[525] The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.[526]

Congress attributed many unwarranted removals of Indian children to cultural bias on the part of social workers and state courts. In many cases children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be. Mere nonconformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify removing the child from the home. The focus must be on whether the particular conditions are likely to cause serious harm.[527] The issue on which qualified expert testimony is required is whether serious harm to the child is likely to occur if the child is not removed from the home.[528]

The *Guidelines* suggest that the following persons are likely to meet the requirements of a qualified expert witness:

> (i) a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices;
> (ii) a lay-expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in child-rearing practices within the Indian child's tribe; or
> (iii) a professional person having substantial education and experience in the area of his [or her] specialty.[529]

523. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(3).
524. Guidelines, *supra* note 63, at D.3(c).
525. *Id.*
526. *Id.*
527. Guidelines, *supra* note 63, at D.3 (commentary).
528. *Id.* at D.4 (commentary).
529. *Id.* at D.4(b)(i)-(iii).

The court or any party may request the assistance of the Indian child's tribe or the BIA in locating persons qualified to serve as expert witnesses.[530] Upon request, the BIA is required to assist the state court and interested parties in identifying qualified expert witnesses.[531] If a person of Indian descent who is participating in the deprived child proceeding cannot speak English, the BIA must assist in helping to identify appropriate interpreters.[532] The required expert testimony is to provide the court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias.[533]

The Oklahoma Supreme Court held in *In re N.L.*[534] that special knowledge of Indian life is not necessary if a professional person has substantial education and experience and testifies on matters not implicating cultural bias.[535] Where cultural bias is clearly not implicated, expert witnesses who do not possess special knowledge of Indian life may provide the necessary proof that continued custody of the child by the parent will result in serious emotional or physical harm to the child.[536] Social workers may be qualified expert witnesses if they have substantial education and experience in their specialties.[537] However, for social workers to be qualified expert witnesses, they must possess "experience beyond the normal social worker qualifications."[538]

In *In re N.L.*[539] the Oklahoma Supreme Court reversed and remanded the case because there was no expert witness testimony as to whether the continued custody of the child by the mother would result in serious emotional or physical harm to the child.[540] A court is required to consider the testimony of a qualified expert witness before placing an Indian child in foster care.[541]

530. *Id.* at D.4(c).

531. 25 C.F.R. § 23.91 (1988).

532. *Id.* § 23.92.

533. *In re* N.L., 754 P.2d 863, 867 (Okla. 1988) (quoting State *ex rel.* Juvenile Department, 76 Or. App. 673, 710 P.2d 793, 799 (1985)).

534. *N.L.*, 754 P.2d at 867.

535. *Id.* at 868.

536. *Id.*

537. *Id.*; D.W.H. v. Cabinet for Human Resources, 706 S.W.2d 840, 843 (Ky. App. 1968); *In re* J.L.H., 316 N.W.2d 650, 651 (1982).

538. *N.L.*, 754 P.2d at 868; State *ex rel.* Juvenile Department. v. Charles, 70 Or. App. 10, 688 P.2d 1354, 1359, n.3 (1984) (quoting H.R. REP. No. 1386, 95 Cong. 2d Sess. 22, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7545).

539. 754 P.2d 863 (Okla. 1988).

540. *Id.* at 868.

541. *Id.* at 867.

The Court's Order at the Conclusion of the Adjudicatory Hearing

If the court finds that the allegations of the petition are not supported by the evidence, the court must order the petition dismissed and the child discharged from any detention or restriction previously ordered.[542] The child's parents, guardian, or other legal custodian are also discharged from any restriction or other previous temporary order.[543] Once the district court's adjudicatory order becomes final, the district court has no authority to exercise further jurisdiction over the minor child in that proceeding.[544]

If, however, the court finds that the allegations of the petition are supported by the evidence, and that it is in the best interests of the child and the public that the child be made a ward of the court, the court sustains the petition, makes an order of adjudication that the child is "deprived," and adjudges the child a ward of the court.[545] The court's order must contain the following findings of fact and findings of compliance:

Findings of Fact:
(1) The child's correct, full legal name, and
(2) the child's date of birth.
Findings of Compliance with:
(1) The Federal Indian Child Welfare Act, 25 U.S.C. § 1901-1963, and
(2) The Uniform Child Custody Jurisdiction Act, title 10, section 1601 *et. seq.* of the Oklahoma Statutes[546]

542. 10 OKLA. STAT. § 1113 (1981).

543. *Id.*

544. *In re* Ivey, 535 P.2d 281, 283 (Okla. 1975) (Syllabus by the Court).

545. 10 OKLA. STAT. § 1114(A) (Supp. 1986). Section 1114 plainly demands more than a finding regarding the truth of the petition's factual allegations. The court must additionally find that it is in the best interests of the child and the public that the child be made a ward of the court. *In re* Christina T., 590 P.2d 189, 192 (Okla. 1979).

546. OKLA. DIST. CT. R. 8.2:

[A]ll orders of adjudication in juvenile proceedings, [and] termination of parental rights . . . resulting in the adjudication of status, custody or wardship of minor children, shall contain a finding of compliance with 25 U.S.C.A. 1901 *et seq.* (Indian Child Welfare Act of 1978), 10 Okla. Stat. section 1601 *et seq.* (Uniform Child Custody Jurisdiction Act). The trial court shall in all such proceedings make findings of fact as to the child's correct, full legal name, and date of birth and all instruments memorializing such decrees, orders and judgments as required by 12 Okla. Stat. section 32.2 shall recite the findings required hereby.

Disposition

The Dispositional Hearing

Juvenile proceedings are bifurcated proceedings. If the child is adjudged "deprived" at the deprived-status adjudicatory hearing, the court conducts a second hearing called the "dispositional hearing."[547] Disposition is held separately from adjudication. The strict rules of evidence do not apply. All evidence helpful in determining the proper disposition best serving the interests of the child and the public, including oral and written reports, may be admitted, and may be relied upon to the extent of their probative value, even though not competent for purposes of the adjudicatory hearing.[548]

The American Bar Association explains the need for bifurcated proceedings:

> At the dispositional hearing, the court will be provided with substantial information about the family and the child. Some of this information might be very prejudicial if considered at the adjudicatory stage, for example, a trier of fact might be influenced by knowing that a family was the recipient of welfare services or that a parent was a drug addict; yet such information might be irrelevant on the factual issue of whether a child has been sexually abused, needed medical care, etc.[549]

Before making an order of disposition, the court must advise the district attorney, the parents, guardian, custodian or responsible relative, and their counsel, of the factual contents and the conclusion of reports prepared for the use of the court and considered by it, and afford fair opportunity, if requested, to controvert them.[550] Except where the child's custody is placed with both parents, the dispositional order must include a specific finding and order of the court relative to the liability and accountability of the parents for the care and maintenance of the child.[551]

The court may adjourn the dispositional hearing for a reasonable period of time to receive reports or other evidence.[552] If the

547. 10 OKLA. STAT. § 1115(a) (1981): "After making an order of adjudication, the court shall hold a dispositional hearing . . . ."

548. *Id.*

549. Juvenile Justice Standards Project, American Bar Association Institute of Judicial Administration, Standards Relating to Abuse and Neglect at 6.1 (1977) (tentative draft).

550. 10 OKLA. STAT. § 1115(b) (1981) (any party submitting a report to the court should send copies to all other parties).

551. *Id.*; *id.* § 1121.

552. *Id.* § 1115(c).

court grants such a continuance, it makes an order for the placement of the child, or releases the child subject to the supervision of the court.[553] In scheduling investigations and hearings, the court gives priority to proceedings in which the child has been removed from home, before an order of disposition has been made.[554]

The Juvenile Code does not specify when the dispositional hearing is to be held. All it requires is that the dispositional hearing be held after the deprived-status adjudicatory order is entered.[555] When the dispositional hearing is held, it may be adjourned for a reasonable period.[556] Certainly the Juvenile Code does not contemplate an immediate post-adjudicatory hearing since it authorizes the introduction of oral and written reports and all other evidence helpful in determining the proper disposition best serving the interests of the child and the public—evidence which could require considerable time to garner.[557]

The Juvenile Code authorizes several alternative dispositional orders. First, if it is consistent with the welfare of the child, the child must be placed with a parent or legal guardian, but if it appears to the court that the conduct of the parent, guardian, stepparent, or other adult living in the home has contributed to the child's deprivation, the court may issue a written order specifying conduct to be followed by the parent, guardian, stepparent or other adult living in the home with respect to the child.[558] The conduct specified is such as would reasonably prevent the child from becoming deprived, [559] delinquent, in need of supervision, or in need of treatment. The court's dispositional order remains in effect for the time specified by the court, not to exceed one year.[560] The order may be extended or renewed by the court.[561] Special statutory provisions apply if the child is a truant.[562]

If the court does not place the child back in the home, the court may place the child with a suitable person elsewhere,

