
INDIAN CHILD WELFARE ACT (ICWA)

25 U.S.C. § 1901, ET SEQ.

In response to the alarming number of Indianⁱ children being removed from their homes, in 1978 the United States Congress passed the Indian Child Welfare Act (ICWA). Congress's twofold intent was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. Tribesⁱⁱ have an interest in protecting tribal children, and Indian children have an interest in their tribes. The ICWA is designed to protect these interests.

The ICWA gives parents greater protections; allows Indian tribes to exercise control over, or have input into, placement decisions; proscribes the order of placement preference for Indian children; mandates compliance with extensive notice procedures; and requires social workers to provide an increased level of services. State court decisions may be invalidated for failure to follow these and other requirements under the ICWA.

The ICWA requires specific independent findings, even where the tribe declines involvement. In cases triggering the ICWA, the court must find active efforts were made to prevent the breakup of the Indian family. 25 U.S.C. § 1912(d). The court applying the ICWA must also find under the Adoptions and Safe Families Act and Chapter 39, Florida Statutes, that reasonable efforts were made to reunify families. 42 U.S.C. § 671(a)(15)(B)(ii); § 39.521(f), Fla. Stat. (2005).

WHO IS COVERED UNDER THE ICWA?

All "Indian" children are covered by the ICWA. 25 U.S.C. §§ (3) and (4). If a child is eligible for membership in an Indian tribe, band, nation, Alaska Native village, or other group, and due to the child's eligibility for membership the child is eligible for services or special programs operated by the federal government, the child is an Indian child under the ICWA. 25 U.S.C. § 1603(d). Tribes have the sole authority to determine who may be eligible for tribal membership. State and federal courts or agencies cannot make that determination. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). States may be required to apply the ICWA before a tribe has made an eligibility determination for the child. Matter of Baby Boy Doe, 849 P.2d 925 (Idaho 1993). Tribes must be notified immediately if there is any reason to suspect a child may have tribal affiliation or be eligible for tribal affiliation.

Additionally, the ICWA is triggered if the child had been living with an "Indian custodian". An Indian custodian is an Indian person who has legal custody under tribal law or custom, or to whom a parent has transferred temporary care. 25 U.S.C. §§ 1903(6) and (9).

If the tribe is unknown, the Bureau of Indian Affairs (BIA) must be notified. Florida has two federally recognized Indian tribes: the Seminole and the Miccosukee. Many Indians in Florida, however, may be members of tribes located outside of Florida, or members of Indian tribes that are not federally recognized. The BIA periodically publishes a list of federally recognized tribes in the Federal Register along with designated agents for service of process. Some useful contact information is listed below.

<p>Miccosukee Indian Tribe Billy Cypress, Chairman Tamiami Station, P.O. Box 44021 Miami, FL 33144 (305) 223-8380</p>	<p>Seminole Tribe of Florida Mitchell Cypress, Chairman 6300 Sterling Road Hollywood, FL 33024 (954) 966-6300</p>	<p>Bureau of Indian Affairs – Eastern Agency Franklin Keel, Regional Director 545 Marriott Drive, Suite 700 Nashville, TN 37214 (615) 564-6700</p>
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NOTICE

For *involuntary* termination of parental rights (TPR) or foster care cases, the party petitioning for TPR or foster care placement must notify Indian parents or custodians, tribes, and the BIA by registered mail prior to each proceeding. The notice must include information about the tribe’s right to intervene. Tribes and Indian parents or custodians must be given 10 days from the date of their receipt of the notice to prepare for each proceeding, and must be given an additional 20 days if requested. 25 U.S.C. § 1912(a). Proceedings may be invalidated if the parties do not strictly adhere to notice requirements. Awareness of a proceeding does not overcome the strict notice requirements. In re Kathleen W., (1991) 233 Cal.App.3d 1414. If a parent or custodian is not likely to understand written English, notice should also be sent to the BIA asking it to arrange for translation.

