

**Rule 315. THIRD-PARTY CUSTODY AND APPLICATION OF INDIAN CHILD WELFARE ACT**

In third-party custody proceedings filed in family court, the following additional rules apply:

**(a) Petition.** Every petition shall contain a statement alleging whether the child is or may be an Indian child as defined in the federal Indian Child Welfare Act, United States Code, title 25, sections 1901 to 1963 (ICWA), or the Minnesota Indian Family Preservation Act, Minnesota Statutes, sections 260.751 to 260.835 (MIFPA), and shall describe the due diligence used to determine whether the child is an Indian child under ICWA or MIFPA. Petitioner has an ongoing obligation to notify the court of any information that provides reason to know the child is or may be an Indian Child as defined by ICWA or MIFPA.

**(b) Court Inquiry.** The court has an affirmative obligation to inquire of every participant at the commencement of the proceeding whether the participant knows or has reason to know that the child is an Indian Child under either ICWA or MIFPA. Responses to the inquiry should be on the record. If the court is unable to determine that the child is or is not an Indian child but has reason to know as defined in Code of Federal Regulations, title 25, section 23.107(c), that the child is an Indian child, the court shall direct the petitioner to further investigate the child's ancestry or heritage and, pending the results of the investigation, shall treat the matter as if ICWA or MIFPA applies, as applicable.

**(c) Orders and Decrees.** Every order or decree shall contain a finding that ICWA and MIFPA do or do not apply. Where there is a finding that ICWA or MIFPA does apply, the decree or order must also contain findings that all notice, scheduling, appointment of counsel, active efforts, evidentiary requirements, consent, intervention rights, transfer obligations, and placement preference requirements under ICWA and MIFPA as applicable have been satisfied.

**(d) Public Access.** The following third-party custody proceeding records are not accessible to the public:

(1) notice of pending court proceedings provided by the petitioner pursuant to the Indian Child Welfare Act, United States Code, title 25, section 1912, and any response to that notice from an Indian tribe or the Bureau of Indian Affairs as to whether the child is eligible for tribal membership, including documents such as family ancestry charts, genograms, and tribal membership information; and

(2) records made inaccessible under other applicable law or court rule.

(Added effective January 15, 2024.)

***Advisory Committee Comment - 2023 Amendments***

*Rule 315 is new in 2023 and applies to third-party custody proceedings in family court. Many family practitioners may be surprised to learn that the Indian Child Welfare Act, United States Code, title 25, sections 1901 to 1963 (ICWA), and the Minnesota Indian Family Preservation Act, Minnesota Statutes, sections 260.751 to 260.835 (MIFPA), can apply to third-party custody matters.*

*In addition to ICWA and MIFPA applicability, note at the outset that pending child protection or permanency proceedings in juvenile court may preclude the family court from proceeding with a third-party custody petition. *Stern v. Stern*, 839 N.W.2d 96, 104 (Minn. App. 2013) (family court had no concurrent jurisdiction to consider third-party custody petition because of pending child protection and permanency proceedings in juvenile court); Minnesota Statutes, section 260C.101, subdivision 1 (juvenile court has original and exclusive jurisdiction in proceedings concerning any child who is alleged to be in need of protection or services, or neglected and in foster care). The*

*Minnesota Court of Appeals has also suggested that it would be appropriate to file a third-party custody proceeding in juvenile court under Minnesota Statutes, sections 260C.151 and 260.152. See Matter of the Welfare of Child of F.J.V., A21-0522, 2021 WL 4944677, at \*4 (Minn. App. Oct. 25, 2021) (holding that the matter was appropriately transferred to Tribal court under ICWA), rev. denied (Minn. Nov. 29, 2021); cert. denied sub nom. Halvorson v. Hennepin Cnty. Children's Servs. Dep't, 143 S. Ct. 2683 (2023).*

*Part (a) of Rule 315 requires a third-party custody petition to include important information on whether the child involved is an Indian child. If the issue is ignored and it turns out that the child is an Indian child, rulings may be subject to invalidation under United States Code, title 25, section 1914, or Minnesota Statutes, section 260.774, subdivision 2 (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 28), for noncompliance with any of the numerous requirements of ICWA or MIFPA, for example.*

*ICWA and MIFPA have slightly different definitions of an Indian child. Compare United States Code, title 25, section 1903(4), with Minnesota Statutes, section 260.755, subdivision 8. Both include a child who is a member of an Indian Tribe, but for a child who is eligible for membership in a Tribe, ICWA adds a requirement that the child is not only eligible for membership but must also be the biological child of a member of an Indian Tribe. The distinction may be irrelevant as MIFPA now provides that both MIFPA and ICWA are applicable without exception in any child placement proceeding involving an Indian child when custody is granted to someone other than a parent or an Indian custodian. Minnesota Statutes, section 260.752 (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 1). When both MIFPA and ICWA apply, note that ICWA dictates under United States Code, title 25, section 1921, that if MIFPA provides a higher standard of protection to the rights of the parent or custodian of an Indian child, the MIFPA standard would be applied.*