553. *Id.*
554. *Id.* § 1115(d).
555. *Id.* § 1115(a).
556. *Id.* § 1115(c).
557. *In re* Stacy W., 623 P.2d 1057, 1061 (Okla. Ct. App. 1980).
558. 10 OKLA. STAT. § 1116(A)(1) (Supp. 1989).
559. *Id.* The Oklahoma Supreme Court has indicated that the district court has authority to specify the appropriate conduct of a parent. See *In re* N.L., 754 P.2d 863, 866 n.2 (Okla. 1988).
560. 10 OKLA. STAT. § 1116(A)(1) (Supp. 1989).
561. *Id.*
562. *Id.*

upon such conditions as the court determines.[563] The court may also commit the child to the custody of a private institution or agency.[564] Further, the court may order the child to receive counseling or other community-based services.[565]

Finally, the court may commit the child to the custody of the Department of Human Services.[566] It is the responsibility of DHS to provide care for deprived children who are committed to its care for custody or guardianship.[567] If a child is placed in DHS custody, it is authorized to place the child back in the child's home, in the home of a relative, in a foster home, or in any other community-based facility under the jurisdiction or licensure of the DHS established for the care of deprived children.[568] However, the child cannot be placed in an institution operated by the DHS.[569] A deprived child, who is also a "child in need of treatment"[570] and eligible for residential care and treatment as provided in title 10, section 1116 of the Oklahoma Statutes, may be placed in a DHS treatment center or other mental health facility.[571]

It is the intent of the Oklahoma Legislature that the placement of each child adjudicated to be a ward of the court and placed in the custody of the Department of Human Services will assure such care and guidance of the child, preferably in the child's home, as will serve the spiritual, emotional, mental

563. *Id.*

564. *Id.* § 1116(A)(2). This subsection further provides that in committing a child to a private institution or agency, the court must select one that is licensed by the Department of Human services or any other state department supervising or licensing private institutions or agencies; or, if such institution or agency is in another state, by the analogous department of that state. Whenever the court commits a child to any institution or agency, it must transmit with the order of commitment a summary of its information concerning the child, and the institution or agency must give to the court such information concerning the child as the court may at any time require.

565. *Id.* § 1116(A)(3).

566. *Id.* § 1116(A)(4).

567. 10 OKLA. STAT. § 1136 (Supp. 1982).

568. *Id.*

569. *Id.*

570. 10 OKLA. STAT. § 1101(5) (Supp. 1988) defines "child in need of treatment" to mean any child who is afflicted with a substantial disorder of the emotional processes, thought or cognition, which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life appropriate to the age of the child. The term "child in need of treatment" shall not mean a child afflicted with epilepsy, mental retardation, organic brain syndrome, physical handicaps, or brief periods of intoxication caused by such substances as alcohol or drugs unless the child also meets the criteria for a child in need of treatment.

571. 10 OKLA. STAT. § 1116 (Supp. 1989); 10 OKLA. STAT. § 1136 (Supp. 1982).

and physical welfare of the child, and will preserve and strengthen the family ties of the child, wherever possible, with recognition of the fundamental rights of parenthood, and with recognition of the responsibility of the state to assist the family in providing necessary education and training.[572] In pursuit of these goals, it is the intention of the Oklahoma Legislature to provide for removing the child from the custody of parents only when the welfare of the child or the safety and protection of the public cannot be adequately safeguarded without removal; and when the child has to be removed from the child's family, to secure for the child custody, care and discipline consistent with the best interests and the treatment needs of the child.[573]

The Department of Human Services must review and assess each child committed to it to determine the type of placement consistent with the treatment needs of the child in the nearest geographic proximity to the home of the child.[574] Such review and assessment must include an investigation of the personal and family history of the child, and the child's environment, and any physical or mental examinations considered necessary.[575] In making such review, DHS may use any facilities, public or private, which offer aid to it in the determination of the correct placement of the child.[576]

If the court places the child outside the child's home, and it appears to the court that the parent, guardian, legal custodian, stepparent or other adult living in the home has contributed to the deprivation of the child, the court may order such person be made subject to any treatment or placement plan prescribed by the DHS or other person or agency receiving custody of the child.[577]

Placement Plan for Child Placed Outside the Home

The legal custodian of every deprived child must prepare and file a "placement plan" with the court within thirty days after the child has been removed from the custody of parents.[578] Unless the court orders otherwise, the placement plan must contain, at a minimum, the following information:

572. 10 OKLA. STAT. § 1135(A) (Supp. 1986).
573. *Id.*
574. *Id.* § 1135(B).
575. *Id.*
576. *Id.* § 1135(C).
577. 10 OKLA. STAT. § 1116(A)(6) (Supp. 1989).
578. *Id.* § 1115.1(A).

1. A history of the child and family;
2. A statement of the conditions that the intervention is designed to alleviate, and a statement of the methods to be used to correct those conditions or to achieve permanent placement of the child;
3. A description of the appropriate special programs available and to be used by the parent, legal guardian, legal custodian, stepparent, or other adult living in the home as well as the child which are in the best interests of the child or will prevent further harm to the child;
4. A statement as to the unavailability or inappropriateness of local placement, or other good cause for any placement more than forty miles from the child's home;
5. A description of acts and conduct that would be expected of the parent or parents, legal guardian, legal custodian, stepparent or other adult living in the home before the child should be returned home; and
6. The name and business address of the attorney representing the child, if any.[579]

Special provisions apply where a baby is born drug-dependent.[580]

The Juvenile Code requires that the court insure that the following information accompanies every deprived child placed outside the home:

1. Demographic information;
2. Type of custody and previous placement;
3. Pertinent family information, including, but not limited to, the names of family members who, by court order, may not visit the child;
4. Known or available medical history, including, but not limited to: (a) allergies, ((b) immunizations, (c) childhood diseases, (d) physical handicaps, (e) psychosocial information, and (f) the name of the child's last doctor, if known; and
5. Copies of policies and procedures of the placement agency which pertain to placement operations of the agency, and which may be necessary to properly inform the institution, foster parents or other custodian of the duties, rights and responsibilities of the custodian.[581]

The inspiration for these elaborate requirements is the method of federal reimbursement to states for the cost of a child's out-

579. *Id.* § 1115.1(B)(1)-(6).
580. *Id.* § 1115.1(C)-(D).
581. *Id.* § 1115.2(1)-(5).

of-home care.[582] If the court places a deprived child in the legal care, custody and control of DHS, the court cannot dictate to DHS the precise placement of the child.[583]

If a deprived child in DHS custody becomes unmanageable and uncontrollable, DHS may return the child to the court for further disposition, or may provide information to the district attorney and request the filing of a petition alleging the child to be delinquent or in need of treatment.[584]

Placement Preference for Indian Children

ICWA requires that any Indian child removed from the home pursuant to a state court order be placed in the least restrictive setting which most approximates a family, and in which the child's special needs, if any, may be met.[585] The child must be placed within reasonable proximity to the home, taking into account any special needs of the child.[586] In the absence of good cause to the contrary, the Indian child's presumptive placement priority is with:

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.[587]

The Indian child's tribe may modify the presumptive placement priorities by resolution, and that modified order of preference must be followed so long as the criteria are met.[588] The standards to be applied in meeting the preference requirements are the prevailing social and cultural standards of the Indian community in which the parent or extended family resides, or with which

582. *See* Adoption and Assistance and Child Welfare Act of 1980, Pub. L. 96-272 (codified in scattered sections of 42 U.S.C.).

583. *In re* Meekins, 554 P.2d 872, 875 n.2 (Okla. Ct. App. 1976).

584. 10 OKLA. STAT. § 1140 (Supp. 1982).

585. Indian Child Welfare Act of 1978, 25 U.S.C. § 1915(b).

586. *Id.*

587. *Id.* § 1915(b)(i)-(iv).

588. *Id.* § 1915(c). *See also* Guidelines, *supra* note 63, at F.2.

the parent or extended family members maintain social and cultural ties.[589]

The *Guidelines* suggest the following as reasons for "good cause" not to follow the placement preference:

1. The request of the biological parents or the child when the child is of sufficient age;
2. The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness;
3. The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

The burden of establishing the existence of "good cause" not to follow the placement preference is on the party urging the preference not be followed.[590]

If a child is committed to the custody of DHS, the court orders the child delivered by the sheriff to the place designated by DHS. The cost of transportation is paid from the county's general fund.[591]

The Rights and Duties of a Person or Agency Receiving Custody of the Child Pursuant to the Court's Dispositional Order

When the court transfers custody of a child under title 10, section 1116 of the Oklahoma Statutes,[592] the person, institution, agency or department receiving custody has the right to, and is responsible for, the care and control of the child. The person or entity also has the duty to provide food, clothing, shelter,

589. 25 U.S.C. § 1915(d) (1978). Title 25 U.S.C. § 1915(e) provides that a record of each such placement, under state law, of an Indian child shall be maintained by the state in which the placement was made, evidencing the efforts to comply with the order or preference specified in this section. Such record shall be made available at any time upon request of the secretary, or the Indian child's tribe. For emergency removal of the Indian child from parent or custodian in Oklahoma, *see* 10 OKLA. STAT. § 40.5 (Supp. 1982).

