

State-Tribal Cooperation and the Indian Child Welfare Act

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Background

The Indian Child Welfare Act (ICWA or the Act) was enacted by Congress in 1978 in response to the disproportionately high number of Indian children being removed from their homes and placed in non-Indian foster care or adoptive homes. The history behind this phenomena is extensive and has roots in federal policy that contributed to the breakdown of Indian families and communities.

In the mid- to late-1800's the Bureau of Indian Affairs (BIA) began sending Indian children to boarding schools in an attempt to force assimilation with the non-Indian population in the United States. Over the years, this had the effect of separating children from their families and weakening ties to their communities. One hundred years later, the Indian Adoption Project was established by the BIA and the Child Welfare League of America to provide non-Indian adoptive homes for Indian children whose parents were thought to be incapable of providing a suitable home. As a result, studies conducted from 1969 to 1974 by the Association on American Indian Affairs found that 25 to 35 percent of all Indian children were being removed from their homes.¹ These policies, combined with placement recommendations made by state child welfare workers who lacked an understanding of the communal nature of Indian communities and the significant role of the extended family, led to rates of out-of-home placements so severe that some came to term it as a form of cultural genocide.

Broadly speaking, the Indian Child Welfare Act was designed to prevent the breakdown of Native American families, preserve tribal culture, and ensure tribal jurisdiction in order to respect and strengthen tribal sovereignty. ICWA applies to Indian children who are the subject of a child welfare proceeding (foster care and adoption placements or termination of parental rights) and are members of a federally-recognized Indian tribe or are eligible for membership in such a tribe. ICWA grants tribes jurisdiction over such cases, establishes minimum federal standards for the removal of Indian children from their homes and establishes a preference system when out-of-home placement is necessary. In cases in which the state assumes jurisdiction, it is necessary for state child welfare caseworkers and court officials to abide by the requirements of the Act. The key provisions of ICWA are indicated in figure 1.

Figure 1. Key Provisions of the Indian Child Welfare Act

Definitions of a child subject to ICWA

ICWA defines a child as Indian if he or she is a member of a federally-recognized tribe or if he or she is eligible for tribal membership and is the biological child of a tribal member. A child who has some American Indian blood, but not enough to qualify for membership in a federally-recognized tribe, or who is a member only of a state-recognized tribe, is not subject to ICWA.

Definitions of child custody proceedings

ICWA applies to the following child custody proceedings: (1) involuntary foster care placements; (2) petitions to terminate parental rights; (3) pre-adoptive placements; and (4) adoptive placements. ICWA does not apply to custody arrangements arising from divorce proceedings or placements by the juvenile justice system when a child commits an act that would be deemed a crime if committed by an adult.

Jurisdiction

American Indian tribes with active tribal courts have exclusive jurisdiction over child welfare proceedings for an American Indian child who resides on the tribal reservation.

States and tribes share jurisdiction over child welfare proceedings involving a child subject to ICWA who does not reside on the tribal reservation. If a tribe or parent requests that a child custody proceeding be transferred to the jurisdiction of the tribe, the proceeding should be transferred to tribal jurisdiction, unless either parent objects to the transfer or good cause exists to not transfer the case. The tribal court has the right to decline any transfer request.

Notification and intervention

A tribe must be notified about any involuntary child welfare proceeding in state courts involving a child subject to ICWA and has the right to intervene in such cases.

A tribe also has the right to intervene in cases in which a parent voluntarily relinquishes custody of a child subject to ICWA, but ICWA does not specifically require that tribes be notified about these cases.

Placement in foster care

A child subject to ICWA cannot be placed in foster care unless clear and convincing evidence exists that continued custody by the parent is likely to result in serious damage to the child.

Placement preferences

An American Indian child placed in foster care or a pre-adoptive placement shall be placed in the least restrictive, most family-like setting in which the child's special needs, if any, may be met. The child shall be placed within reasonable proximity to his or her home and preference shall be given, absent good cause to the contrary, to a placement with:

1. a member of the child's extended family;
2. a foster home, licensed, approved, or specified by the tribe;
3. an American Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
4. an institution approved by a tribe or operated by an American Indian organization that has a program suitable to meet the child's needs.