*Federal regulations in Code of Federal Regulations, title 25, section 23.107(b), direct that the court must confirm due diligence efforts in determining whether the child is an Indian child. This regulation is the basis for the requirement in part (a) of the rule directing that the petitioner must include a description of their due diligence in the petition. The petitioner's ongoing obligation to keep the court informed regarding the child's status as an Indian child is derived from the directive in Code of Federal Regulations, title 25, section 23.107(a), that "[s]tate courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child," and from the statement in Minnesota Statutes, section 260.761, subdivision 1 (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 16) that the petitioner's duty to inquire is ongoing.*

*Part (b) of Rule 315 recognizes that both case law and ICWA place a duty on the court to inquire of every participant at the commencement of the proceeding whether the participant knows or has reason to know that the child is an Indian child under either ICWA or MIFPA. See *In re M.R.P.-C.*, 794 N.W.2d 373, 379 (Minn. App. 2011). See Code of Federal Regulations, title 25, section 23.107, for details about how the in-court inquiry should be made, what it means for the court to have "reason to know" that a child is an Indian child, and details about how the court should proceed if there is "reason to know" the child is an Indian child but the court does not have sufficient evidence to determine whether the child is or is not an Indian child.*

*A continued inquiry by the court at subsequent proceedings can provide additional information about whether ICWA or MIFPA applies, especially from parties or participants who did not attend the initial hearing.*

*Part (c) of Rule 315 recognizes that there are numerous obligations imposed by ICWA and MIFPA on the parties and the court.*

*Notice under ICWA is extremely important. Under United States Code, title 25, section 1912(a), and Code of Federal Regulations, title 25, sections 23.11 and 23.111, in any involuntary third-party custody proceeding when the court knows or has reason to know that an Indian child is involved, and when the identity and location of the child's parent or Indian custodian or Tribe is known, the petitioner seeking third-party custody must notify the child's parents, Indian custodian, and Tribe of the pending proceeding. United States Code, title 25, section 1912(a). Notice must be by registered or certified mail with return receipt requested. Copies of the notices must also be sent to the Bureau of Indian Affairs Regional Director in like manner. In addition to but not as a replacement for such mailed notice, the court may direct personal service on the parents and Indian custodian. If the identity or location of the parent or Indian custodian and the Tribe cannot be determined, notice must be given to the Bureau of Indian Affairs Regional Director in like manner, and the Bureau then has 15 days after receipt of the notice to make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The required content of the notice is extensive and is included in the federal regulations cited above. Address and other information about the Bureau of Indian Affairs (BIA) Midwest Regional Office can be found on its website (<https://www.bia.gov/regionaloffices/midwest-region>). Petitioners will want to file copies of the notices and receipts with the court to support findings under Rule 315(c).*

*Notice under MIFPA as applicable to third-party custody matters is less clear. Minnesota Statutes, section 260.761, subdivisions 1 and 2, paragraphs (a) and (b), place Tribal notice obligations on the local social services agency or private child-placing agency, which may not be involved in a third-party custody proceeding. MIFPA requires an individual petitioner to provide notice related to an admit/deny hearing or potential preadoptive or adoptive placement, neither of which appears to apply to a third-party custody proceeding. Minnesota Statutes, section 260.761, subdivision 2, paragraph (d) (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 16). Nevertheless, MIFPA provides a general directive that Minnesota Statutes, sections 260.751 to 260.835, and ICWA are applicable without exception in any child placement proceeding involving an Indian child when custody is granted to someone other than a parent or an Indian custodian. Minnesota Statutes, section 260.752 (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 1). MIFPA also provides that the notice provisions in Minnesota Statutes, section 260.761, apply to involuntary child placement proceedings, and that an Indian child ten years of age or older, the Indian child's parents, the Indian custodian, and the Indian child's Tribe shall have notice of the right to participate in all hearings regarding the Indian child. Minnesota Statutes, section 260.771, subdivision 1d (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 27).*

*Scheduling can be impacted under ICWA. Under Code of Federal Regulations, title 25, section 23.11(c), when notice is given to the Bureau of Indian Affairs Regional Director, the Department of the Interior has 15 days after receipt to provide the requisite notice to the parent or Indian custodian and the Tribe. Further, under United States Code, title 25, section 1912(a), and Code of Federal Regulations, title 25, section 23.112(a), no involuntary third-party custody proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian and the Tribe, provided that the parent or Indian custodian or the Tribe shall, upon request, be granted up to 20 additional days to prepare for the proceeding.*