590. Guidelines, *supra* note 63, at F.3. The commentary to the guidelines suggests that in a few cases the child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Such considerations can be considered as good cause to the contrary. A diligent attempt to find a suitable family meeting the preference criteria should be made before nonpreference placement is considered. A diligent attempt to find a suitable family includes, at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally-known Indian programs with available placement resources.

591. 10 OKLA. STAT. § 1143 (Supp. 1981).

592. 10 OKLA. STAT. § 1116 (Supp. 1986).

ordinary medical care, education, discipline for the child, and, in an emergency, to authorize surgical or other extraordinary care.[593] The person or entity having legal custody of the child pursuant to court order is entitled to notice of court proceedings regarding the child as provided in title 10, sections 1105 and 1115 of the Oklahoma Statutes[594] to intervene, upon application, as a party to all court proceedings pertaining to the care and custody of the child, including, but not limited to adjudication, disposition, review of disposition, and termination of parental rights.[595]

In placing a child in the custody of a person or entity, the court should select one with the same religious faith as that of the parents of the child, or in the case of difference in the religious faith of the parents, then in the religious faith of the child, or, if the religious faith of the child is not ascertainable, then of the faith of either of the parents.[596] However, it is left to the discretion of the court to place the child where the child's total needs will best be served.[597]

Parent's Financial Obligation for a Child Placed Outside the Home

After adjudication, and at the court's request, DHS must investigate the home conditions and environment of the child, and the financial ability, occupation and earning capacity of the parent, legal guardian or custodian of the child.[598] The court has authority to adjudge natural parents, who may be present at the hearing, or who have been served with notice of the hearing, liable and accountable for the care and maintenance of any child, and to order payment for the care and maintenance of the child.[599] The court's order is modifiable, depending upon

593. 10 OKLA. STAT. § 1117(A) (Supp. 1983). The medical care, surgery and extraordinary care is to be charged to the appropriate agency where the child qualifies for such care under law, rule or regulation or administrative order or decision. Nothing in section 1117 shall abrogate the right of the child to any benefits provided through public funds, or the parent's statutory duty or responsibility to provide such necessities. Further, no person, agency or institution shall be liable in a civil suit for damages for authorizing or not authorizing surgery or extraordinary care in an emergency, as determined by competent medical authority.

594. 10 OKLA. STAT. §§ 1105, 1115 (1981).

595. 10 OKLA. STAT. § 1117(B) (Supp. 1983).

596. 10 OKLA. STAT. § 1119 (1981).

597. *Id.*

598. 10 OKLA. STAT. § 1120(D) (Supp. 1986). Upon request by the court of another state, the DHS may conduct a similar investigation.

599. 10 OKLA. STAT. § 1121(A) (1981).

the needs of the child and ability of the parents to pay.[600] Since the Juvenile Code provides no precise guidance as to the amount of child support, the court may be guided by the statutory child support guidelines enacted for divorce proceedings.[601] Finally, in the event the DHS has legal custody of an Indian child, there is a special statutory arrangement for the payment of foster care expenses.[602]

Review Hearings

Federal law requires that, before the federal government reimburses a state for providing foster care placement of a child, the state must have made reasonable efforts to prevent the need of removing the child from the home in the first place, and then make reasonable efforts to return the child to the home.[603] A case plan must be developed for each child,[604] and review hearings must be conducted either by the agency or by the court every six months while the child is in placement, and a hearing to develop a permanent plan must be conducted by the court eighteen months from the time the child is initially placed.[605]

In Oklahoma, the Juvenile Code requires that a dispositional order removing a child from the custody of parents be reviewed at a hearing by the court at least once every six months until the child is returned to parental custody.[606] The Oklahoma Court of Appeals has described review hearings as a "critical state" of the deprived child proceeding.[607] The dispositional order removing a deprived child from the custody of parents must be reviewed by the court at least once every six months until the child is returned to the custody of the parents, and the conditions which caused the child to be adjudicated deprived have been corrected, or the parental rights of the parents are terminated and a final adoption decreed.[608] The Juvenile Code provides that review hearings must continue to take place where a child has been removed from the home even after the child has been returned to the home until the court orders the case closed.[609]

600. *Id.* § 1121(B).

601. *See* 12 OKLA. STAT. §§ 1277.7-1277.9 (Supp. 1988).

602. *See* 10 OKLA. STAT. § 40.8 (Supp. 1982).

603. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272 (codified in scattered sections of 42 U.S.C., in particular §§ 671(a)(15) & 672(a)(15)).

604. *See* 42 U.S.C. §§ 671(a)(16), 675(1).

605. *Id.* §§ 671(a)(16), 675(5).

606. *See* 10 OKLA. STAT. § 1116(B) (Supp. 1986); 42 U.S.C. §§ 675(5)(B).

607. *In re* J.W., 742 P.2d 1171, 1174 (Okla. Ct. App. 1987).

608. 10 OKLA. STAT. § 1116.1(A) (Supp. 1983).

609. *Id.*

The legal custodian of a child who has been removed from the custody of parents must prepare for each review hearing a written report on each child who is the subject of the review hearing.[610] At a minimum, the report must contain a summary of the physical, mental, and emotional condition of the child, the conditions existing in the home or institution where the child has been placed, and adjustment thereto, a report on the child's progress in school and visitation exercised by the child's parents.[611]

If DHS is the child's legal custodian, the report must also include any efforts on the part of the parents to correct the conditions which caused the child to be adjudicated deprived.[612] The report must also contain recommendations, and written reasons for the following: (1) whether the parental rights of the parents of the child should be terminated, and the child placed for adoption, (2) whether the child should remain in the home, or if placed outside the home of the child's parents, (3) whether the child should remain outside the home or be returned to the home from which the child was removed.[613] If it is determined that the child should be placed for adoption, foster parents may be considered eligible to adopt the child.[614]

The Juvenile Code also places responsibilities on the court. At the review hearing, the court must specifically inquire as to the nature and extent of services being provided the child and parents and must direct additional services be provided if necessary to protect the child from further physical, mental, or emotional harm.[615] In addition, the attorney representing the child may submit a report to the court for presentation at the review hearing to assist the court in reviewing the placement or status of the child.[616]

Finally, the Juvenile Code recognizes the emotional stress a child may undergo if frequently moved from foster home to foster home. Therefore, the Juvenile Code requires that children in DHS custody cannot be moved from one foster home to another, if the child has already been moved once since the last court hearing, without first obtaining the approval of the court following a hearing on the reasons and necessity for removing

610. 10 OKLA. STAT. § 1116.1(B)(1) (Supp. 1989).
611. *Id.* § 1116.1(B)(2).
612. *Id.* § 1116.1(B)(3).
613. *Id.*
614. *Id.*
615. *Id.* § 1116.1(C).
616. *Id.* § 1116.1(D). The legal custodian of the child shall not deny the child the right of access to an attorney, and must facilitate such access.

the child.[617] However, the DHS may move any child due to an emergency, in which case a hearing must be conducted, if requested in writing, within ten days following the moving of the child on the reasons and necessity for moving the child.[618] The DHS must notify the attorney for the child whenever the child's placement is changed, and inform the attorney where the child is now located.[619]

No later than eighteen months after placing a child in foster care and every twelve months thereafter, the court making the original order of adjudication must conduct another dispositional hearing to determine the future status of the child, and determine whether:

1. The child should be returned to parents or other family members;
2. The child should be continued in foster care for a specified period;
3. The rights of the parents of the child should be terminated, and the child placed for adoption or legal guardianship; or
4. Whether the child, because of exceptional circumstances, should remain in foster care on a long-term basis as a permanent plan or with a goal of independent living.[620]

No child who has been adjudged deprived may be placed in a state training school.[621] The case is also reviewed by the foster care review board, which acts in an advisory capacity to the court.[622]

Terminating Parental Rights

The Purpose and Effect of Terminating Parental Rights

Terminating parental rights is the unmitigated cessation of all natural and legal rights a parent has with a child, and a permanent parting of all bonds linking parent to child.[623] It terminates the parent-child relationship, including the parents' rights to the custody of the child; the right to visit the child; the right to control the child's training and education; the necessity to consent to the adoption of the child; the right to the earnings

617. *Id.* § 1116.1(E).
618. *Id.*
619. *Id.*
620. *See* 10 OKLA. STAT. § 1116(B) (Supp. 1986); 42 U.S.C. § 675(5)(C).
621. 10 OKLA. STAT. § 1111.6(D) (Supp. 1989).
622. *See id.* §§ 1116.2-1116.6; 42 U.S.C. § 675(5)(B).
623. A.E. v. State, 743 P.2d 1041, 1047 (Okla. 1987).

of the child; and the right to inherit from or through the child.[624] The purpose of terminating parental rights is to emancipate the child from the offending parents' legal bond in order to set the child free for future adoption.[625]

The common law regards the parent-child bond as indestructible and hence not terminable by judicial decree.[626] Since parental rights could not be terminated at common law, termination proceedings did not exist.[627] While, under the common law, courts were powerless to sever the natural bond between parent and child, they could in equity restrict the quantum of parental control.[628] Upon a complaint alleging abuse of parental authority, a private civil action could be brought with a view to freeing the child from the guilty parent's dominion.[629] The terms of title 10, section 9 of the Oklahoma Statutes[630] are declaratory of the common law norms.[631] Termination of parental rights is purely a creature of statute.[632]

Section 1130 of the Juvenile Code,[633] which provides grounds for terminating parental rights, is a statute in derogation of the common law.[634] The impetus for enacting termination statutes came from the economic pressures placed on public and private welfare agencies in implementing a multitude of child welfare programs. Termination statutes accomplish two purposes: they free children from unfit parents, and thus render them eligible for adoption, and they ease the financial burden upon state and foster care agencies.[635]

624. 10 OKLA. STAT. § 1132 (1981). However, termination of parental rights in no way affects the right of the child to inherit from the parent.

