

**Rule 46. Relief From Order****46.01 Clerical Mistakes**

Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time upon its own initiative or upon motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected with leave of the appellate court.

**46.02 Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud**

Upon motion and upon such terms as are just, the court may relieve a party or the party's legal representatives from a final order or proceeding, including a default order, and may order a new trial or grant such other relief as may be just for any of the following reasons:

- (a) mistake, inadvertence, surprise, or excusable neglect;
- (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial;
- (c) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (d) the judgment is void; or
- (e) any other reason justifying relief from the operation of the order.

The motion shall be made within a reasonable time, but in no event shall it be more than ninety (90) days following the service of notice by the court administrator of the filing of the court's order. (Amended effective January 1, 2004; amended effective January 1, 2007.)

**46.03 Invalidation of Action Under ICWA**

**Subdivision 1. Petition or Motion.** Pursuant to 25 U.S.C. section 1914, any Indian child who is the subject of any action for foster care placement or termination of parental rights, any parent or Indian custodian from whose custody an Indian child was removed, or the Indian child's tribe may seek to invalidate the action upon a showing that such action violates the Indian Child Welfare Act, 25 U.S.C. sections 1911-1913.

(a) **Motion.** A motion to invalidate may be brought regarding a pending juvenile protection matter.

(b) **Petition.** A petition to invalidate may be brought regarding a juvenile protection matter in which juvenile court jurisdiction has been terminated.

**Subd. 2. Form and Service.** A motion or petition to invalidate shall be in writing pursuant to Rule 15.01 and shall be filed and served pursuant to Rule 15.02. Both a motion and a petition to invalidate shall be processed by the court as a motion. Upon receipt of a petition to invalidate a proceeding in which juvenile court jurisdiction has been terminated, the court administrator shall re-open the original juvenile protection file related to the petition.

**Subd. 3. Hearing.** Within thirty (30) days of the filing of a motion or petition to invalidate, the court shall hold an evidentiary hearing of sufficient length to address the issue raised in the motion or petition. A motion filed thirty (30) or more days prior to trial shall be heard prior to trial and the decision shall be issued prior to trial. A motion filed less than thirty (30) days prior to trial shall not delay commencement of the trial and the decision shall be issued as part of the trial decision.

**Subd. 4. Findings and Order.** Within fifteen (15) days of the conclusion of the evidentiary hearing on the motion or petition to invalidate, the court shall issue findings of fact, conclusions of law, and an order regarding the petition or motion to invalidate.

(Added effective January 1, 2004; amended effective August 1, 2009.)

#### ***2008 Advisory Committee Comment***

*Grounds for Petition to Invalidate.* Rule 46.03 establishes a procedure for filing a petition or motion to invalidate an action under the Indian Child Welfare Act (ICWA). 25 U.S.C. section 1914. Section 1914 of the ICWA permits an Indian child, the Indian child's parent or Indian custodian, or the Indian child's tribe to petition the court to invalidate any action for foster care placement or termination of parental rights upon a showing that the action violated the ICWA section 1911 (dealing with exclusive jurisdiction and transfer to tribal court), section 1912 (dealing with notice to the Indian child's tribe regarding the district court proceedings, appointment of counsel, examination of reports, and testimony of a qualified expert witness), or section 1913 (dealing with voluntary consent to foster care placement and termination of parental rights). Section 14 of the ICWA is silent about the time for bringing a petition to invalidate, the relief available, and whether relief is available even if there was no objection below.

*Time Limit for Filing Petition to Invalidate.* Although there is no time limit for bringing a petition to invalidate contained in section 1914 of the ICWA, the Alaska Supreme Court has held that a challenge to an adoption under section 1914 shall be brought within a year. *In re Adoption of Erin G.*, 140 P.3d 886, 891 (Alaska 2006). In a slightly later case, the Alaska Supreme Court suggested that the time limit in an ICWA challenge brought under 42 U.S.C. section 1983 would be two years. *Dept. of Health & Soc. Servs. v. Native Village of Curyung*, 151 P.3d 388, 411 (Alaska 2006). The authors of *A Practical Guide to the Indian Child Welfare Act* do not cite any other cases, but they disagree that there should be time limits which vary from state to state. *Native American Rights Fund, A Practical Guide to the Indian Child Welfare Act* 161 (2007). The authors of *The Indian Child Welfare Act Handbook* recommend using the two-year time limit contained in section 1913(d). *B.J. Jones, M. Tilden & K. Gaines-Stoner, The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* 156 (2d ed. 2008).

*Reach of Relief Available.* There are a number of cases which hold that section 1914 of the ICWA is not available to attack an ICWA violation occurring during the foster care placement proceeding (i.e., child in need of protection or services (CHIPS)) as part of the termination of parental rights proceeding. *In Re Welfare of the Children of S.W., et al., Parents*, 727 N.W.2d 144 (Minn. Ct. App. 2007); *Interest of J.D.B.*, 584 N.W.2d 577 (Iowa Ct. App. 1998); *Interest of J.W.*, 528 N.W.2d 657, 661 (Iowa Ct. App. 1995); *D.E.D. v. State*, 704 P.2d 774, 782 (Alaska 1985); *In Re M.E.M.*, 679 P.2d 1241, 1243-44 (Mont. 1984). Although these courts have rejected this sort of collateral attack, there is some suggestion in all four of these cases that a different decision might have resulted if the termination of parental rights judge had made extensive use of the evidence introduced in the foster care placement proceeding in which the violations occurred. The North Dakota Supreme Court appears to agree. See *B.R.T. v. Social Serv. Bd.*, 391 N.W.2d 594, 600 n.10 (N.D. 1986).

The *Native American Rights Fund* cites three cases that, it says, compel vacation of the adjudication for specific ICWA violations: *Interest of H.D.*, 729 P.2d 1234, 1240-41 (Kansas Ct. App. 1986); *In Re L.A.M.*, 727 P.2d 1057, 1060 (Alaska 1986); and *Morgan v. Morgan et al.*, 364 N.W.2d 754, 758 (Mich. Ct. App. 1985). *Native American Rights Fund, A Practical Guide to the Indian Child Welfare Act* 162 (2007). But none of these three cases invalidates a subsequent termination of parental rights because of ICWA violations occurring during the foster care placement proceeding.

*In an American Bar Association treatise on the subject, the authors argue a broader role for section 1914, including collateral attack in federal court. See B.J. Jones, M. Tilden & K. Gaines-Stoner; The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children, pp. 153-56 ) (2d ed. 2008).*

*Necessity of Objection During Trial Court Proceeding. Although it is not a section 1914 case, Matter of L.A.M., 727 P.2d 1057, 1059 (Alaska 1986), specifically holds that objection during the trial court proceeding is not required to preserve an objection on appeal to a section 1912 violation. The Native American Rights Fund lists two cases which hold that an objection below is not necessary to seek relief under section 1914: In re S.R.M., 153 P.3d 438 (Colo. Ct. App. 2006); and In re S.M.H., 103 P.3d 976, 982 (Kan. Ct. App. 2005). Native American Rights Fund, A Practical Guide to the Indian Child Welfare Act 161 (2007).*