INTERVENTION

A tribe may intervene as a party at any time in any foster care or TPR proceeding involving an Indian child. 25 U.S.C. § 1911(c). When a tribe is a party, the court cannot ignore the tribe’s interests in the Indian child, even where the tribe’s interests conflict with those of the parents. The tribe’s interests may even outweigh the parents’ interests. Matter of an Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988).

JURISDICTION

Indian tribes with established judicial systems have *exclusive* jurisdiction over “any child custody proceeding” where:

- The child’s resides on the tribe’s reservation;
- The child is domiciled on the reservation; or
- The child is a ward of the tribal court.

25 U.S.C. § 1911(a). If a Florida circuit court invokes emergency jurisdiction over a child who fits the above criteria, the case must either be dismissed or transferred to the tribe as soon as the imminent threat has abated or as soon as the tribe requests jurisdiction, whichever is earlier. 25 U.S.C. § 1922.

In all other cases, jurisdiction is concurrent, but presumptively tribal. Mississippi Choctaw Indian Band v. Holyfield, 490 U.S. 30 (1989). State courts *must* transfer jurisdiction to a tribal court if cases involve foster care placement or TPR of an Indian child where:

- A parent or custodian requests transfer; or
- A tribe requests transfer.

State courts *may* decline to transfer a case if:

- Either parent or custodian objects to the transfer;
- The tribe declines jurisdiction; or
- There is good cause not to transfer the case.

25 U.S.C. § 1911.

The burden of establishing good cause not to transfer jurisdiction is on the party opposing the transfer. Good cause may exist where the case is at an advanced stage; where the tribe, parent, or custodian delayed requesting transfer; where the child objects to the transfer; where evidence could not be presented without hardship; or where it would not be in the child’s best interests. *Guidelines for State Courts, Indian Child Custody Proceedings*, 44 Fed. Reg. 67590-91 (Nov. 26, 1979). Good cause may not be based on perceived adequacy of tribal social services or judicial systems. *Id.*

LEVEL OF EFFORTS

Absent an emergency, the court must be satisfied that the department used “active efforts” to provide remedial and rehabilitative services to prevent the breakup up the Indian family in a case involving foster care placement or TPR. 25 U.S.C. § 1912(d). Arguably, active efforts may require more on-going social work than the “reasonable efforts” typically required. H.R. Rep. No. 1386, 95th Cong. 2d Sess. 22 (1978). The efforts must take into account the prevailing social and cultural conditions and way of life of the tribe. *Guidelines*, 44 Fed. Reg. 67582(D)(2).

EXPERT WITNESSES AND STANDARDS OF EVIDENCE

In Non-Emergency Foster Care Cases

- The court must find by *clear and convincing evidence* that the child’s continued custody by the parent would cause *serious* emotional or physical damage to the child; and
- This finding must be supported by the testimony of at least one expert witness.

25 U.S.C. § 1912(e).

In TPR Cases

- The court must find *beyond a reasonable doubt* that the child’s continued custody by the parent would cause *serious* emotional or physical damage to the child; and
- This finding must be supported by the testimony of at least one expert witness.

25 U.S.C. § 1912(f).

Temporary emergency custody cannot extend beyond 90 days, absent extraordinary circumstances, unless:

- The court finds by *clear and convincing evidence* that custody of the child by the parent would cause *serious* emotional or physical damage to the child; and
- This finding is supported by the testimony of at least one expert witness.

Guidelines, 44 Fed. Reg. 67588 (B)(7)(d).

In all cases, the referring or investigating social worker should not be used as the expert. H.R. Rep. No. 1336 at 22. The expert's qualifications must extend "beyond the normal social worker qualifications." In re Adoption of TRM, 525 N.E.2d 298, 311 (1988). If the case involves issues of cultural bias, the expert witness must have expertise in the social and cultural aspects of Indian life or in the placement of Indian children. In re C.W., 479 N.W.2d 105 (Neb. 1992). Failure to have an expert witness is reversible error.

To be clear and convincing, evidence must show a causal relationship between the likely harm and the particular condition in the home. Evidence of poverty, inadequate or crowded housing, or non-conforming behavior will not suffice. 44 Fed. Reg. *Guidelines*, 67582-3 (D)(3).