625. Davis v. Davis, 708 P.2d 1102, 1112 (Okla. 1985); Allison v. Bryan, 26 Okla. 520, 109 P. 934, 938-39 (1910); *In re* Talley's Estate, 188 Okla. 338, 109 P.2d 495, 498 (1941); Alford v. Thomas, 316 P.2d 188, 192 (Okla. 1957); J.D.L. v. State Dep't. of Inst., 572 P.2d 1283, 1284 (Okla. 1978).

626. *Davis*, 108 P.2d at 1111.

627. *A.E.*, 743 P.2d at 1046.

628. *Davis*, 708 P.2d at 1112; *see also A.E.*, 743 P.2d at 1045 ("At common law, rights and liabilities arising from status-based relationships were determined in equitable proceedings.").

629. *Davis*, 708 P.2d at 1112.

630. 10 OKLA. STAT. § 9 (1981).

631. *Davis*, 708 P.2d at 1112.

632. *In re* Christopher H., 577 P.2d 1292, 1293 (Okla. 1978).

633. 10 OKLA. STAT. § 1130 (Supp. 1987).

634. *Davis*, 708 P.2d at 1111.

635. A.E. v. State, 743 P.2d 1041, 1051 (Okla. 1987) (Opala, J., concurring in part and dissenting in part).

The Oklahoma Legislature first enacted a statutory procedure for terminating parental rights in 1965.[636] The practice before enactment was for the court to declare a child previously adjudicated "deprived" eligible for adoption if the court found such disposition was necessary for the child's welfare. The substance of the law was that once a child was a ward of the court, termination of parental rights was a matter of judicial discretion.[637] Enactment of the termination statute was a legislative attempt to bridle that discretion.[638]

The integrity of the family unit and preservation of the parent-child bond command the highest protection in our society. Intrusion upon the privacy and sanctity of that bond can be justified by a compelling state concern.[639] The United States Supreme Court has repeatedly recognized that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the fourteenth amendment.[640]

The Oklahoma Supreme Court has also recognized that parents have a fundamental, constitutionally protected interest in continuing the legal bond with their children. The integrity of familial status is a value to be guarded with great solicitude.[641] The United States Supreme Court instructs us that:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[642]

Proceedings to terminate parental rights affect three distinct interests: (1) a parental claim to the child; (2) the state's re-

636. 1965 Okla. Sess. Laws ch. 507, §§ 1-5 (now codified as 10 OKLA. STAT. §§ 1130-1135 (Supp. 1987)).

637. *In re* J.F.C., 577 P.2d 1300, 1301 (Okla. 1978).

638. *Id.*

639. *Davis*, 708 P.2d at 1109.

640. Santosky v. Kramer, 455 U.S. 745, 753 (1982) (collecting cases).

641. *In re* Delaney, 617 P.2d 886, 890 (Okla. 1980).

642. *Santosky*, 455 U.S. at 753-54.

sponsibility to afford protection to underage citizenry, and (3) the child's claim to a wholesome milieu free from harm of abuse and neglect.[643] The interest of children in a wholesome environment has a constitutional dimension no less compelling than that the parents have in the preservation of family integrity. In the hierarchy of constitutionally-protected values, both interests rank as fundamental and must hence be shielded with equal vigor and solicitude.[644] Therefore, state intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the due process clause of the United States Constitution.[645]

The Oklahoma Supreme Court has held that substantive due process forbids termination of parental rights in the absence of a compelling state interest in the form of specific findings of existing or threatened harm to the child.[646] Therefore, any state-action proceeding to terminate parental rights under title 10, section 1130(A)(3), (7), or (8) of the Oklahoma Statutes requires either a prior or simultaneous adjudication of the child's deprived status.[647] Further, termination based on these grounds must be deferred until after the initial deprived status petition has been adjudicated.[648]

Pleadings

If termination of parental rights is sought when the petition to determine the child's deprived status is filed, that fact must be stated in the verified petition and in the summons.[649] If the need for termination becomes fixed after the petition and summons are filed and issued, no verification of pleading to terminate parental rights is required.[650] The pleading may be filed in a juvenile action after the child has been adjudicated deprived.[651]

Notice of Termination of Parental Rights

Procedural due process and the Oklahoma Juvenile Code require parents receive notice and an opportunity to be heard

643. *In re* T.R.W., 722 P.2d 1197, 1200 (Okla. 1985).
644. *In re* T.H.L., 636 P.2d 330, 334 (Okla. 1981).
645. *Santosky*, 455 U.S. at 753.
646. *In re* J.N.M., 655 P.2d 1032, 1036 (Okla. 1982).
647. *See In re* R.J.W., 789 P.2d 233 (Okla. 1990).
648. *Id.*
649. 10 OKLA. STAT. § 1103(B) (Supp. 1982).
650. *In re* Ernest James C., 578 P.2d 352, 355 (Okla. 1978).
651. *Id.*

when their parental rights might be terminated.[652] The Juvenile Code requires a parent receive actual notice of any hearing to terminate parental rights.[653] However, if the court finds that the whereabouts of a parent cannot be ascertained, it may order that notice be given by publication and a copy mailed to the last known address of the parents.[654] The parent is entitled to sufficient notice to prepare for the termination hearing.[655] Therefore the Juvenile Code guarantees the parent a minimum of at least ten days after receipt of notice.[656] The parent can waive the waiting period.[657] If the court authorizes service by publication, the hearing cannot be held for at least ten days after the date of publication of the notice.[658] If a parent does not receive actual notice of the termination hearing, the parent has six months from the date of the order terminating parental rights to reopen the proceedings.[659] The Juvenile Code provides specific direction as to the notice to be given a father or putative father of a child born out of wedlock.[660]

Conduct of the Termination Hearing

A termination hearing is an adjudicatory proceeding.[661] The hearing is conducted according to the rules of evidence.[662] It is a private hearing unless the court orders otherwise.[663] The finder of fact must base its decision on sworn testimony with the right to cross-examine.[664] The matter is heard separately from the trial of cases against adults. Finally, stenographic notes or other transcript of the hearing must be kept, but are not open to inspection except by order of the court.[665]

652. A.E. v. State, 743 P.2d 1041, 1043 (Okla. 1987). Procedural due process requirements for termination of parental rights are codified in 10 OKLA. STAT. § 1131 (Supp. 1986). *See also* Dana P. v. State, 656 P.2d 253, 257 (Okla. 1982); 10 OKLA. STAT. § 1116(C) (Supp. 1986).

653. 10 OKLA. STAT. § 1131(A) (Supp. 1986).

654. *Id.*; *Dana P.*, 656 P.2d at 257; Tammie v. Rodriguez, 570 P.2d 332, 334 (Okla. 1977); Kickapoo Tribe of Oklahoma v. Rader, 822 F.2d 1493, 1498 (10th Cir. 1987) (DHS failed to use due diligence in locating parent).

655. *Ernest James D.*, 578 P.2d at 354.

656. 10 OKLA. STAT. § 1131(A) (Supp. 1986).

657. *Id.*

658. *Id.*

659. *Id.*; *See also Dana P.*, 656 P.2d at 257.

660. 10 OKLA. STAT. § 1131(B) (Supp. 1986).

661. A.E. v. State, 743 P.2d 1041, 1047 (Okla. 1987).

662. 10 OKLA. STAT. § 1111 (1981).

