



## RESOURCE MATERIALS

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# Federal Laws Governing Child Abuse & Neglect Cases

Though most of the law governing child protection, foster care, adoption, and juvenile court proceedings originates with state legislatures, state law is influenced significantly by several federal statutes enacted since 1974. Under these federal laws, states receive billions of dollars each year for the support of their child welfare system, foster care, and adoption services. They are required to comply with the provisions set out in the Child Abuse Prevention and Treatment Act of 1974 (CAPTA), the Adoption Assistance and Child Welfare Act of 1980 (AACWA), and the Adoption and Safe Families Act of 1997 (ASFA) as a condition of receiving these federal funds. Under AACWA, states receive federal funds to offset the costs of providing a wide range of child welfare services to families and children. These funds may be used for, among other things, family support, preservation, and reunification services. States also are reimbursed for a substantial portion of the money they pay to foster parents and other care providers for the “maintenance” (primarily room and board) of a child in foster care. Federal funds pay a portion of the staff training costs, administrative costs, adoption assistance payments to parents of special needs children, and the information systems developed by state agencies for their child welfare systems. The following federal laws will be examined in greater depth:

- ✓ The Child Abuse Prevention and Treatment Act of 1974 (amended in 1996);
- ✓ The Indian Child Welfare Act of 1978;
- ✓ The Adoption Assistance and Child Welfare Act of 1980;
- ✓ The Multi-Ethnic Placement Act of 1994;
- ✓ The Adoption and Safe Families Act of 1997;
- ✓ The Foster Care Independence Act of 1999; and
- ✓ The Volunteer Protection Act of 1997.

## The Child Abuse Prevention & Treatment Act of 1974 (PL 93-247), Amended In 1996 (PL 104-235)

### Background

From a historical perspective, we are still relatively new to the concepts of protecting abused and neglected children and developing appropriate systems, methods, and programs to cope with the problems of these children and their families. Although every state had enacted a child abuse reporting law by 1965, the child welfare system was not adequately protecting children and their families. During the 1970s, the United States Congress became aware of this problem and enacted the Child Abuse Prevention and Treatment Act of 1974 (CAPTA). This legislation earmarked federal funds for states to establish special programs for child victims of abuse or neglect. It also mandated the appointment of guardians ad litem to represent children. Since its enactment in 1974, CAPTA has been amended several times.

## Summary

The federal Child Abuse Prevention and Treatment Act, along with its implementing regulations, requires states that receive federal funds for their state child welfare programs to adhere to the following requirements:

1. The state must have a statute mandating the reporting of child abuse and neglect.
2. Upon receipt of a report of suspected abuse/neglect, the state (a) must determine if the report meets the definition of child abuse/neglect under state law, (b) conduct an assessment of the safety of all children under the care of the suspected abuser, (c) begin a prompt investigation of the report, and (d) take steps to ensure the safety of all children under the care of the suspected abuser, including removal of them to a safe environment.
3. The state must have specific procedures or programs for responding to reports of medical neglect, including instances of withholding medically indicated treatment from disabled infants with life-threatening conditions.
4. The state must define “child abuse” and “neglect” in accordance with federal statutes and regulations.
5. The state must submit a state program plan to the federal government every five years to remain eligible for federal funding.
6. The state must provide a guardian ad litem to every abused or neglected child whose case results in a judicial proceeding. The guardian ad litem may be an attorney or CASA (or both) whose responsibilities include completing an independent investigation of the child’s situation and needs, determining what actions are in the best interest of the child, and making recommendations to the court.
7. The state must maintain the confidentiality of DCF records but make them available to persons who are the subject of the report, government agencies overseeing the state’s child welfare program, child abuse citizen review and fatality review panels, a grand jury or court, and other agencies or persons authorized by state law. The state may refuse to disclose the identity of the person who made the report of suspected abuse unless a court has found that the reporter knowingly made a false report.
8. State law must provide immunity from prosecution for persons who make good faith reports of suspected abuse/neglect.
9. Records of false or unsubstantiated reports of suspected abuse must be deleted from any database accessible to the public or used for employment or background checks. However, DCF may keep this information in its files for use in risk and safety assessments.
10. State law must not require reunification of a surviving child with a parent who is convicted of murder of one of his/her children or an assault resulting in serious bodily injury to a child. In addition, state law must provide that conviction of one of these crimes against children is sufficient grounds for terminating parental rights.