CONSENT

If a parent or custodian of an Indian child wishes to consent to either foster placement or TPR, the consent is only valid if made in writing before a judge and recorded in the case file. 25 U.S.C. § 1913. A certificate from the judge that the consent was made with the parent's full understanding of the legal issues must also be in the case file. Id. The legal issues must be explained to the parent in detail and in the parent's native language if the parent is not fully fluent in English. Id. An Indian parent may withdraw his or her consent to TPR at any time prior to the final TPR order. Id.

Placement Preferences

Indian children placed in foster care must be placed:

- In the least restrictive, family-like setting that can meet the child's special needs;
- In close proximity to the child's home;
- Absent good cause, in the following order of priority placements:
 1. The child's extended family (as defined by tribal law or custom);
 2. A foster home specified by the child's tribe (Indian tribes may license foster homes according to tribal criteria);
 3. An Indian foster home;
 4. An institution approved by the child's tribe.

25 U.S.C § 1915 (b). If the tribe passes a resolution changing the prioritization of placements, the tribe's priorities must be followed. 25 U.S.C § 1915 (c).

Absent good cause, Indian children placed in adoptive homes must be placed in the following order of priority placements:

1. With the child's extended family (as defined by tribal law or custom);
2. With other members of the child's tribe;
3. With other Indian families.

25 U.S.C § 1915 (a). If the tribe passes a resolution changing the prioritization of placements, the tribe's priorities must be followed. 25 U.S.C § 1915 (c).

In applying the placement preferences, the applicable standards are the social and cultural standards of the Indian community. 25 U.S.C § 1915 (d). Where appropriate, the placement preferences of the Indian child or parents should be considered. 25 U.S.C § 1915 (c).

If an Indian child is placed in a non-Indian home, a finding must be made that the department made diligent efforts to locate an Indian home. Guidelines, 44 Fed. Reg. 67584 (F)(3). The court must articulate that it is following the ICWA placement preferences or make specific findings regarding the good cause for departing from the priorities. The ICWA gives no definition of good cause for departing from the placement priorities. Good cause is a matter of discretion for the trial court. In re Maricopa County, 667 P.2d 228, (1983). In all placement decisions, the placement priorities must give way to the child's best interests. Id.

PROCEDURAL REQUIREMENTS FOR SHELTER HEARINGS UNDER THE ICWA

Key Inquiries

- Is the child a member of, or eligible for, membership in an Indian tribe?
- What efforts, if any, have been made to identify the child's tribe?
- What efforts, if any, have been made to give notice to the tribe and the BIA?
- Was the child in the custody of an Indian custodian prior to the shelter hearing?
- Does the child reside on an Indian reservation?
- Is the child's domicile an Indian reservation?
- Is the child a ward of a tribal court?
- What attempts, if any, has the department made to identify and locate extended family, other tribal members, or Indian families for placement?
- Is the Indian parent or custodian able to read and fully understand English, and, if not, what language is needed for translation?

Necessary Findings

- The child's tribal affiliation (if the child's tribe is identified) or that the tribal affiliation is unknown;
- The court has jurisdiction;
- The child is placed according to the ICWA placement preferences or that good cause exists to deviate from the ICWA placement preferences;
- In assessing placement options, the social and cultural standards of the Indian community were relied upon; and
- The Indian parent or custodian is able to read and fully understand English, or what efforts were made to provide translation, and if those efforts were successful.

Necessary Orders

- If the child's tribe is not yet identified, that written notice be sent to the U.S. Secretary of the Interior/BIA;
- That notices of all hearings and court proceedings and a copy of the petition and advisement of rights under the ICWA be mailed to the tribe, BIA, and parent/custodian by registered mail, return-receipt requested (notice must be received at least 10 days prior to each hearing);
- If the child is not placed according to the ICWA preferences, that a diligent search be carried out to find a placement complying with the ICWA preferences;
- That all assessments and evaluations be socially and culturally appropriate; and

- If the Indian parent or custodian requires translation, that translation be provided at all future hearings and dealings with the department.