663. *Id.*

664. *Id.*

665. *Id.*

Right to Counsel

In *Lassiter v. Dept. of Social Services*,[666] the United States Supreme Court held that the due process clause of the fourteenth amendment of the United States Constitution does not mandate the appointment of counsel for an indigent parent in every case where the state seeks to terminate parental rights.[667] Instead, the Court left the decision to the state courts in the first instance, to be decided on a case-by-case basis subject to appellate review.[668] Of course, states are free to afford parties higher protection. In Oklahoma, children and indigent parents are entitled to court-appointed counsel.[669]

In all public law termination proceedings, potential conflicts exist between the interests of the child and those of the state and the parents. Therefore, independent counsel must be appointed to represent the child whenever tripartite concerns are expressed in the context of public law litigation.[670] The Oklahoma Supreme Court has held that independent counsel must be appointed to represent the child in all termination proceedings regardless of the child's financial status.[671] Indigent parents who "desire"[672] or "request"[673] appointment of counsel are entitled to such representation at no cost.[674] Counsel must be appointed unless knowingly and intelligently waived.[675]

Right to Jury Trial In Proceedings to Terminate Parental Rights

As previously discussed, the question of trial by jury in juvenile proceedings is one of state law. The Oklahoma Supreme

666. 452 U.S. 18 (1981).
667. Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981).
668. *Id.*
669. 10 OKLA. STAT. § 24 (1981); 10 OKLA. STAT. § 1109(b) (Supp. 1986).
670. Davis v. Davis, 708 P.2d 1102, 1110 (Okla. 1985).
671. *Id.*; *In re* T.M.H., 613 P.2d 468, 469 (Okla. 1980).
672. 10 OKLA. STAT. § 24(A) (Supp. 1989).
673. *Id.* § 1109(B).
674. *T.M.H.*, 613 P.2d at 468; *In re* Chad S., 580 P.2d 983, 986 (Okla. 1978). The Oklahoma Supreme Court held in *Chad S.* that the due process clause of the fourteenth amendment required counsel to be provided without expense to indigent parents. The Oklahoma Supreme Court went on to hold that counsel must be appointed unless knowingly and intelligently waived. The court also said that the right to court appointed counsel carried with it the obligation to advise parents of their rights. Where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon request. However, the continued validity of these holdings by the Oklahoma Supreme Court are questionable because of the more recent holding by the United States Supreme Court in *Lassiter*.
675. *In re* J.W., 742 P.2d 1171, 1174 (Okla. Ct. App. 1987).

Court in *A.E. v. State*[676] held that the right to jury trial in proceedings to terminate parental rights is constitutionally mandated by the Oklahoma Constitution and the Oklahoma Juvenile Code.[677] The Court also held that the right to jury trial cannot be surrendered except by voluntary consent or waiver.[678] Since there are three sides to a proceeding to terminate parental rights (the child, the parents, and the state), each is entitled to three peremptory jury challenges.[679]

Standard of Proof

There is always in litigation a margin of error, representing error in fact-finding, which all parties must take into account.[680] The function of a standard of proof is to instruct the fact finder concerning the degree of confidence society thinks the fact finder should have in the correctness of factual conclusions for a particular type of adjudication.[681] In any given proceeding, the minimum standard of proof tolerated by the due process clause of the fourteenth amendment reflects not only the weight of the private and public interest affected, but also a societal judgment about how the risk of error should be distributed between the litigants.[682]

As previously discussed, in the deprived status adjudicatory hearing, the burden of proof is on the state by a preponderance of the evidence because litigants should share the risk of error in roughly equal fashion. However, in proceedings to terminate parental rights, the United States Supreme Court held in *Santosky v. Kramer*[683] that before a state may sever completely and irrevocably the parent-child bond, the due process clause of the fourteenth amendment requires that the state support its allegations by at least clear and convincing evidence.[684] In so hold-

676. 743 P.2d 1041 (Okla. 1987).

677. The Oklahoma Supreme Court expressly overruled its previous holdings in J.V. v. State Dep't of Inst. Social & Rehabilitative Servs., 572 P.2d 1283, 1284-85 (Okla. 1987); *In re* Keyes, 574 P.2d 1026, 1030 (Okla. 1977); Wilson v. Foster, 595 P.2d 1329, 1331-32 (Okla. 1979) (court refused to recognize a state constitutional right to trial by jury, and held that a hearing to determine whether parental rights should be terminated was merely a disposition of a child's previously adjudicated deprived status, and that termination proceedings were not within the purview of the Juvenile Code).

678. A.E. v. State, 743 P.2d 1041, 1048 (Okla. 1987).

679. *In re* T.R.W., 743 P.2d 1197, 1197 (Okla. 1985).

680. *In re* Winship, 397 U.S. 358, 364 (1970).

681. Santosky v. Kramer, 455 U.S. 745, 754-55 (quoting Addington v. Texas, 441 U.S. 481, 423 (1979)).

682. *Id.*

683. *Id.* at 745.

684. *Id.* at 746.

ing, the Court stated: "Increasing the burden of proof is one way to impress the fact finder with the importance of the decision, and thereby perhaps to reduce the chances that inappropriate terminations will be ordered."[685]

Even before the Court's decision in *Santosky*, the Oklahoma Supreme Court held that proceedings to terminate parental rights call for such extreme public law redress that due process under Oklahoma's Constitution requires the termination-seeking claimant to prove by clear and convincing evidence parental potential for harm to the child by abuse or neglect.[686] Oklahoma case law defines "clear and convincing evidence" as the measure of proof which will produce in the mind of the trier of fact a firm belief as to the truth of the allegations sought to be established.[687]

In proceedings to terminate parental rights to an Indian child, Congress requires the state prove its case beyond a reasonable doubt.[688] The stringency of the "beyond a reasonable doubt" standard is usually reserved for criminal actions to deny a defendant liberty or life, or for juvenile delinquency proceedings.[689] Under the "beyond a reasonable doubt" standard, society imposes almost the entire risk of error upon itself.[690]

Congress requires evidence "beyond a reasonable doubt" for termination of Indian parental rights, reasoning that the removal of an Indian child from a parent is a penalty as great as, if not greater than, a criminal penalty.[691] ICWA provides that no termination of parental rights may be ordered in a state proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child.[692]

The Oklahoma Court of Appeals has explicitly held that the "beyond a reasonable doubt" standard must be applied in termination proceedings governed by the ICWA.[693] "The re-

685. *Id.* at 764-65.

686. *In re* C.G., 637 P.2d 66, 71 (Okla. 1981); *See also* A.E. v. State, 743 P.2d 1041, 1042, n.1 (collection of Oklahoma cases holding that termination must be based on clear and convincing evidence).

687. *C.G.*, 637 P.2d at 71 n.12.

688. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(f).

689. Santosky v. Kramer, 455 U.S. 745, 755 (1982); *In re* Winship, 397 U.S. 358, 368 (1970).

690. *Santosky*, 455 U.S. at 755.

691. *Id.* at 769. *See also* H.R. 1386, 96th Cong., 1st Sess. 22 (1978).

692. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(f).

693. *In re* J.W., 742 P.2d 1171, 1175 (Okla. Ct. App. 1987).

quired expert testimony is to provide the court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias."[694]

Circumstances in Which Parental Rights May be Terminated

Before exploring the eight statutory grounds for terminating parental rights, it is important to note reasons that are not sufficient. First, a finding that a child is delinquent, in need of supervision or deprived does not terminate parental rights.[695] Nor is a parent's incarceration, standing alone, sufficient to terminate parental rights.[696] Nor is a finding that a parent has a mental illness or mental deficiency, standing alone, sufficient to terminate parental rights.[697] A parent's unemployment is not a reasonable basis for terminating parental rights.[698] Nor is evidence that parents are poor and uneducated, have a dirty house, are thought by the social worker to be very lazy and lack initiative, and whose eldest child's school attendance is so poor that she misses sixty-four percent of the school year sufficient to terminate parental rights.[699]

Termination of parental rights is not a means by which the State of Oklahoma, through its district courts and the DHS, may exact conformity from its citizen parents through the imposition of an "acceptable" common value system and lifestyle.[700] Instead, the Juvenile Code authorizes district courts to terminate parental rights only in the following situations:

Written Consent[701]

Parental rights may be terminated upon the written consent of a parent, including a parent who is a minor, who desires to terminate parental rights. The written consent must be acknowledged as provided in title 10, section 60.5(4) of the Oklahoma Statutes.[702] In addition the court must find that termination is in the best interests of the child. The voluntary termination of

694. *In re* N.L., 754 P.2d 863, 867 (Okla. 1988); *see also* Guidelines, *supra* note 63, at D.3, D.4.
695. 10 OKLA. STAT. § 1130(A) (Supp. 1987).
696. *Id.* § 1130(A)(7).
697. *Id.* § 1130(A)(8).
698. *In re* J.W., 742 P.2d 1171, 1174 (Okla. Ct. App. 1987).
699. *In re* Cherol A.S., 581 P.2d 884 (Okla. 1978).
700. *Id.* at 888.
701. 10 OKLA. STAT. § 1130(A)(1) (Supp. 1987).
702. 10 OKLA. STAT. 60.5(4) (Supp. 1986).

parental rights by a parent or Indian custodian to an Indian child must comply with the ICWA.[703]

Abandonment[704]

The court may terminate parental rights upon a finding that the parent who is entitled to custody of the child has abandoned it. The Oklahoma Supreme Court has construed this subsection to mean that a parent who bears no custodial responsibility and who has not failed to discharge any court-imposed obligation or some well-defined legal duty does not come within the purview of abandonment as a ground for terminating parental rights.[705]

Failure to Correct Conditions Which Led to the Child Being Adjudged Deprived[706]

The court may terminate parental rights upon a finding that:

(a) the child is deprived; and
(b) such condition is caused by or contributed to by acts or omissions of the child's parent; and
(c) termination of parental rights is in the best interest of the child; and
(d) the parent has failed to show that the condition which led to the making of said finding has not been corrected, although the parent has been given three months to correct the condition.[707]

The parent must be given notice of any hearing to determine whether the condition which led to the deprived-status adjudication has been corrected.[708] The court may extend the time in which the parent may show the condition has been corrected if, in the court's judgment, such extension of time would be in the best interest of the child.[709] During the period that the parent has to correct the condition, the court may return the child to the custody of a parent or guardian, subject to any conditions which it may wish to impose, or the court may place the child with an individual or agency.[710]

703. Indian Child Welfare Act of 1978, 25 U.S.C. § 1913. *See also* Guidelines, *supra* note 63, at E(1-4), G(1-4).

704. 10 OKLA. STAT. § 1130(A)(2) (Supp. 1987).