11. State law must establish at least three citizen review panels whose role is to determine if state and local agencies are carrying out their responsibilities for child protection under state law and professional standards.
12. State law must provide a procedure whereby persons with an official finding of substantiated or founded abuse can appeal that finding.
13. State law must require the disclosure to the general public of information about individual cases of child abuse or neglect that resulted in a child's death or near death.

Synopsis prepared in October 1995 by Jill Moore, UNC law student.  
Updated in May 2000 by William L. Grimm, Staff Attorney, National Center for Youth Law.

## **The Indian Child Welfare Act of 1978 (PL 95-608)**

### **Background**

The Indian Child Welfare Act (ICWA) was a response to Congressional findings that there was a need for a federal law to prevent state courts and social workers, as well as private agencies, from further destruction of the American Indian family caused by unwarranted removal of Indian children from their tribes and families. ICWA acknowledges the loss of Indian culture resulting from historical government policies, such as separating Indian children completely from their tribe, placing them in boarding schools, and forbidding them to speak their native language. In an effort to “civilize” and assimilate Indians into the mainstream, a decision was reached in the early 1800s to start with the children. Bureau of Indian Affairs (BIA) agents and social workers were given cash incentives based on the head count of children taken away from their tribes and placed in non-Indian institutions and adoptive homes—usually far from home. The Indian Civilization Act was passed in 1810 to facilitate the removal of children in an attempt to assimilate them into Anglo-America. Subsequently, non-Indian caseworkers, courts, and agencies continued to see the Indian family structure as alien, foreign, and undesirable, so the process of adoptions by non-Indians occurred in wholesale numbers. The sense of loss and devastation not only tore away the child's heritage and foundation, it nearly destroyed the Indian family unit and the tribal government structure.

The Indian Child Welfare Act was established to strengthen the participation by Indian tribes when placement of Indian children is being considered. It establishes requirements for child-placing agencies to follow when placing Indian children.

### **Summary**

Children who are members of an Indian tribe, or who are the biological children of a member of an Indian tribe and are eligible for membership in the tribe themselves, may only be placed in foster care or for adoption according to the requirements of the Indian Child Welfare Act. The child's tribe is the final determinate of who is a member of the Indian community entitled to ICWA coverage. When ICWA coverage applies in a child's case, it takes precedence over other federal or state legislation.

If a state agency initiates an Indian child custody proceeding on the reservation, jurisdiction belongs exclusively with the tribe. When the proceeding is off-reservation, the case must be transferred to the tribe upon the request of the tribe unless there is “good cause to the contrary,”

as set forth in the Department of the Interior’s 1979 BIA “Guidelines for State Courts,” Indian Child Custody Proceedings. Some of the reasons not to transfer include the following: parents object; child is over twelve and he/she objects; or the case is at an advanced stage and all witnesses are off-reservation. The state court cannot look at the economics of the family or tribe in making the decision not to transfer. Likewise, the state court cannot look at what it might deem “in the best interest of the child,” since the law presumes that it is always in the best interest of an Indian child to have his/her own people determine what is proper for his/her future.

ICWA sets forth the following requirements:

1. State court proceedings for foster care placement or termination of parental rights that involve an Indian child must be transferred to the jurisdiction of the tribe unless they meet one of the exceptions outlined in the 1979 BIA “Guidelines for State Courts.”
2. A state court faced with pending proceedings for the foster care placement of an Indian child or the termination of parental rights must notify the child’s parent, custodian, or tribe of the proceedings.
3. An Indian child may not be placed in foster care unless there is a determination, supported by clear and convincing evidence, that the child will likely suffer serious emotional or physical damage if left in the custody of his/her parent or Indian custodian.
4. An Indian child’s parents may not have their parental rights terminated unless there is a determination, supported by evidence beyond a reasonable doubt, that the child is likely to suffer serious emotional or physical damage if left in the custody of his/her parent or Indian custodian.
5. Voluntary consents to foster care placement or termination of parental rights that involve Indian children are not valid unless executed in writing before a judge and accompanied by the judge’s certificate that the terms and consequences of the consent were fully explained to and fully understood by the parent or Indian custodian.
  - Voluntary consents to foster care placement may be withdrawn at any time.
  - Voluntary consents to termination of parental rights or adoption may be withdrawn at any time before the final decree of termination or adoption is issued—and up to two years thereafter upon a showing of fraud or duress.
6. In adoptions of Indian children, preferences for placement must be accorded as follows: (1) to a member of the child’s extended family; (2) to other members of the child’s tribe; and (3) to other Indian families.
7. In foster care or preadoptive placements of Indian children, preferences for placement must be accorded as follows: (1) to a member of the child’s extended family; (2) to a foster home licensed or approved or specified by the child’s tribe; (3) to an Indian foster home licensed or approved by an authorized non-Indian licensing authority; and (4) to an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suited to the child’s needs.

Synopsis prepared in October 1995 by Jill Moore, UNC law student. Updated in May 2000 by Evelyn M. Stevenson, Tribal Attorney, Confederated Salish and Kootenai Tribes of the Flathead Nation.

# The Adoption Assistance & Child Welfare Act of 1980 (PL 96-272)

## Background

This law is a blueprint for combined efforts to preserve families and, if necessary, to build new families for children. It was adopted because insufficient services were being provided to keep families together, inappropriate placements of children were being made, disincentives for adoption existed, foster care was prolonged resulting in a lack of permanency for children, and there was a lack of information about children in foster care. The intention of the law was to prevent the breakup of families and provide permanency planning for children.

## Summary

The federal Adoption Assistance and Child Welfare Act, along with its implementing regulations, requires states that receive federal funds for assistance with foster care maintenance and adoption assistance to adhere to the following requirements:

1. The state must have a plan for child welfare services that:
  - Provides for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of the children needing such care;
  - Describes the measures taken by the state to comply with the Indian Child Welfare Act; and
  - Provides assurances that: (1) the state has completed an inventory of all foster children who have been in care for six months or more; (2) the state is operating a statewide information system regarding children in foster care; (3) the state is operating a case review system for children in foster care; (4) the state is operating a service program to help children return to their families or be placed permanently; (5) the state is operating a program designed to help children at risk of being placed in foster care remain with their families; and (6) the state has reviewed its policies and procedures for children abandoned at or shortly after birth.
2. The state agency administering the state plan must report known or suspected cases of abuse or neglect among children receiving foster care maintenance payments or adoption assistance aid to the appropriate state agency.
3. The state must establish standards for foster family homes and review the standards periodically.
4. In its state plan, the state must set specific goals as to the maximum number of children who will be in foster care for more than twenty-four months, and describe the steps it will take to meet the goal of decreasing the length of stay for children in care.
5. The state must make “reasonable efforts” (a) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his/her home, and (b) to make it possible for the child to return to his/her home. There is a greater burden to prove “reasonable efforts” when the Indian Child Welfare Act applies. (*Note: Under the Adoption and Safe Families Act of 1997, the safety of the child must be of paramount concern when making decisions regarding reasonable efforts.*)

6. The state must develop a case plan for every child in foster care who receives foster care maintenance payments and must provide a case review system.
7. Under the case review system, the status of each child must be reviewed at least every six months, either by a court or by administrative review.
8. The state must have a procedure or system by which parents may revoke voluntary placement agreements and the child may be returned to them.
9. The state must provide a dispositional hearing for every child in foster care no later than eighteen months after the original placement and every twelve months thereafter while the child's foster care continues. (*Note: Under the Adoption and Safe Families Act of 1997, the hearings are called permanency hearings and must be held within twelve months after the date of the initial order removing custody and at least every six months thereafter.*)
10. The state must have a data collection and reporting system that includes information about children in foster care and children placed for adoption.

Synopsis prepared in October 1995 by Jill Moore, UNC law student.  
Updated in May 2000 by William L. Grimm, Staff Attorney, National Center for Youth Law.