When placing an American Indian child for adoption, preference shall be given, absent good cause to the contrary, to a placement with:

1. a member of the child's extended family;
 2. other member's of the child's tribe; or
 3. other American Indian families.
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Source: Pub. L. No. 95-608 & United States Government Accountability Office, 2005.

State Implementation of ICWA

ICWA is federal law and states are required to apply it. Since the Act's 1978 implementation, its effectiveness and state compliance with its requirements have been unclear. Recent research has uncovered problems related to the states' success in applying the Act, but no nationwide, systematic data is available to determine the extent and exact nature of the problems that have surfaced. We do know, however, that there are a number of overarching issues that have caused implementation problems throughout the U.S. These include difficulty in determining a child's Indian heritage and tribal eligibility, lack of appropriate foster and adoptive homes, tribal access to federal child

welfare funding sources, lack of tribal institutional capacity, incompatible state laws, and undeveloped or poor state-tribal relationships.

A number of studies, sponsored by the Casey Family Programs and the National Indian Child Welfare Association, have investigated state Title IV-B Child and Family Services Plans (CFSP) and Annual Progress and Services Reports (APSR) to determine the level of state compliance with the Indian Child Welfare Act. Under Title IV-B of the Social Security Act, states and tribes receive federal funding for a number of child welfare services including pre-placement preventative services to strengthen families and avoid out-of-home placement, services to prevent abuse and neglect, family reunification and adoption services.² States are required to include a specific plan for ICWA compliance in their CFSP's.

In general, a nationwide analysis revealed that state plans for ICWA compliance were vague,³ and state-specific findings turned up mixed results. For example, there is a high level of compliance among child welfare workers in North Dakota in determining if the child is a member of a tribe or eligible for membership, although ICWA placement preferences were not followed--as two-thirds of the state records indicated that Indian children were placed in non-Indian foster homes. Additionally, state child welfare workers typically did not communicate with the tribal courts to determine if any previous proceedings involving the child had taken place, thereby rendering them a ward of the tribal court and outside state jurisdiction.⁴ Similarly, research indicates Arizona has taken positive steps to promote an understanding of ICWA among the state's child welfare workers and to promote compliance in state court proceedings, although there are a number of other areas related to ICWA implementation that are still in need of improvement. A survey of state child welfare workers revealed that 87 percent reported that the state had provided training on ICWA at the beginning of their employment, although ongoing, systematic training occurs infrequently. A high percentage of children are placed within the ICWA preferences for out-of-home placement, however.⁵ The study, conducted in 2002, also revealed issues arising from incompatible state laws that impede the state's ability to comply with ICWA's tribal and parental notification requirements. For example, Arizona's Model Court Act was enacted to ensure that children were moved through child welfare court proceedings as quickly as possible, but the timeframe imposed by this act does not allow enough time for state officials to notify and collaborate with all the necessary parties. It does not appear that there have been attempts to modify the act in the years since the study was conducted, however. Finally, a number of state and tribal officials reported that they are interested in seeing these cases handled by the tribal courts more often, but a lack of resources and appropriate tribal foster/adoptive homes prevented this from happening more often.⁶

Barriers to Successful ICWA Implementation

Determining Tribal Eligibility & Lack of Native Foster and Adoptive Homes

In order to properly apply ICWA the states must first determine if the child involved is an Indian child who falls under the protection of the Act. As previously mentioned, only children who are members of a federally-recognized tribe or are eligible for membership

in a federally-recognized tribe fall under the jurisdiction of ICWA. A child's ethnicity or cultural heritage is not always easily determined, and in some cases, the parents may not be aware of or forthcoming with this information. This can slow down the processing of these cases and delay temporary and permanent child placements. The number of out-of-home placements and the duration of the stay are all effected by a state's ability to determine whether the child is subject to this law, the availability of American Indian foster and adoptive homes and the level of state-tribal cooperation in processing these cases.⁷

In addition, a nationwide study by the Government Accountability Office (GAO) revealed that a number of states reported difficulty in complying with ICWA's preference system regarding out-of-home placements due to a lack of licensed American Indian foster and adoptive homes. This problem is tied to Native families' inability to meet state licensing standards necessary to be eligible to receive financial assistance for caring for a foster child, the failure of state licensing standards to recognize communal living situations common in Native communities (thereby excluding appropriate Indian caretakers), lack of tribal access to federal (Title IV-E) funds needed to reimburse foster families, and a failure of states to actively recruit Native families to provide foster homes.⁸

