



# TRIBAL LAW AND POLICY INSTITUTE

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## THE INDIAN CHILD WELFARE ACT SUMMARY

*The Indian Child Welfare Act, 25 U.S.C. §1901 et. seq., recognizes that there is a **government to government relationship** between the United States and Tribes. This law, passed in 1978, affirms that **special political relationship**, and is not based on race or ethnic factors. Responding to reports that 25-35% of Indian children nationwide (as high as 50-75% in some states) had been removed from their families and placed at a rate of nearly 90% in non-Indian homes, Congress found that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children...” Congress also determined that states “... often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. Congress declared that*

*It is the policy of this nation to protect the best interest of Indian children and to promote the stability and security of Indian Tribes and families by the establishments 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.*

### **PURPOSE OF THE INDIAN CHILD WELFARE ACT**

**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...and placement of such children in ...homes which will reflect the unique values of Indian culture... 25 U.S.C.§ 1902.**

- ICWA regulates States regarding the handling of child abuse and neglect and adoption cases involving Native children - State courts, State Child Protection agencies, and adoption agencies;
- ICWA sets minimum standards for the handling of these cases;
- ICWA affirms the rights of Tribal Courts to adjudicate child abuse and neglect and adoption cases involving children on the reservation;
- ICWA establishes a preference for Tribal courts to adjudicate child abuse and neglect cases in situations of concurrent jurisdiction; and
- ICWA affirms and supports Tribal jurisdiction in child welfare proceedings.

### **TYPICAL PARTIES IN AN ICWA CASE**

- Native child
- Native tribe (if the Tribe intervenes)
- Parent/s or Indian custodian
- State

*NOTE: Foster parents or adoptive parents may also be permitted to provide information to the court and to participate in meetings and hearings, but they do not have “party” status.*

## **NATIVE CHILD'S RIGHTS**

- To Tribal identity and entitlements;
- NOT to have family broken up;
- To be placed with a Native family;
- To have information regarding the child's Tribal identity protected and preserved.

## **TRIBE'S RIGHTS**

- To receive notice of a child custody proceeding involving an "Indian child" as defined by ICWA, 25 U.S.C. §1912(a);
- To intervene at anytime until the case is dismissed; 25 U.S.C. §1911(c)
- To request transfer of jurisdiction to Tribal court from State court; 25 U.S.C. §1911(b)
- To get records; 25 U.S.C. §1912(c)
- To establish child welfare programs; 25 U.S.C. §1931
- To petition the Secretary of Interior for resumption of jurisdiction. 25 U.S.C. §1918
- To full faith and credit from Federal and state courts for any child custody proceeding in Tribal court, 25 U.S.C. §1911(d)

***NOTE: An important U.S. Supreme Court case in support of ICWA, Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S.30 (1989), determined that it is necessary to protect the tribal interest in the child which is distinct from, but on parity with, the interest of the parents.***

## **PARENT OR INDIAN CUSTODIAN RIGHTS**

- To designate an Indian custodian (who then has the same rights as the parent under ICWA; 25 U.S.C. §1903(6))
- To a court appointed attorney in any removal, placement or termination of parental rights; 25 U.S.C. §1912(b)
- To notice of proceedings; 25 U.S.C. §1912(a)
- To have State make ACTIVE EFFORTS to provide remedial services to PREVENT the break-up of the family (*State must prove efforts were unsuccessful*); 25 U.S.C. §1912(d) and (e)
- To a translator. 25 U.S.C. §1913(a)

## **RIGHTS OF ADOPTED INDIAN CHILDREN 25 U.S.C. § 1917**

An Indian child has a right to apply to the court where the adoption order was entered for information regarding the child's tribal relationships. (Adoption proceedings are otherwise sealed unless all parties consent to open them.)