705. *In re* McNeely, 734 P.2d 1294, 1297 (Okla. 1987).

706. 10 OKLA. STAT. § 1130(A)(3) (Supp. 1987).

707. *Id.* § 1130(A)(3). "Deprived" is defined in 10 OKLA. STAT. § 1101(4) (Supp. 1988).

708. 10 OKLA. STAT. § 1130(A)(3)(d) (Supp. 1987).

709. *Id.*

710. *Id.*

Any parent whose child is adjudged deprived must be judicially advised of those conduct norms the parent is expected to follow or eschew to recapture a legally unencumbered standing.[711] The purpose of these norms of parental conduct is to afford parents an opportunity to ameliorate their condition and to effectively defend against termination efforts.[712] "Judicial notice cannot depend on inferences to be gathered from reports of social workers or of medical doctors."[713] It can be found in written judicially-prescribed norms of conduct to which the parent is expected to conform.[714] "Once these norms have been fashioned with clarity, the parent is entitled to the minimum statutory period of three months to conform."[715] In *In re C.G.*[716] the Oklahoma Supreme Court described the purpose of the norms of parental conduct:

> Norms for parental conduct are designed to advise parents of what is expected of them *qua* parents and to guide them in avoiding patterns or a level of behavior that may trigger official intervention. Without knowledge of the expected norms of conduct—as balanced by community norms, and by the socio-economic milieu of the parent—a parent would be unable to set in motion an effort of compliance with society's expectation, i.e. to rectify the problems which caused the child to become the subject of a public-law proceeding, and to remove all residue of a clouded status. The approach is clearly consistent with the general policy of the law against needless family disruption.[717]

Judicial clarity in fashioning prescribed norms of parental conduct is essential to the preservation of the procedural safeguards mandated by federal and state due process. A "fair warning" requirement breathes life into these fundamental law guarantees while lack of specificity make them meaningless.[718]

711. A.E. v. State, 743 P.2d 1041, 1043 (Okla. 1987).

712. *Id.*

713. *Id.*

714. *Id.*

715. *A.E.*, 743 P.2d at 1043 (quoting *In re* C.G., 637 P.2d 66, 69 (Okla. 1981)). A Department of Human Services social worker's "contract" with the parents concerning the standards of parental conduct is constitutionally infirm unless it bears a judicial imprimatur and is communicated to both affected parties.

716. 637 P.2d 66 (Okla. 1981).

717. *Id.* at 69.

718. *Id.*; *In re* T.H.L., 636 P.2d 330, 333 (Okla. 1981); *In re* J.W., 742 P.2d 1171, 1174 (Okla. Ct. App. 1987).

The "fair warning" gives a person of ordinary intelligence a reasonable opportunity to know what is expected, and the minimum statutory three-month period of time provides a reasonable opportunity to accomplish the task.[719] Termination cannot occur unless there has been a failure to correct the conduct which led to the deprived-status adjudication. It is only when the parent fails to correct the very conditions found in the deprived status hearing that termination for these reasons may result.[720] The statute does not shift the burden of proof to the parent, but does put the burden of persuasion on the parent as to correction of conditions.[721]

The state must prove by clear and convincing evidence parental potential for harm to the child by abuse or neglect.[722] Whenever a parent bears the burden of showing compliance with previously prescribed norms of parental conduct, the parent need not be held to the same standard as the termination-seeking claimant.[723]

Public policy mandates as much concern in guarding against error at this stage as it does when a parental termination status is sought. The risk of mistake remains balanced in favor of the parent who may meet the onus cast on him by the "clear weight of the evidence" standard rather than the "clear and convincing" standard.[724] By the interplay of burdens in public law litigation a heavier onus may be placed on the state when it seeks to deprive a parent of parental rights than on the individual who may have the burden of sustaining the affirmative as to some other aspect of proof in the same case.[725] The state is required, as the moving party with the ongoing burden of proof, to overcome the parent's burden of persuasion on the issue of change of condition.[726]

Willful Failure to Support the Child[727]

The court may terminate parental rights upon a finding that the parent who does not have custody of the child has willfully

719. *C.G.*, 637 P.2d at 69.
720. *In re* J.F.C., 577 P.2d 1300, 1302 (Okla. 1978).
721. *Id.*
722. *C.G.*, 637 P.2d at 71.
723. *Id.*
724. *Id.*; *see also T.H.L.*, 636 P.2d at 333; *In re* Christopher H., 577 P.2d 1292 (Okla. 1978); *In re* Moore, 558 P.2d 371 (Okla. 1976).
725. *C.G.*, 637 P.2d at 71 n.14.
726. *Christopher H.*, 577 P.2d at 1292; *Moore*, 558 P.2d at 371.
727. 10 OKLA. STAT. § 1130(A)(4) (Supp. 1987).

failed to contribute to the support of the child as provided in a decree of divorce or in some other court order during the preceding year, or in the absence of such order, consistent with the parent's means and earning capacity.[728]

Criminal Conviction of Child Abuse; a Finding in a Deprived Child Action of Abuse that is Heinous or Shocking; or a Finding in a Deprived Child Action of Repeated Abuse[729]

The court may terminate parental rights if the parent is convicted of specified crimes that constitute child abuse.[730] Those crimes are: (1) child abuse;[731] (2) abuse and neglect;[732] (3) sexual abuse;[733] (4) sexual exploitation;[734] (5) child pornography;[735] (6) rape,[736] and (7) lewd or indecent proposals or acts with a child under sixteen.[737]

728. *Id.*

729. *Id.* § 1130(A)(5).

730. *Id.*

731. 21 OKLA. STAT. § 843 (Supp. 1982) describes "child abuse" as any parent or other person who shall willfully or maliciously injure, torture, maim, or use unreasonable force upon a child under the age of 18, or who shall cause, procure or permit any of said acts to be done.

732. 21 OKLA. STAT. § 845(B)(1) (Supp. 1985) defines "abuse and neglect" as harm or threatened harm to a child's health or welfare by a person responsible for the child's health or welfare. Harm or threatened harm to a child's health or welfare can occur through: non-accidental physical or mental injury; sexual abuse; sexual exploitation or negligent treatment or maltreatment, including the failure to provide adequate food, clothing, shelter, or medical care, except as provided in *id.* § 846.

733. *Id.* § 845(B)(3) defines "sexual abuse" to include rape, incest and lewd or indecent acts or proposals, as defined by law, by a person responsible for the child's welfare.

734. *Id.* § 845(B)(4) defines "sexual exploitation" to include allowing, permitting, or encouraging a child to engage in prostitution, as defined by law, by a person responsible for the child's welfare, or allowing, permitting, encouraging, or engaging in the lewd, obscene, or pornographic photographic filming, or depicting of a child in those acts as defined by the state law, by a person responsible for the child's welfare.

735. 21 OKLA. STAT. § 1021.3 (Supp. 1986), defines "child pornography" as any parent, guardian or individual having custody of a minor under age 18 years who knowingly permits or consents to the participation of a minor in any film, motion picture, video tape, photography, negative, slide, drawing, painting, play or performance wherein the minor is engaged in or portrayed, depicted, or represented as engaging in any act of sexual intercourse, in any act of fellatio or cunnilingus, in any act of excretion in the context of sexual activity, or in any lewd exhibition of the uncovered genitals in the context of masturbation or other sexual activity.

736. 21 OKLA. STAT. § 1111 (Supp. 1984).