Title IV-E Funding

The federal government provides critical funding to states for foster care and adoption services for economically disadvantaged children and children with special needs under Title IV-E of the Foster Care Program and Adoption Assistance Program. This money provides for:

- monthly maintenance payments for eligible children in foster care;
- monthly assistance payments for special needs children in adoptive placements;
- administration costs associated with placement of eligible children; and
- training costs for personnel administering programs for foster and adoptive parents.⁹

Tribes do not have equal access to this funding stream. In order for tribes to take advantage of these funds, they must enter into agreements with the state governments. The results of these state-tribal agreements vary--with some being effective, while others are more problematic.¹⁰ In either case, however, the funding allocation does not put the tribe on equal footing with the states, and can serve as a barrier to providing effective services to children under a tribe's jurisdiction--despite the fact that the program was intended to serve all eligible children. Given the fact that one impediment to the successful implementation of ICWA is the lack of tribal resources and tribal institutional capacity, the nature of this funding allocation--and the barriers it produces--pose a significant problem.

Another problem associated with Title IV-E funding is the fact that it cannot typically be used to provide financial assistance for kinship care. Kinship cases are those in which the child has been removed from the home and is residing with an extended family member. This type of care is often provided on an informal basis and the relative caretaker is not

licensed to provide a foster home. Considering that the out-of-home placement preferences established by ICWA prioritize placement with family members, and that the structure of Title IV-E funding does not allow for financial support to these families unless they are licensed by the state or tribe, the funding requirements and the goals of the Act are in conflict. This is an issue not only for the tribes, but also for the states. Non-Indian children who are not subject to the provisions of the Act also frequently reside with family members when it is not possible for them to remain in their home, and some states have established placement preferences along these lines. This situation can pose a financial burden for extended family who are attempting to keep these children out of the foster care system, although they are not able to receive federal financial assistance to help them care for these children. States often use their Temporary Assistance to Needy Families (TANF) or state general funds to provide support to these families,¹¹ although this support is subject to state budget constraints.

Additional Barriers to Successful ICWA Application

Another barrier to the successful application of ICWA is the lack of tribal institutional capacity. ICWA provides exclusive tribal jurisdiction over cases involving Indian children who are members of the tribe or eligible for membership and who reside on the reservation. The Act provides for concurrent state and tribal jurisdiction in cases involving eligible Indian children who are not domiciled on the tribe's reservation. It is not possible for tribes to exercise jurisdiction over these cases if there is not a tribal court system in place capable of handling them, however. Funding constraints are one of the main reasons tribes lack the institutional capacity to handle ICWA-eligible cases. State agencies often will assume jurisdiction over child custody proceedings involving Indian children due to the fact that many tribal governments lack the capacity to provide child welfare services and tribal courts are often forced to rely on the state to process these cases.¹² When this happens, it is important that state court judges and child welfare caseworkers are knowledgeable of the Act and abide by ICWA's requirements regarding "active efforts" to prevent the breakup of the family in the first place, and abide by ICWA's placement preferences when out-of-home placement is in the best interest of the child. Unfortunately this is not always the case. If the child's tribe does not have the capacity to process the case, it is imperative that the state provide appropriate services. Providing state officials with proper training on applying ICWA and requiring state court and state agency oversight is one tool to ensuring that the state is abiding by the goals of the Act.

Incompatible state laws are another possible barrier to the state's ability to carry out the goals of the Act. As mentioned above, Arizona's Model Court Act was enacted to move child welfare proceedings through the state court system as quickly as possible. The timeframe established under this act and the timeframe for notification requirements under ICWA are not compatible. As a result, there is often not enough time for state and tribal officials to adequately collaborate on an ICWA case.¹³ Other states may wish to examine their own laws to determine if there are state law provisions that impede ICWA compliance and make necessary revisions.