## **BURDENS OF PROOF**

ICWA establishes burdens of proof that are higher than those applied in non-Native cases. When an Indian child is involved, the court must find that the children are dependent by using the clear and convincing evidence standard, rather than the preponderance of the evidence standard used in state court. Using expert witnesses, there must be a finding that "continued custody of the child by the parent of Indian custodian is likely to result in serious emotional or physical damage to the child" 25 U.S.C. § 1912(e). In an action to terminate parental rights, the burden of proof rises to a "beyond a reasonable doubt" standard, using expert witnesses, to show 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. 25 U.S.C. § 1912(f)



## MAJOR PROVISIONS OF ICWA

### **A. IDENTIFICATION OF ICWA CASES** 25 U.S.C. § 1903(1) and (4).

ICWA applies to cases in State courts only (not Tribal courts) in specific situations: (1) child custody proceedings - foster care placement, termination of parental rights, pre-adoptive and adoptive placements (2) involving an Indian child - any person under the age of 18 who is a member of an Indian tribe or the biological child of a member of an Indian tribe and eligible for membership in an Indian tribe. (ONLY A TRIBE CAN DECIDE MEMBERSHIP – “membership” is not the same as “enrollment”.)

### **B. JURISDICTION** 25 U.S.C. § 1911(a); see also 25 U.S.C. § 1918.

Where a Native child resides or is domiciled on his/her reservation or is the ward of the tribal court, only the Tribal court may properly exercise jurisdiction. There are special issues in Public Law 280 states where Tribes may need to complete a re-assumption process to achieve exclusive jurisdiction over children. For all other children, the State court may exercise jurisdiction, but the State court is required to transfer the case to the Tribal court if the Tribe or parents requests transfer except when there is “good cause” not to transfer.

### **C. PLACEMENT** 25 U.S.C. § 1912, § 1915; see also 25 U.S.C. § 1913(b)

No placement (away from the biological parents, adoptive parents, or Indian custodian) can be made without (1) active efforts to preserve the family through remedial and rehabilitative services designed to “prevent the breakup of the Indian family”; and (2) clear and convincing evidence that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. A “qualified expert witness” is required to establish the “clear and convincing” standard. The “social and cultural standards of the Indian community in which the parent or extended family resides” must be applied to placements. 25 U.S.C. § 1915(d).

*Foster Placement Preferences* (when the above standards have been met): 25 U.S.C. § 1915(b)

1. With a member of the child’s extended family;
2. In a foster home licensed, approved or specified by the child’s Tribe;
3. In an Indian foster home licensed or approved by an authorized non-Indian licensing authority (such as the state or a private licensing agency);
4. In an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child’s needs.

*Adoptive Preference Placements* (when parental rights have been terminated or relinquished) 25 U.S.C. § 1915(a)

1. With a member of the child’s extended family;
2. With other members of the child’s Tribe; or
3. With another Indian family.

*NOTE:* A Tribe may change the order of preference for foster care or adoptive placements by resolution. 25 U.S.C. § 1915(c).

*NOTE:* When there is an emergency removal of an Indian child under state law, in order to prevent imminent physical damage or harm to the child, the child must be returned to the parent or Indian custodian when the removal is no longer necessary to prevent imminent harm to the child. 25 U.S.C. § 1922.

### **D. CRITERIA FOR TERMINATION OF PARENTAL RIGHTS** 25 U.S.C. § 1912(f)

In proceedings to terminate parental rights to an Indian child, there must be: (1) evidence “beyond a reasonable doubt” that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child; (2) a qualified expert witness.

**NOTE:** *Where a parent or Indian custodian voluntarily consents to termination of parental rights, the consent must be signed before a judge and the judge must certify that the consequences of the consent were fully understood by the parent or Indian custodian 25 U.S.C.§ 1913*

**E. CONSEQUENCES FOR FAILING TO FOLLOW ICWA: 25 U.S.C.§ 1914**

If any of the requirements in 25 U.S.C.§ 1911,1912 and 1913 are not met, the violations of ICWA may be grounds for a tribe, parent, Indian custodian or a child to ask the court to vacate court orders and require new proceedings.

For more in-depth information on practice issues regarding the Indian Child Welfare Act, for the text of the law and/or the Bureau of Indian Affairs Guidelines for State Courts, see [www.tribal-institute.org](http://www.tribal-institute.org).