## **The Multi-Ethnic Placement Act of 1994 & Inter-Ethnic Adoption Provisions**

### **Background**

Increasing awareness of the damage done to children when they are moved from one non-permanent placement to another brought attention to children whose placements were determined solely, or primarily, on the basis of race. Additionally, public attention was focused on the high percentage of children of color who come into care and who remain in care for long periods of time. Federal law set out guidelines meant to respect the importance of a child's culture and heritage while reducing the time that children wait for homes. This legislation also focused on increasing the numbers and diversity of the pool of available foster and adoptive families.

### **Summary**

The Howard Metzenbaum Multi-Ethnic Placement Act of 1994 (MEPA), prohibits denial or delay of placement for foster care or adoption by any agency that receives federal funds because of the child's or foster/adoptive parent's race, color, or national origin. The law was intended to:

- Decrease the time children wait to be adopted;
- Prevent discrimination in the placement of children on the basis of race, color, or national origin;
- Prevent discrimination on the basis of race, color, or national origin when selecting foster and adoptive placements; and
- Facilitate the development of a diverse pool of foster and adoptive families.

In August 1996, Congress amended MEPA with the Inter-Ethnic Adoption Provisions (IEP) in order to strengthen its nondiscriminatory provisions and to provide stiff penalties for violation of the act. The antidiscrimination provisions of MEPA-IEP now state that any public or private agency or entity that receives federal assistance cannot:

- Deny to any person the opportunity to become an adoptive or foster parent on the exclusive basis of the race, color, or national origin of the adoptive or foster parent or the race, color, or national origin of the child involved in the foster or adoptive placement; and
- Delay or deny the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent or the race, color, or national origin of the child involved in the foster care or adoptive placement.

MEPA was enacted to encourage transracial placements of children when appropriate same-race placements are not available. The act specifically permits the consideration of a child's cultural, ethnic, or racial background and the ability of a potential foster parent to meet the child's related needs as one of many factors to consider in determining the best interest of a child. The Department of Health and Human Services published a policy guideline in the Federal Register on April 25, 1995, to be used as guidelines for compliance by agencies. An updated policy guideline related to the amendment was made available in June 1997.

Noncompliance with this act is a violation of Title VI of the Civil Rights Act of 1964. Any person who believes that he/she has been a victim of a violation of the act has a right to bring an action for relief in the appropriate U.S. district court. Any entity found in violation of the law will lose considerable federal matching funds. MEPA does not affect the Indian Child Welfare Act of 1978.

Summary prepared for the Alaska Citizen's Foster Care Review Board. Author unknown. Updated in May 2000 by William L. Grimm, Staff Attorney, National Center for Youth Law.

## **The Adoption & Safe Families Act of 1997 (PL 105-89)**

### **Background**

While major provisions of federal child welfare law were enacted in 1980 (AACWA) and 1997 (ASFA), there were important amendments to the federal law in the interim. An Independent Living Initiative was added in 1986, which was then replaced with the John Chafee Foster Care Independence Program in 1999. In 1989, as part of the Omnibus Budget Reconciliation Act, the definition of "case plan" was modified to require that health and education records be included in the case plan and shared with the child's foster parents. As part of the welfare reform act (the Personal Responsibility and Work Opportunities Reconciliation Act) of 1996, states were directed to consider giving preferences to relatives over a non-related caregiver when placing a child in foster care. That same act contained a provision allowing federal funds to be used to pay for the care of children in private, for-profit institutions.

## Summary

The Congressional mandates, which states must follow in order to receive federal funds for child welfare services, are found in several sections of the United States Code. They include Titles IV-B and IV-E of the Social Security Act. Title IV-B allots funds to states for a wide range of services whose purposes include protecting and promoting the welfare of homeless, handicapped, or neglected children; preventing the breakup of families; placing children in adoptive homes; and assuring adequate care of children placed outside the home. It also funds the Promoting Safe and Stable Families Program, which funds family preservation services (including services to adoptive, extended, and foster families), community-based family support services, time-limited (i.e., within fifteen months after the child enters care) reunification services, and adoption promotion and support services. Title IV-B requires a state to submit a plan outlining how it will use those funds and guaranteeing that it meets certain conditions, including a statewide information system, elimination of barriers to timely adoptions across state lines, a case review system, prompt decisions about permanent placement for children abandoned at birth, a plan to comply with the Indian Child Welfare Act, and a plan that ensures that the safety of children is the paramount concern for all service programs supported by these funds. Title IV-E attaches additional conditions with which states must comply in order to receive federal funds for their foster care and adoption assistance programs. Many of these provisions were first enacted as part of AACWA.