Recent challenges to the legality of ICWA can also impede tribal involvement in cases involving Indian children subject to the Act. Arguments have been made that ICWA is unconstitutional on grounds that it violates state prerogative under the 10th Amendment. The state legislatures have the option of countering this argument by adopting legislation that establishes a state Indian child welfare act. To date, 14 states have adopted ICWA implementation legislation. State Indian child welfare laws promote compliance with the goals of the federal Act (through incorporation into the state's children's codes) without state court judges having to apply federal law.¹⁴

Finally, ICWA-related research indicates that when state and tribal governments have good working relationships, the goals of the Act are more easily fulfilled. Without this, the cooperation necessary to carry out the requirements of ICWA is difficult to sustain. Having an open communication process between state and tribal officials and knowing who to contact within each system can help the state more readily obtain information on a child's tribal status so as to determine ICWA eligibility and make appropriate out-of-home placements. It can also help the tribe stay connected to state court proceedings and better understand whether or not the state is meeting the needs of Indian children. Frequent communication will also enable the parties to have a clear understanding of their roles and responsibilities in processing ICWA cases, particularly where state-tribal child welfare agreements are concerned. Good relationships that result in a higher degree of understanding of the other's system of government and institutional processes promote trust that the child welfare proceeding will be handled in an appropriate manner, whether it is processed in state or tribal court, and can help resolve or prevent jurisdictional disputes.

Legislative and Judicial Mechanisms to Improve Indian Child Welfare Outcomes

State Legislation

A variety of state legislation has been introduced and enacted over the last few years to improve the states' compliance with ICWA. Due to its vague nature, some states have taken steps to affirm the implementation of the federal act, clarify the roles and responsibilities of state officials regarding Indian child welfare cases or enact state versions of ICWA that further clarify state responsibilities. State legislators may wish to examine their state's compliance with ICWA and introduce legislation designed to remedy some of the common barriers to successful implementation discussed above. In addition, some states have established working groups to monitor the state's activities related to Indian child welfare issues. Should it be determined that such a group would be helpful to a state's effort to comply with the Act, the legislature may wish to support or require its creation. Arizona and Colorado both have established state-tribal working groups. Each group is comprised of officials from around the state who monitor state ICWA efforts.

Legislation was considered regarding the tribal notice requirements under ICWA during the 2008 sessions. For example, the Colorado legislature considered a bill (HB 1206) that would amend the state statutes to allow tribal notice to be provided by certified mail. In its current form the statute requires that such notice be provided by registered mail.

The bill was passed by the House and went onto the Senate for further consideration in March. The Senate committee considered testimony illustrating how the weaker notice standard would impede a tribes' ability to participate in state court proceedings and would potentially subvert the intent of the federal Act. As a result, the bill was postponed indefinitely by the Senate Committee on Local Government.

During the 2007 legislative sessions, at least three states considered a number of bills that would improve child welfare services for Indian children, though the measures were without success. At the department level however, a state-tribal agreement was formed to clarify and uphold state and tribal responsibilities in carrying out the federal act. This agreement was established between the Minnesota department of human services and the 11 tribes within the state. It states that the department and the tribes agree that Native American children should be kept with their families whenever possible, that Native American children who must be removed from their home should be placed with a family member or member of their tribe, and that the department will defer to tribal recommendations regarding custody matters involving the tribe's children as long as the recommendations are consistent with the state and federal Indian child welfare acts. And while an investigation of legislation introduced during the 2006 legislative sessions did not reveal any bills designed to address child welfare issues as they apply to Native American children, five states introduced at least one bill designed to increase state compliance with ICWA and to improve child welfare services provided to Indian children through the state system in 2005. Similarly, in the 2003 and 2004 sessions, there were seven bills introduced in states across the U.S. designed to address the implementation of ICWA. A summary of these measures is included in Figure 2.

Figure 2.
State Indian Child Welfare Legislation

2008 Legislation

South Dakota HB 1302 - While not exclusively relating to Indian children, the bill requires the state Division of Child Protection Services to provide information to the relative of a child in state custody, who has indicated a desire to take temporary or permanent placement of the child, on the steps required for the relative to be considered for placement. Status: Enacted.

2007 Legislation

Minnesota SF 1257 & HF 1524 - Would appropriate money to the commissioner of human services to expand the American Indian child welfare project to include the Red Lake Band of Chippewa Indians. Status: Not Enacted.

New Mexico SB 1104 - Would appropriate money to expand child abuse, child neglect and child abandonment case management and social worker positions in Navajo communities. Status: Not Enacted.