*Appointment of counsel is required by ICWA under United States Code, title 25, section 1912(b), in cases of indigency, for the child's parent or Indian custodian, and discretionary appointment of counsel for the child can also be made upon a finding that such appointment is in the best interests of the child. Although ICWA provides that the Secretary of the Interior pays reasonable fees and expenses when state law makes no provision for appointment of counsel in such proceedings, that is subject to availability of funds, which have not to date been made available to the Secretary. MIFPA requires appointment of counsel for the parent or parents of an Indian child or the Indian custodian who meets the requirements of Minnesota Statutes, section 611.17, and for any Indian*

*child ten years of age or older. Minnesota Statutes, section 260.771, subdivision 2b (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 27).*

*"Active efforts" are required by ICWA. Under United States Code, title 25, section 1912(d), a party seeking third-party custody of an Indian child must satisfy the 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 these efforts have proven unsuccessful. The petitioner's requirement to "satisfy" the court implies that the court must make findings regarding active efforts. Code of Federal Regulations, title 25, section 23.2, defines active efforts and includes examples of active efforts in the context of child protection proceedings. There is currently little guidance available regarding application of the ICWA active efforts requirement to third-party custody proceedings, where a social services agency is not typically a party to the case. One commentator suggests that examples of "active efforts" that can be utilized in private custody actions are:*

*(1) reintegration therapy with the child;*

*(2) drug and/or alcohol evaluations and/or rehabilitation services, including drug testing;*

*(3) mental health evaluations and subsequently recommended treatment or services;*

*(4) transportation of the parent or Indian custodian (or transportation of the child) if transportation is an issue for the parent or Indian custodian so that visits can occur during the pending of the proceeding;*

*(5) vocational rehabilitation services if obtaining or maintaining steady employment is an issue for the parent or Indian custodian;*

*(6) domestic violence classes for perpetrators; or*

*(7) domestic violence services for victims.*

*Lisa A. Schellenberger, An Overview of the Applicability of ICWA, in Colorado's Private Legal Actions Involving Non-Parents: A Guideline on Arguing for and Complying with the ICWA, 6, [https://www.denbar.org/LinkClick.aspx?fileticket=qqOZVIEFY\\_8%3D&portalid=18](https://www.denbar.org/LinkClick.aspx?fileticket=qqOZVIEFY_8%3D&portalid=18) (undated). The commentator adds that any services provided should be offered, arranged, and paid for by the petitioning non-parent. *Id.**

*MIFPA under Minnesota Statutes, sections 260.762, subdivisions 1 to 3 (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 18), 260.771, subdivision 1d (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 27), and 260.755, subdivision 1a (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 4), has a slightly different definition of active efforts (including pointing out that "active efforts" sets a higher standard than reasonable efforts), and places the burden on the petitioner to satisfy the 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 these efforts have proved unsuccessful.*

*The evidentiary standard in ICWA under United States Code, title 25, section 1912(e), and Code of Federal Regulations, title 25, section 23.121(a), for third-party custody is clear and convincing evidence, including required testimony of a qualified expert witness that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Federal regulations in Code of Federal Regulations, title 25, sections 23.121(c), 23.121(d), and 23.122, address the causal relationship of particular conditions in the home, and the qualifications of the required expert witness. MIFPA essentially repeats the ICWA standard in United States Code, title 25, section 1912(e). Minnesota Statutes, section 260.771, subdivision 6 (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 27). Although ICWA and*

*MIFPA under United States Code, title 25, section 1922; Code of Federal Regulations, title 25, section 23.113; and Minnesota Statutes, section 260.758 (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 15) allow an emergency removal or placement of an Indian child without a requirement of a qualified expert witness when removal is necessary to prevent imminent physical damage or harm to the child, the removal or placement must terminate immediately when it is no longer necessary to prevent the imminent damage or harm, and the court must promptly hold a hearing on whether the emergency removal continues to be necessary. MIFPA also directs that no such emergency removal or placement can extend beyond 30 days unless the court finds by a showing of clear and convincing evidence that: (1) continued emergency removal or placement is necessary to prevent imminent physical damage or harm to the Indian child; (2) the court has been unable to transfer the proceeding to the jurisdiction of the Indian child's Tribal court; and (3) it has not been possible to initiate a child placement proceeding with all of the protections of MIFPA, including obtaining the testimony of a qualified expert witness. *Id.**