Additional Requirements for Emergency Removals

- If the child was residing or domiciled on a reservation prior to removal or if the child is a ward of a tribal court, a finding is required that the state court is exercising jurisdiction pursuant to an emergency (requires finding of *imminent* threat of *serious* emotional or physical harm, and jurisdiction will end as soon as imminent threat ceases or when tribe asserts jurisdiction);
- Finding required that emergency prevented the provision of rehabilitative and remedial services designed to prevent the breakup of the Indian family;
- Order required that notice be provided to the child's tribe and the BIA of the proceedings and the tribe's right to intervene or request jurisdiction; and
- Evidentiary hearing to establish by *clear and convincing evidence* that continued custody of the child by the Indian parent or custodian will likely result in *serious* emotional or physical damage to the child. This hearing *must* be scheduled and *occur* within 90 days and must include the testimony of *at least one expert witness*.

Additional Necessary Findings for Non-Emergency Removals

- The tribe, parents or custodians, and BIA were provided written notice of the proceeding, including notice of right to request an additional 20 days to prepare and of tribe's right to intervene or request transfer of jurisdiction;
- Whether the tribe or a parent or custodian requested additional time to prepare for the hearing;
- Whether the tribe or a parent or custodian has requested intervention or transfer of jurisdiction;
- The court has jurisdiction as the child was not residing or domiciled on a reservation prior to the shelter hearing, and the child is not a ward of a tribal court;
- The tribe has been afforded the opportunity to fully participate in the proceedings and has been given copies of all court documents, including department reports;
- *Clear and convincing evidence*, including the testimony of *at least one expert witness*, establishes that the department provided rehabilitative and remedial services designed to prevent the breakup of the Indian family;
- *Clear and convincing evidence*, including the testimony of *at least one expert witness*, establishes that continued custody of the child by the Indian parent or custodian will likely result in *serious* emotional or physical damage to the child; and
- The department made active efforts to locate a placement according to the ICWA placement preferences if a non-preferred placement is approved.

PROCEDURAL REQUIREMENTS FOR ADJUDICATION HEARINGS UNDER THE ICWA

Necessary Findings

- The child is an Indian child under the ICWA;
- Specific efforts were made to identify the child's tribe;
- The Indian tribe does not have exclusive jurisdiction, or that an emergency exists such that emergency jurisdiction might be extended;
- The department has properly noticed the parents, the tribe, and the BIA by registered mail, and if the tribe is not yet identified, the department has properly noticed the U.S. Secretary of the Interior, BIA;
- The tribe has been afforded the opportunity to fully participate in the proceedings and has been given copies of all court documents, including department reports;
- The tribe has declined to request jurisdiction;
- Neither the tribe nor the parents have requested additional time to prepare for the hearing, or if they have requested it, additional time was provided;
- Specified active efforts were made to provide rehabilitative programs and remedial services designed to prevent the breakup of the Indian family;
- The department's active efforts were not successful; and
- Specific *clear and convincing evidence*, including the testimony of *at least one expert witness*, establishes that continued placement outside the Indian home is necessary to prevent *serious* emotional or physical damage to the child.

PROCEDURAL REQUIREMENTS FOR ADOPTIONS UNDER THE ICWA

Necessary Findings

- Notice provided to tribe and the BIA by registered mail (even if tribe not involved in prior proceedings);
- If adoption involves change of placement, notice provided to parents by registered mail;
- The tribe was afforded the opportunity to fully participate in the proceedings and was given copies of all court documents, including department reports;
- If Indian parent consenting, consent was made in writing before the judge, consequences of consent and alternatives to adoption were fully explained to parent, parent fully understood (interpreter provided if parent's primary language not English), and consent was not obtained through fraud or duress;
- Child was placed according to the ICWA placement preferences, and if not, that a diligent search was conducted to find a placement within the preferences, and that good cause exists not to follow the preferences; and
- In assessing placement options, the social and cultural standards of the Indian community were relied upon.