South Dakota HB 1212 - Would require the department of social services to seek sufficient funding from the U.S. Congress, other federal entities, and any other lawful source to provide for the implementation of the federal Indian Child Welfare Act. Status: Not Enacted.

2005 Legislation

Maine LD 415 (2005) - Requires the Department of Health and Human Services to comply with the Indian Child Welfare Act. Status: Not Enacted.

Maine SB 139 (2005) - Would ensure that the Department of Health and Human Services comply with the Federal Indian Child Welfare Act. Status: Enacted.

Montana SB 86 (2005) - Clarifies definitions relating to the implementation of the federal Indian Child Welfare Act. Status: Enacted.

New Mexico HB 223 (2005) - Requires the consideration of an Indian child's cultural needs before she/he undergoes child placement. Status: Passes House and Senate. Pocket veto by Governor.

South Dakota HB 1226 (2005) - Establishes provisions regarding the custody and placement Indian children. Status: Not Enacted.

South Dakota HB 1185 (2005) - Would implement the federal Indian Child Welfare Act. Status: Not Enacted.

Washington HB 2148 (2005) - Would permit Indian tribes to license agencies, located on or near the reservation, for foster care placement. Status: Not Enacted.

2004 Legislation

Arizona SB 1055 (2004) - Authorizes tribal child welfare agencies to send children to independent living facilities. Status: Enacted.

South Dakota SB 211 (2004) - Implements the federal Indian Child Welfare Act. Status: Enacted.

Washington HB 3051 (2004) - Revises notice provisions for proceedings involving the Indian Child Welfare Act to all tribes that are affiliated with the child. Status: Enacted.

2003 Legislation

California SB 947 (2003) - Clarifies state responsibilities related to Indian child welfare cases. Status: Enacted.

Iowa SB 354 (2003) - Implements the federal Indian Child Welfare Act. Status: Enacted.

South Dakota HB 1230 (2003) - Provides for a study of Native American children in foster care. Status: Not Enacted.

Washington HB 2000 (2003) - Revises provisions pertaining to third-party custody proceedings involving the Indian Child Welfare Act. Status: Not Enacted.

Source: NCSL, 2008.

Federal Activity

At the Congressional level, legislation is currently pending that would increase tribes' ability to provide child welfare services to their members. The Tribal Foster Care and Adoption Act of 2007 (S. 1956) was introduced by Senator Max Baucus to amend part E of title IV of the Social Security Act. This bill would provide tribes with direct access to federal funding for foster care services and would authorize tribes to administer Title IV-E funded foster care programs. The bill also would amend the John H. Chafee Foster Care Independence Program to allow tribes direct access to the program's funding. The legislation would, in effect, remove much of the inequity between states and tribes regarding Title IV-E foster care funding and programmatic authority. The legislation also would ensure that Indian children in Title IV-E funded foster care programs are eligible for Medicaid.

This bill is still in the beginning stages of the legislative process with the last major action occurring in August 2007 when it was referred to the Senate Committee on Finance where it awaits further consideration.

CASA Programs

State support of judicial mechanisms that facilitate state-tribal cooperation, such as the Court Appointed Special Advocates program (CASA), is another tool for improving ICWA implementation in the state system. The CASA program trains volunteers--or advocates--to be appointed to speak on behalf of the best interest of children involved in abuse and neglect proceedings in the juvenile court system. CASA programs exist in every state and in several tribal courts across the country. As of October 2007 there were 14 tribal court programs located in seven states.¹⁵ Tribal CASA volunteers are trained to be knowledgeable about the tribal community and the tribal court system in which they work. This knowledge can make them good liaisons between the state and tribal court systems, particularly in cases in which a transfer of jurisdiction is taking place.¹⁶ CASA volunteers, whether in the state or tribal court system, can be essential in ensuring that the needs of the child are met and information pertaining to the case is not overlooked by overburdened child welfare and judicial officials. State support of local CASA programs can expand the pool of volunteers available to represent abused and neglected children and increase the number of tribal CASA volunteers available to serve as an information link between the state and tribal court and child welfare systems, which may not have a positive working relationship.¹⁷

Looking Ahead

The health, safety and well-being of all children, Native and non-Native alike, is critical to the future stability and success of this country. Public officials at all levels of government have an interest in seeing that child welfare services are effective and culturally-competent, and that child welfare court proceedings are handled in a way that ensures that the best interest of the child is served. The implementation of ICWA is one way to see that the needs of Native American children are met. There are a number of options available to state legislators to increase state compliance with the federal Act and to improve outcomes for Native children involved in child welfare proceedings. In doing so, states may wish to consider the following policy options.