Several new conditions were added, time lines changed, and other provisions substantially modified by the Adoption and Safe Families Act of 1997 (ASFA). Foremost among the changes made in 1997 was the declaration that a child's health and safety must be the paramount concern in all decisions, the creation of exceptions to the requirement of reasonable efforts, and the mandatory filing of a petition to terminate parental rights for a child in care for fifteen months (of the most recent twenty-two months). The conditions imposed upon the states now include:

1. **Reasonable Efforts:** This mandate was part of the 1980 act. It requires states to make reasonable efforts (a) prior to the placement of a child in foster care to prevent or eliminate the need for removal from his/her home, and (b) to make it possible for him/her to return home from foster care. Its misinterpretation or misapplication by agencies provided much of the impetus for the overhaul of federal law in 1997.
  - **Health and Safety the Paramount Concern:** In determining what efforts are “reasonable” and in implementing services that are part of the reasonable efforts, the paramount concern governing the agency's actions must be the health and safety of the child.
  - **Exceptions:** Reasonable efforts are not required if any one of the following three conditions exists: (a) the parent has subjected a child to an aggravated circumstance. The federal law gives four examples—abandonment, torture, chronic abuse, or sexual abuse. However, states are free to add to the list of aggravated circumstances; (b) the parent has been convicted of murder or manslaughter or having aided, attempted, or conspired to kill his/her child, or been convicted of felony assault resulting in serious bodily injury to one of his/her children; or (c) the parent's rights to a sibling were involuntarily terminated.
  - **Expedited Permanency Hearing:** If the court determines that no reasonable efforts need be made, then a hearing to determine the permanent plan for the child must be held within thirty days and the agency must immediately begin efforts to place the child in a permanent home.

2. **Concurrent Planning:** At the same time the agency is making reasonable efforts to return a child home, it may plan for and make reasonable efforts to place the child for adoption or legal guardianship.
3. **Judicial Determination:** Unless the child is in care as a result of a voluntary written agreement with the parents, there must be a judicial determination that the child’s continuation in the home of his/her parent or guardian is “contrary to the welfare of the child” and that reasonable efforts to prevent placement or reunite the child have been made.
4. **Case Plan:** Each child must have his/her own individualized case plan and for a child 16 or older, the plan must describe the services that will help the youth prepare for independence.
5. **Periodic Reviews:** No less frequently than every six months after a child enters care, the court or administrative agency (including a citizen review board) must review the child’s case. The purpose of this review is to determine the safety of the child, compliance with the case plan, the progress made in eliminating the causes for placement, appropriateness of the placement, and a projected date for the child’s return home or alternative permanent plan.
6. **Permanency Hearing:** The focus of this hearing is different from the periodic reviews. Twelve months after a child has entered foster care, a hearing to determine the permanent plan for the child must be held. In cases of children placed out of state, this hearing must also determine if that placement is still appropriate for the child and in the child’s best interest. In cases of a child sixteen years old or older, this hearing must determine what services are needed to help this youth make the transition from foster care to independent living. This hearing must be held every twelve months as long as the child remains in care.
7. **Permanency Plan Options:** Congress specified four types of permanent plans that are acceptable: return to the parent, placement for adoption, legal guardianship, or planned permanent living arrangement. The latter plan may only be considered when the agency has documented for the court the reasons for eliminating the other three permanent options.
8. **Termination of Parental Rights Petitions:** The child welfare agency must file a petition to terminate parental rights for a foster child who falls within one of the following categories: (1) a child who has been in foster care for fifteen of the most recent twenty-two months; (2) a child who has been adjudicated an abandoned infant; or (3) a child whose parent was convicted of one of the crimes that create an exception to reasonable efforts.
9. **Termination of Parental Rights Petitions—Exceptions:** There are three situations in which the agency may defer filing a petition to terminate parental rights: (1) the child is being cared for by a relative; (2) a compelling reason supports a finding that termination would not be in the child’s best interest; or (3) the agency has not provided the parent with the services listed in the case plan as necessary for the child’s safe return home.
10. **Procedural Safeguards:** Basic procedural safeguards (i.e., notice and an opportunity to be heard) must be provided to the parent and child whenever the child is removed from the home, there is a change in the child’s foster care placement, or an alteration in the visiting plan for child and parent is made.
11. **Relative Placement Preference:** The agency “shall consider” giving placement preference to a relative over a non-related foster care provider if the relative meets state child protection standards.