PROCEDURAL REQUIREMENTS FOR DISPOSITION HEARINGS UNDER THE ICWA

Necessary Findings

- The department properly noticed the parents, the tribe, and the BIA by registered mail;
- The tribe was afforded the opportunity to fully participate in the proceedings and was given copies of all court documents, including department reports;
- If the Indian parent's primary language is not English, efforts were made to ensure the parent fully understands the case plan;

- *Clear and convincing evidence*, including the testimony of *at least one expert witness*, establishes continued placement outside the Indian home is necessary to prevent *serious* emotional or physical damage to the child;
- The child was placed according to the ICWA placement preferences;
- If the child was not placed according to ICWA placement preferences, good cause exists to deviate from the placement preferences and a diligent search was conducted to find a placement consistent with the ICWA placement preferences; and
- The department relied upon the social and cultural standards of the Indian community in determining the appropriate placement for the child.

PROCEDURAL REQUIREMENTS FOR JUDICIAL REVIEW HEARINGS UNDER THE ICWA

Necessary Findings

- The department has properly noticed the parents, the tribe, and the BIA by registered mail;
- The tribe has been afforded the opportunity to fully participate in the proceedings and has been given copies of all court documents, including department reports;
- Active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and whether those efforts were successful;
- What, if any, additional efforts must the department make to establish that active efforts have been employed to provide remedial and rehabilitative services designed to prevent the breakup of the Indian family;
- The child is placed according to the ICWA placement preferences, and if not, that good cause exists to deviate from the ICWA placement preferences, and that diligent efforts have been made to locate a placement within the ICWA placement preferences;
- In assessing placement options, the social and cultural standards of the Indian community were relied upon; and
- If the child is not returned home, that *clear and convincing evidence*, including the testimony of *at least one expert witness*, establishes continued custody of the child by the Indian parent would likely result in serious emotional or physical damage to the child.

PROCEDURAL REQUIREMENTS FOR PERMANENCY HEARINGS UNDER THE ICWA

Necessary Findings

- The department properly noticed the parents, the tribe, and the BIA by registered mail;
- The tribe was afforded the opportunity to fully participate in the proceedings and was given copies of all court documents, including department reports;
- Specified efforts by the department constitute active efforts made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family;
- The active efforts by the department were or were not successful;
- *Clear and convincing evidence*, including the testimony of *at least one expert witness*, establishes that continued custody of the child by the Indian parent would likely result

- in *serious* emotional or physical damage to the child, where the child is not returned home;
- The ICWA placement preferences were followed where the child cannot safely be returned home;
 - Good cause exists to deviate from the ICWA placement preferences where the placement preferences are not followed;
 - A diligent search was conducted to find an appropriate Indian placement where the child is not returned home and is not placed with a member of the child's extended family or with an Indian family; and
 - In assessing placement options, the social and cultural standards of the Indian community were relied upon.

Notice of Change in Child's Status

Tribes and parents must be given written notice prior to initial placement and prior to any change in placement, including where an adoption is vacated. 25 U.S.C. §§ 1912 and 1916(b). The notice must inform the parents of their right to petition for custody of the child. Indian parents have the right to petition for custody of Indian children in such cases even if their parental rights have been terminated. The court must grant an Indian parent's petition for return of the child unless the court finds there is clear and convincing evidence supported by at least one expert witness that the child would suffer serious emotional or physical damage. 25 U.S.C. §§ 1912 and 1916(b).

Child's Right to Information

Indian children enrolled as members of tribes may be entitled to benefits from the tribe. If a child is eligible for tribal enrollment, enrollment should be encouraged prior to adoption, which may affect those rights. When Indian children reach 18, they may petition the court for information about their parents' tribal affiliation and other information needed to protect the children's rights relating to tribal affiliation. 25 U.S.C. § 1917. This information must be provided to the child even where there has been an adoption. Id.

ⁱ The term "Indian" is used in this chapter to conform to the language of the ICWA, and refers to those of Native American heritage.

ⁱⁱ The term "tribe" is used in this chapter to refer to all Indian tribes, bands, Alaska Native villages, nations, or other organized groups or communities that are eligible, due to their native status, for services or special programs operated by the federal government.