*In evaluating the best interests of the child to determine issues of custody and parenting time, Minnesota Statutes, section 518.17, requires the court to consider and evaluate all relevant factors. If a child is an Indian child as defined by ICWA, in addition to evidentiary standards (including expert witnesses) and placement preferences, policy statements in United States Code, title 25, section 1902, explain that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." If a child is an Indian child as defined by MIFPA, the "best interests of an Indian child" is defined in Minnesota Statutes, section 260.755, subdivision 2a, to mean: "compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act to preserve and maintain an Indian child's family. The best interests of an Indian child support the child's sense of belonging to family, extended family, and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe." Policy statements in MIFPA also include that the state of Minnesota has long recognized the importance of Indian children to their Tribes, not only as members of Tribal families and communities, but also as the Tribe's greatest resource as future members and leaders of the Tribe. Minnesota Statutes, section 260.754 (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 3). MIFPA declares that the vitality of Indian children in the state of Minnesota is essential to the health and welfare of both the state and the Tribes and is essential to the future welfare and continued existence of the child's Tribe. *Id.**

*Consent of any parent or Indian custodian to third-party custody under ICWA, United States Code, title 25, section 1913(a), or MIFPA, Minnesota Statutes, section 260.765, subdivision 3a (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 23), shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction. In addition, the presiding judge must find that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also find that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given before, or within ten days after, the birth of the Indian child shall not be valid. Pursuant to ICWA, United States Code, title 25, section 1913(b), and MIFPA, Minnesota Statutes, section 260.765, subdivision 4 (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 24), any parent or Indian custodian may withdraw consent at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.*

*Placement preferences under ICWA are set forth in United States Code, title 25, sections 1915(b) to 1915(d), and in MIFPA in Minnesota Statutes, section 260.771, subdivisions 1b and 7, paragraph*

*(a) (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 27). Both ICWA regulations and MIFPA limit the factors to consider in deciding whether good cause exists to deviate from the placement preference order, with considerable overlap between the two legal sources. Compare Code of Federal Regulations, title 25, section 23.132, with Minnesota Statutes, section 260.771, subdivision 7, paragraph (j), clause (2) (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 27).*

*Intervention as of right at any point in the third-party custody proceedings is provided under ICWA, United States Code, title 25, section 1911(c), to the Indian custodian of the child and the Indian child's Tribe. MIFPA's intervention rights apply to the Indian child's Tribe, parent or parents, and Indian custodian under Minnesota Statutes, section 260.771, subdivision 2a (effective Aug. 1, 2023; see Laws 2023, chapter 16, section 27).*

*Transfer obligations differ under ICWA depending on whether the child resides or is domiciled within the reservation of the Tribe. Under United States Code, title 25, section 1911(a), jurisdiction is exclusive with the Tribe (unless other federal law provides otherwise) when the child resides or is domiciled within the reservation, or is a ward of the Tribal court. Under United States Code, title 25, section 1911(b), when the Indian child's residence or domicile is not within the reservation, in the absence of good cause to the contrary, the court shall transfer the proceeding to the jurisdiction of the Tribe, absent objection by either parent, upon petition of either parent or the Indian custodian or the Tribe. Under Code of Federal Regulations, title 25, section 23.115, an Indian child's parent, Indian custodian, or Tribe may request, at any time, either orally on the record or in writing, that the court transfer the third-party custody proceeding to Tribal court. MIFPA essentially repeats these same provisions. Minnesota Statutes, section 260.771, subdivisions 1 and 3.*

*Part (d)(1) of Rule 315 is meant to provide consistent access to notices provided by the petitioner to, and the responses from, Indian Tribes regarding membership or eligibility for membership in an Indian Tribe. These records are not public in juvenile child protection proceedings. Minn. R. Juv. Prot. P. 8.04, subd. 2(k). Parties must submit the notice and the response from the Tribe as non-public documents under a separate Form 11.2 Cover Sheet for Non-Public Documents or, if electronically filed using the E-Filing System, using a specific filing code in the E-Filing System which defaults the document to Confidential or Sealed, and designating the documents as confidential or sealed in the E-Filing System before transmitting it to the court as required by Minn. Gen. R. Prac. 11.03(a) and 14.06(a). This does not mean that a third-party custody petition discussing whether the child is an Indian child is itself non-public as Rules of Public Access to Records of the Judicial Branch promulgated by the Minnesota Supreme Court ("Access Rules") allow the parties and the court to mention the contents of certain otherwise non-public documents in their publicly accessible pleadings or documents such as motions and orders. Minn. R. Pub. Access 4, subdivision 4. Under the Access Rules, notices to, and responses from, Indian Tribes also become accessible to the public upon formal admission into evidence in a testimonial-type proceeding that is open to the public. Minn. R. Pub. Access 8, subdivision 5(a).*

*Part (d)(2) of Rule 315 is a catch-all intended to remind litigants that public access to judicial branch records is governed by the Access Rules. A table identifying non-public case records is posted on the main judicial branch website ([www.mncourts.gov](http://www.mncourts.gov)) alongside the Access Rules under the Court Rules tab.*