737. 21 OKLA. STAT. § 1123 (Supp. 1985), defines "lewd or indecent proposals as acts with a child under sixteen" as any person who knowingly and intelligently makes any oral or written lewd or indecent proposal to any child under 16 years of age for

Absent a criminal conviction, the Oklahoma Supreme Court has authorized termination of parental rights upon a finding of a single act of extreme abuse.[738] In *Jerry L.*, Jerry was only three years old when he was sexually molested by his parents. As a result of the sex acts performed on the child, Jerry became infected with anal gonorrhea. In interpreting the then-existing statute,[739] the Oklahoma Supreme Court stated that the Oklahoma Legislature could not have intended to allow a child to suffer two acts of serious physical abuse before permitting the state to terminate parental rights.[740]

After *Jerry L.*, the Oklahoma Legislature amended the Juvenile Code to provide for the termination of parental rights on a finding of a single incident of abuse that is "heinous or shocking."[741] It now provides that the court may terminate parental rights upon a finding in a deprived child action that:

> the parent has physically or sexually abused the child or a sibling of such child, or failed to protect the child or a sibling of such child from physical or sexual abuse that is heinous or shocking to the court, or that the child or sibling of such child has suffered severe harm or injury as a result of such physical or sexual abuse.[742]

The Juvenile Code also authorizes termination of parental rights in the event of repeated child abuse.[743] The court may terminate parental rights upon a finding in a deprived child action that the parent has physically or sexually abused the child or the child's sibling, or failed to protect the child or sibling

---

the child to have unlawful sexual relations or sexual intercourse with any person, or any such person who shall intentionally look upon, touch, maul, or feel the body or private parts of any child under 16 years of age in any lewd or lascivious manner by any acts not amounting to the commission of a crime against public decency and morality, as defined by law; or any such person who shall designedly ask, invite, entice, or persuade any child under 16 years of age to go alone with any person to a secluded, remote, or secret place, with the unlawful and willful intent and purpose then and there to commit any crime against public decency and morality, as defined by law, with the child, or to in any manner lewdly or lasciviously look upon, touch, maul, or feel the body or private parts of the child in any indecent manner or in any manner relating to sexual matters or sexual interest.

738. *In re* Jerry L., 662 P.2d 1372, 1374 (Okla. 1983).

739. 10 OKLA. STAT. § 1130(A)(5) (1981).

740. *Jerry L.*, 662 P.2d at 1373-74.

741. 1983 Okla. Sess. Laws ch. 291, § 1.

742. *See also In re* T.R.W., 722 P.2d 1197, 1203 n.14.

743. 10 OKLA. STAT. § 1130(A)(5) (Supp. 1987).

from abuse after a previous finding that the parent had abused the child or sibling, or failed to protect the child or sibling from abuse.[744]

Criminal Conviction of the Death of a Sibling[745]

The court may terminate parental rights upon a conviction in a criminal action that the parent has caused the death of a sibling of the child by physical or sexual abuse or chronic neglect.

Lengthy Incarceration[746]

The court may terminate parental rights upon a finding that all of the following exist:

(a) the child is deprived, and
(b) the custody of the child has been placed outside the home of a natural or adoptive parent, guardian, or extended family member, and
(c) the parent whose rights are sought to be terminated has been sentenced to a period of incarceration of not less than ten years, and
(d) the continuation of parental rights would result in harm to the child based on consideration of the following factors, among others: the duration of incarceration and its detrimental effect on the parent/child relationship; any previous incarceration; any history of criminal behavior, including crimes against children; the age of the child; the evidence of abuse or neglect of the child or siblings of the child by the parents; and the current relationship between the parent and the child, and the manner in which the parent has exercised parental rights and duties in the past, and
(e) termination of parental rights is in the best interest of the child.[747]

Mental Illness[748]

The court may terminate parental rights upon a finding that all of the following exist:

744. *Id.*
745. *Id.* § 1130(A)(6).
746. *Id.* § 1130(A)(7).
747. *Id.* "Deprived" is defined in 10 OKLA. STAT. § 1101(4) (Supp. 1988). Of course, incarceration of the parent alone is not sufficient to deprive a parent of parental rights.
748. 10 OKLA. STAT. § 1130(A)(8) (Supp. 1987).

(a) the child is deprived, and
(b) custody of the child has been placed outside the home of a natural or adoptive parent, guardian or extended family member, and
(c) the parent whose rights are sought to be terminated has a mental illness or mental deficiency which renders the parent incapable of adequately and appropriately exercising parental rights, duties and responsibilities, and
(d) the continuation of parental rights would result in harm or threatened harm to the child, and
(e) the mental illness or mental deficiency of the parent is such that it will not respond to treatment, therapy or medication, and based upon competent medical opinion, the condition will not substantially improve, and
(f) termination of parental rights is in the best interests of the child.[749]

Confinement of the parent in a mental hospital, while necessitating custody of the child being placed elsewhere, does not, standing alone, provide a basis for terminating parental rights.[750]

Oklahoma District Court Rule 8.2

Oklahoma District Court Rule 8.2[751] provides that all orders terminating parental rights must contain a finding of compliance with the ICWA and the UCCJA.[752] The trial court also must make findings of fact as to the child's correct, full legal name and date of birth, and all instruments memorializing the order as required by title 12, section 32.2 of the Oklahoma Statutes, and must recite the findings required in Rule 8.2.[753]

Post-Termination Placement of the Child

Once parental rights have been terminated, the court may award custody of the child to any qualified person or agency.[754] The child is emancipated from the offending parents' legal bond,

749. *Id.* "Deprived" is defined in 10 OKLA. STAT.. § 1130(A)(8) (Supp. 1987). "Mental illness" and "mental deficiency" are defined in 43A OKLA. STAT. § 6-201, art. II(f), (g). As previously discussed, a finding that a parent has a mental illness or mental deficiency alone is not sufficient to deprive the parent of parental rights. *See also In re* J.N.M., 655 P.2d 1032, 1037 (Okla. 1982).

750. *In re* Baby Girl Williams, 602 P.2d 1036, 1040 (Okla. 1979).

751. OKLA. DIST. CT. R. 8.2.

752. *Id.*

753. *Id.*

754. 10 OKLA. STAT. § 1133(A) (1981).

and is set free for future adoption.[755] In committing the child to an individual or agency, the court may invest in the individual or agency authority to consent to the adoption of the child,[756] or the court in its discretion may reserve unto itself the authority to consent to the adoption.[757]

If the court commits the child to DHS, the court must vest it with authority to place the child, and upon notice to the court that an adoption petition has been filed concerning the child, the court must invest DHS with authority to consent to the child's adoption and the jurisdiction of the committing court terminates.[758]

In *In re Jeffery S.*,[759] the court adjudged Jeffery S. and Amanda S. deprived, and terminated parental rights.[760] The court awarded custody of the children to DHS, who in turn placed the children for adoption with prospective adoptive parents under a placement plan promulgated by DHS.

The Oklahoma Supreme Court held that the district court had no power or authority to withdraw the placement of the children for adoption made by the DHS or to order the children to be placed with the district court's designee without a prior judicial determination that the best interests of the children, upon consideration of their temporal, mental, and moral welfare, under the provisions of title 10, section 1116.1 of the Oklahoma Statutes, required judicial incursion into the placement arrangements made by the DHS.[761]

Placement Preference for Indian Children

ICWA and OICWA provide special "pre-adoptive placements" for Indian children.[762] ICWA provides that any Indian

755. Davis v. Davis, 708 P.2d 1102, 1112 (Okla. 1985).

756. 10 OKLA. STAT. § 1116(C) (Supp. 1986).

757. 10 OKLA. STAT. § 1133(A) (1981).

758. 10 OKLA. STAT. § 1116(C) (Supp. 1986).

759. 663 P.2d 1211 (Okla. 1983).

760. *Id.* at 1212.

761. For other statutes dealing with children placed in the custody of the Okla. Department of Human Services, *see* 10 OKLA. STAT. § 1135 (placement determination); *id.* § 1136 (DHS care for deprived children); *id.* § 1140 (children in custody becoming unmanageable and uncontrollable); *id.* § 1142 (cooperative agreements for education and training of children); *id.* § 1145 (Director of Public Welfare to serve as legal guardian).

762. Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(1)(iii) defines pre-adoptive placement to mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement.

child accepted for "pre-adoptive placement" must be placed in the least restrictive setting which most approximates a family in which the child's special needs, if any, may be met.[763] The child must also be placed within reasonable proximity of the home, taking into account any special needs of the child.[764] In any "pre-adoptive placement," a preference is given, in the absence of good cause to the contrary, to a placement with:

(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.[765]

The Indian child's tribe may establish a different order of preference by resolution, and that order of preference must be followed as long as the criteria of section 1915(b) of the ICWA are met.[766] ICWA also authorizes preference in "adoptive placements" of Indian children.[767]

Title 25 U.S.C. § 1915(a) provides placement preferences for Indian children. In any adoptive placement of an Indian child under state law, a preference must be given, in the absence of good cause to the contrary, to a placement with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.[768] Again, the Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed as long as placement is in the least restrictive setting appropriate to the child's needs.[769]

The standards applied in meeting the preference requirements are the prevailing social and cultural standards of the Indian

763. *Id.* § 1915(b).