- Adopting legislation clarifying the requirements of the federal Indian Child Welfare Act and encouraging state-tribal cooperation.
- Mandating education for child welfare case workers and judges about the Indian Child Welfare Act and providing funding for on-going training.
- Encouraging the state to provide culturally-competent child welfare services.
- Sponsoring forums of child welfare case workers, attorneys, judges and tribal program officials so legislators can hear from practitioners about impediments to state-tribal cooperation regarding the implementation of the Indian Child Welfare Act.
- Supporting cross-court educational efforts and staff training.
- Supporting state-tribal Title IV-E agreements to ensure that tribes have access to federal child welfare funds. These agreements should consider the need to develop tribal institutional capacity.
- Urging the passage of federal legislation that would provide tribes with direct access to Title IV-E funds.

- Creating and supporting state-tribal liaison positions to help child welfare workers and court officials communicate and collaborate more effectively.
- Supporting tribal CASA programs to train volunteers to navigate the state and tribal court systems while representing children involved in a child welfare proceeding.
- Requiring periodic legislative review to ensure that full faith and credit is given to tribal court orders.
- Requiring a legislative review of state ICWA compliance or study of Native American children involved in the state child welfare system so problems in the system can be detected.
- Requiring a periodic legislative review of state-tribal child welfare agreements in the state.
- Reviewing and revising state laws that conflict with ICWA or impede its implementation.
- Creating state-tribal working groups to monitor and address the state's ICWA-related activities and promote state-tribal cooperation. Requiring the group to make periodic reports to the legislature.
- Requiring a government-to-government approach to all agreements and contracts formed between the state and the tribes.

¹ Brown, Eddie, et. al., *Tribal/State Title IV-E Intergovernmental Agreements: Facilitating Tribal Access to Federal Resources* (Portland, OR: National Indian Child Welfare Association, 2000), pg. 11.

² Brown, Eddie, et. al., *Title IV-B Child and Family Services Plans: An Evaluation of Specific Measures Taken by States to Comply with the Indian Child Welfare Act* (Portland, OR: National Indian Child Welfare Association, 2001) pg. 12-13.

³ *Ibid.*, pg. 6.

⁴ Jones, B.J., et. al., *Indian Child Welfare Act: A Pilot Study of Compliance in North Dakota* (Portland, OR: National Indian Child Welfare Association, 2000) pg. 6-7.

⁵ Brown, Eddie, et.al., *The Indian Child Welfare Act: An Examination of State Compliance in Arizona* (Portland, OR: National Indian Child Welfare Association, 2002) pg. 11-13, 19.

⁶ *Ibid.*, pg. 13, 16.

⁷ *Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States*, (Washington, D.C.: Government Accountability Office, 2005), pg. 3.

⁸ *Ibid.* pg. 21-22, 52.

⁹ *Tribal/State Title IV-E Intergovernmental Agreements*, pg. 13.

¹⁰ *Tribal/State Title IV-E Intergovernmental Agreements*, executive summary.

¹¹ Steve Christian, Program Director, Child Welfare Program, National Conference of State Legislatures, e-mail communication, May 3, 2005.

¹² *Tribal/State Title IV-E Intergovernmental Agreements*, pg. 23.

¹³ *The Indian Child Welfare Act: An Examination of State Compliance in Arizona*, pg., 13.

¹⁴ *Indian Child Welfare Act: 30 Year Update*, 33rd Annual Federal Bar Association Indian Law Conference, April 11, 2008, Albuquerque, NM.

¹⁵ National Court Appointed Special Advocates Association, www.casenet.org

¹⁶ Big Boy, Marla Jean, *CASA Advocacy in Tribal Courts* (Seattle: Wash.: National Court Appointed Special Advocates Association) www.nationalcasa.org/JudgesPage/Article_CASAadvocacyCourts_0304.htm

¹⁷ *Ibid.*