- 12. Foster Care Standards:** Standards drawn from the standards of national organizations, which ensure that children in foster care placements with public or private agencies are provided with quality services that protect their health and safety, must be implemented.
- 13. Foster Parent Criminal Background Check:** Criminal record checks must be completed before a child is placed with a foster or adoptive parent.
- 14. Exclusion of Foster/Adoptive Parent Applicants:** No applicant who has a felony conviction for a crime of violence, including child abuse, spousal abuse, rape, or sexual assault, shall be approved. No applicant with a felony conviction for assault, battery, or a drug offense within the five years prior to his/her application shall be licensed.
- 15. Preparation of Foster Parents:** Due to recognition that foster parents are often inadequately prepared and supported to provide care for the children placed by public agencies in their homes, this provision was added in 1999. It requires that before a child is placed with prospective foster parents, those foster parents will be prepared adequately with the appropriate knowledge and skills to provide for the needs of the child, and that such preparation will be continued, as necessary, after the placement of the child.
- 16. Health Insurance for Adopted Children:** Any special-needs child who is covered by an adoption assistance agreement shall be provided with health insurance coverage that is “of the same type and kind” as that provided to children under the state’s medical assistance program.

Synopsis prepared in May 2000 by William L. Grimm, Staff Attorney, National Center for Youth Law.

## The Foster Care Independence Act of 1999

### Background

After passage of the Adoption and Safe Families Act in 1997, some of the same Congressional leaders who supported or sponsored ASFA turned their attention to older youth in foster care, particularly those youth aging out of the system. Each year approximately twenty thousand children “graduate” from foster care. Many of these children are not prepared to be self-sufficient. Half have not finished high school, almost half have been homeless or incarcerated or have received public assistance after leaving care, and many have no health insurance and go without needed medical care. Confronted with these grim statistics, Congress enacted the Foster Care Independence Act of 1999.

### Summary

The highlights of the Foster Care Independence Act (FCIA) of 1999 include the following provisions. The act:

- Allows states to provide medical insurance coverage to youth between ages eighteen and twenty-one who were in foster care on their eighteenth birthday;
- Allows states to use up to one third of the funds they receive under this new program for room and board for youth between ages eighteen and twenty-one who are leaving foster care;

- Permits states to use federal funds for a wide range of activities and services that will help youth prepare for independence (e.g., substance abuse prevention; preventive health activities; assistance in obtaining a high school diploma or preparing for college or other post-secondary education; mentors; and vocational training);
- Requires that both youth who have left foster care because they aged out at eighteen as well as those youth likely to remain in foster care until age eighteen be provided with services under the program;
- Requires that youth participate directly in selecting the activities and services they need to establish independence and accept personal responsibility for adhering to their plan;
- Doubles the amount of funding for independent-living services;
- Emphasizes that reasonable efforts to find adoptive homes applies to all children, including older children in care;
- Requires that benefits and services must be made available to Indian children the same as other children in care;
- Requires states to use training funds it receives under Titles IV-B and IV-E to provide training to help foster parents, workers in group homes, adoptive parents, and others address the problems youth face in preparing for independence; and
- Subjects states to greater accountability for the programs operated with these funds. The federal agency responsible for this oversight must consult with youth providers, advocates, and others in establishing outcome measures by which the effectiveness of services will be evaluated.

Synopsis prepared in May 2000 by William L. Grimm, Staff Attorney, National Center for Youth Law.