764. *Id.*

765. *See also* 10 OKLA. STAT. § 40.6 (Supp. 1982).

766. Indian Child Welfare Act of 1978, 25 U.S.C. § 1915(c). *See also* Guidelines, *supra* note 63, at F.2. For examples of good cause to modify the preference, *see id.* at F.3.

767. 25 U.S.C. § 1903(1)(iv) defines adoptive placement to mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

768. *See also* Guidelines, *supra* note 63, at F.1 (adoptive placements).

769. *See* Indian Child Welfare Act of 1978, 25 U.S.C. § 1915(c).

community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.[770] ICWA further provides that under state law a record of each such placement of an Indian child must be maintained by the state in which the placement was made, evidencing the efforts to comply with the order of preference.[771] The record must be made available at any time upon the request of the Secretary of Interior or the Indian child's tribe.[772]

Under the OICWA,[773] DHS has the responsibility of establishing a single location where all records of every involuntary "foster care," "pre-adoptive placement" and "adoptive placement" by Oklahoma courts of any Indian child in the custody of the DHS or under DHS supervision will be available within seven days of a request by the tribe or the Indian child or by the Secretary of Interior.[774] The records must include, at a minimum, all reports of the state case worker, including a summary of the efforts to rehabilitate the parents of the Indian child, a list of the names and addresses of families and tribally-approved homes contacted regarding placement, and a statement of reasons for the final placement decision.[775]

Return of Custody of the Indian Child

ICWA provides that whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody. The state court must grant the petition unless there is a showing, in a proceeding which is subject to the provisions of 25 U.S.C. § 1912, that such return of custody is not in the best interests of the child.[776] Further, upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the state court which entered the final decree must inform that individual of the tribal affiliation, if any, of the individual's

770. *Id.* § 1915(d).

771. *Id.* § 1915(e).

772. *Id.*; *see also* Guidelines, *supra* note 63, at G.4 (maintenance of records).

773. 10 OKLA. STAT. § 40.9 (Supp. 1982).

774. *Id.*

775. *Id.* For additional record keeping responsibilities, *see* Indian Child Welfare Act of 1978, 25 U.S.C. § 1951; 25 C.F.R. § 23.81 (1978).

776. 25 U.S.C. § 1916(a); Guidelines, *supra* note 63, at G.3 (notice of change in child's status).

biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.[777]

It is crucial that state courts follow the mandate of the ICWA concerning Indian children. Otherwise, the state court's decrees and orders are subject to invalidation. Title 25 U.S.C. § 1914 provides that: (1) any Indian child who is the subject of any action for foster care placement or termination of parental rights under state law; (2) any parent or Indian custodian from whose custody such child was removed; and (3) the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provisions of 25 U.S.C. § 1911-1913.[778] Finally, the ICWA provides that every state must give full faith and credit to the public acts, records and judicial proceedings of Indian tribes.[779]

Suggested Changes in the Law

The shroud of secrecy should be lifted from juvenile proceedings. Democracy works best when government is conducted in public. Therefore, all juvenile hearings and records should be open to the public unless closed by court order for good cause shown. This would strike an appropriate balance between the public's right to know and the individual's right to privacy.

The Juvenile Code should be revised to set forth a clear and concise procedure for emergency removal of a child from home. Notice requirements in the OICWA should be revised by lifting the burden of giving notice from the court and placing that responsibility on the petitioner, as required in the ICWA. Duplication between the federal and state Indian Child Welfare Acts should be eliminated.

The summons should state on its face that each party is entitled to be represented by counsel, and that if a party is financially unable to hire a lawyer, one will be appointed by

777. 25 U.S.C. § 1917; *see also* Guidelines, *supra* note 63, at G.2 (adult adoptee rights).

778. The Oklahoma Supreme Court held in *In re* Adoption of Baby Boy D., 742 P.2d 1059 (Okla. 1985), that an unwed father whose paternity has not been acknowledged or established does not have standing to invalidate state court actions under 25 U.S.C. § 1914.

779. 25 U.S.C. § 1911(d) states:

> The United States, every state, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records and judicial proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

the court without charge. Oklahoma should implement a statewide public defender system to provide representation for children and indigent parents.

The Oklahoma Supreme Court should reconsider its decision in *A.E. v. State*.[780] The decision violates the doctrine of stare decisis (to abide by decided cases) and fails to recognize that the sole intent of the constitutional amendment was to incorporate the statutory right of jury trial at adjudicatory hearings into Oklahoma's fundamental law. If Oklahoma intends to extend the right of jury trial to termination hearings, it should be done by a vote of the people, not judicial fiat.

Finally, there should be created within the district court system a special branch at the court to supervise juvenile and family problems—a family court. Its sole function would be to adjudicate matters concerning marriage, divorce, adoption, and the four Juvenile Code categories of deprived, delinquent, in need of treatment, and children in need of supervision. Lawyers and judges would be required to demonstrate expertise by education, training or experience before being admitted into the proposed family court.

Continuing legal and judicial education should be required, for it is only by understanding our system of justice that we may seek to improve it.

Summary

To understand proceedings to protect abused children, especially Indian children, one must have a working knowledge of the United States Constitution, the Indian Child Welfare Act of 1978 (ICWA), the Federal Adoption Assistance and Child Welfare Act of 1980, the Secretary of Interior's mandatory rules and regulations as codified in the Code of Federal Regulations, the BIA-recommended guidelines for state courts as published in the Federal Register, the Oklahoma Constitution, the Uniform Child Custody Jurisdiction Act (UCCJA), the Oklahoma Juvenile Code, the Oklahoma Indian Child Welfare Act (OICWA), the general provisions of Title 10 of the Oklahoma Statutes, the Rules for the District Courts of Oklahoma, and a plethora of federal and state cases.

This article traces the origins of the juvenile court system, its history, philosophy, and the need for public law proceedings to protect abused children. Jurisdiction over child custody pro-

780. 743 P.2d 1041 (Okla. 1987).

ceedings as between different nations and different states is explored in the Uniform Child Custody Jurisdiction Act.

The consequences of ignoring jurisdiction became graphically evident in April, 1989, when the United States Supreme Court, in *Mississippi Band of Choctaw Indians v. Holyfield*,[781] invalidated an adoption approved by a state court involving Indian children domiciled on the reservation. The article explains the dual jurisdictional scheme established by Congress in which the tribal court exercises exclusive jurisdiction over Indian children who reside or are domiciled on the reservation, as well as wards of the tribal court regardless of location. For state court proceedings involving Indian children who are not tribal wards, nor residents or domiciliaries of the reservation, the tribe enjoys concurrent but presumptive jurisdiction.

The article then discusses pretrial matters, such as pleadings, summons, service of process, emergency proceedings, shelter care and show cause hearings, reasonable efforts to prevent the need to remove the child from the home, efforts to return the child to the home, guardians ad litem, and CASA volunteers.

Having dispensed with pretrial matters, the article next examines the heart of deprived child proceedings, the adjudicatory hearing. The hearing is held to determine whether the allegations of the petition are true, whether the child should be adjudge deprived, and whether the child should be made a ward of the court. Issues addressed include the right to counsel, appointed counsel for indigents, independent counsel for the child, the right to jury trial, the rules of evidence, the allocation of the burden of proof and the appropriate standard of proof, and hearings before referees.

Discussed next is the dispositional hearing, including placement of the child, efforts to alleviate the problems that caused the child to be adjudged deprived, the rights and duties of the person who receives custody of the child, the parent's financial obligations, and review hearings.

The article then addresses terminating parental rights, the most drastic of all public law remedies and considered the death penalty in the family law context. Topics in this special proceeding include pleadings, notice, right to counsel, the reverse in course by the Oklahoma Supreme Court concerning right to jury trial, and higher standards of proof. The eight statutory grounds for terminating parental rights are explored.

781. 109 S. Ct. 1597 (1989).

The article examines the special rights of Indian parents, including notice, additional time to prepare for proceedings, the indigent parent's right to court-appointed counsel, right to examine all reports and documents filed with the state court, right to remedial services and rehabilitative programs, right to intervene and petition the state court to transfer the case to tribal court or to veto such transfer, ways to reduce the risk of cultural bias, placement preferences for placing Indian children with Indians, and procedural protections governing voluntary consent to termination of parental rights. The Indian parent also has the right to invalidate state court proceedings that violate certain provisions of the ICWA.

The article also recognizes and discusses the tribe's interest in its Indian children, which is equal to but distinct from the interest of parents. In addition to the jurisdictional prerogatives, the tribe is entitled to have notice, additional time to prepare, examine reports, intervene, petition to transfer or decline to accept transfer of cases from state court, negotiate and conclude agreements with states, enjoy full faith and credit for tribal court decisions, alter the presumptive placement preference priorities of Indian children, and petition to invalidate certain state court proceedings.

The article concludes with suggested changes in the law.