## The Volunteer Protection Act of 1997

### Summary

The federal Volunteer Protection Act of 1997 provides protection from liability for volunteers acting within the scope of their volunteer responsibilities. The volunteer must be properly authorized for the activities. Protection is not provided for willful or criminal misconduct, gross negligence, or reckless misconduct; for a conscious and flagrant indifference to the rights or safety of the individual harmed by the volunteer; for violations of federal civil rights laws; for crimes of violence or terrorism or hate crimes; for actions taken under the influence of alcohol or other drugs; or for harm caused by operating a vehicle that must be licensed. Some states have legislation that gives greater protection than this federal law. States may also pass legislation making the federal protection inapplicable. Many GAL programs purchase liability insurance to offer greater protection for their volunteers, staff, board members, and the organization. One of the best ways GAL volunteers can protect themselves from liability is to act within the prescribed GAL volunteer role and in accordance with the program's policies and procedures.

Synopsis prepared in December 2000 by Michael S. Piraino, Chief Executive Officer, NCASAA.



# CHILD NEGLECT

## Facts About Child Neglect

Deprivation-related disorders develop when the basic needs of the child are not being met, including adequate nutrition, clothing, shelter, emotional support, love and nurturing, education, safety, and medical and dental care. There may be multiple reasons why parents fail to meet those needs, including lack of resources, inadequate access to care, parental substance abuse, mental illness (e.g., depression), the parent putting his/her own needs above the needs of the child, or even a history of abuse of the parent when he/she was a child. In the latter case, the psychological effects may limit the caretaker's recognition of neglect as maltreatment. It is critical to make the distinction between poverty and neglect—a family without financial resources should be offered assistance, not punishment, to help them provide a safe home for their children. Neglect is more than poverty. Below is a list of findings typical to neglect situations:

### Family Social History

- Lack of appropriate well-child care, including immunizations;
- Lack of appropriate medical care of chronic illness;
- Failure to provide necessary health aids such as eyeglasses or hearing aids;
- Failure to provide appropriate dental care; or
- Poor school attendance.

### Physical Findings

- Lack of adequate nutrition (on examination or as evidenced by charting growth);
- Poor hygiene, such as being extremely filthy or having extraordinarily severe diaper rash;
- Developmental delay due to lack of stimulation;
- Untreated medical conditions; or
- Rampant dental cavities.

### Behavioral Findings

- Depression;
- Anxiety;
- Enuresis (wetting);
- Sleep disturbances;
- Excessive masturbation;
- Difficulty relating well or appropriately to other people (e.g., lack of cuddliness, gaze avoidance, preference for inanimate objects);
- Discipline problems, aggressive behavior;
- Poor school performance;
- “Role reversal,” in which child assumes caretaker role; or
- Taking on household responsibilities, including child care, that are not appropriate for age.

*(Note: These findings are not unique to cases of neglect.)*

Adapted from “Diagnostic and Treatment Guidelines on Child Physical Abuse and Neglect,” American Medical Association, 1992.



# CHILD PHYSICAL ABUSE

## Facts About Child Physical Abuse

Although child abuse was identified as a social problem in the nineteenth century, it took almost one hundred years for violence toward children to be considered a major national problem. In the 1940s, through the use of diagnostic x-ray technology, physicians began to notice patterns of healed fractures in young children that could have resulted only from repeated blows. Although pediatric radiologists were diagnosing child abuse, it was not until C. Henry Kempe and his associates published their classic work, “The Battered Child Syndrome,” in the *Journal of the American Medical Association* in 1962 that battering and abuse became a focal point of public attention. By the end of that decade, all states had passed laws requiring the reporting of child abuse and neglect and had initiated efforts to treat abused children and their families. In 1974, the U.S. government established the National Center on Child Abuse and Neglect to provide a mechanism for increasing knowledge about the causes of child abuse and neglect and to identify steps toward prevention and treatment.

The causes of child abuse are complex and varied. Child maltreatment can be inflicted by anyone responsible for caring for children, and it occurs in all types of families and settings. Children of all ages may be physically abused. Although infants and young children are more likely to receive serious or life-threatening injuries, adolescent abuse also occurs and often is unrecognized. Emotional abuse is hard to prove but generally exists with other types of abuse and neglect.

Child abuse may be occurring even when the child discloses nothing or says that he/she has never been hurt. Children frequently do not complain about abuse. Current research has found that the following child and family characteristics may be risk factors for child abuse or neglect:

### Child Characteristics

- The child was born prematurely;
- The child has disabilities or abnormalities; or
- The child exhibits certain different behaviors of infancy and childhood, such as persistent crying.

### Family Characteristics

- There is other violence in the home (in particular, the father abuses the mother or siblings abuse one another);
- Substance abuse, including alcohol abuse, by the parents or caretakers;
- The parents or caretakers lack the necessary maturity to care for the child and have poor coping skills;
- Parental expectations do not match the child’s developmental abilities;
- The caretaker is socially isolated (i.e., has no external support systems);
- Teen parent;
- The family is experiencing high levels of stress from events such as loss of a job, increased financial burdens, serious illness, death in the family, separation, or divorce; or
- Adult members of the family have themselves been abused as children, either physically or sexually.

These risk factors do not always lead to abuse. However, abuse or neglect must be considered whenever physical or behavioral signs are suggestive or recurrent, regardless of the presence or absence of the risk factors above. Different forms of abuse can and do coexist in families. Moreover, abusive behavior often occurs in successive generations of families, a phenomenon known as the “cycle of violence.”

## Diagnosis of Abuse

Physical abuse is defined as inflicted injury to a child and can range from minor bruises and lacerations to severe neurological trauma and death. The following physical findings may be indicative of physical abuse:

<p><b>Burns</b></p> <ul style="list-style-type: none"> <li>• Cigar or cigarette burns, especially on the soles of feet, palms, back, or buttocks;</li> <li>• Immersion burns (stocking- or glove-like without splash burns on extremities, doughnut-shaped on buttocks or genitals); or</li> <li>• Patterned burns resembling an electrical appliance (e.g., iron, burner, grill).</li> </ul> <p><b>Fractures</b></p> <ul style="list-style-type: none"> <li>• Skull, ribs, long bones, metaphyseal (bone growth plates at the bone ending).</li> </ul> <p><b>Central Nervous System Injuries</b></p> <ul style="list-style-type: none"> <li>• Subdural hematoma (internal bruising/bleeding in the space between the skull and the brain)—often reflective of blunt trauma or violent shaking;</li> <li>• Retinal hemorrhage (bleeding inside the eye)—often reflective of blunt trauma or violent shaking;</li> <li>• Subarachnoid hemorrhage (bleeding between the brain and skull)—often reflective of shaking; or</li> <li>• Cerebral infarction (blocking of blood to the brain, stroke), secondary to cerebral edema.</li> </ul>	<p><b>Bruises &amp; Welts</b></p> <ul style="list-style-type: none"> <li>• Forming regular patterns, often resembling the shape of the article used to inflict the injury (e.g., hand, teeth, belt buckle, electrical cord).</li> </ul> <p><b>Lacerations/Abrasions</b></p> <ul style="list-style-type: none"> <li>• Rope burns, particularly on wrist, ankles, neck, torso;</li> <li>• Palate, mouth, gums, lips, eyes, ears; or</li> <li>• External genitalia.</li> </ul> <p><b>Abdominal Injuries</b></p> <ul style="list-style-type: none"> <li>• Bruises on the abdominal wall;</li> <li>• Bleeding into the wall of duodenum or proximal jejunum (stomach or colon);</li> <li>• Intestinal perforation (upturned or torn intestines);</li> <li>• Ruptured liver or spleen;</li> <li>• Ruptured blood vessels;</li> <li>• Kidney, bladder, or pancreatic injury; or</li> <li>• Collapsed lung.</li> </ul> <p><b>Other Indicators</b></p> <ul style="list-style-type: none"> <li>• Münchausen syndrome by proxy (a form of child abuse in which the parent/caretaker relates fictitious illnesses in a child by either inducing or fabricating the signs/symptoms); or</li> <li>• Symptoms of suffocation.</li> </ul>
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Adapted from “Diagnostic and Treatment Guidelines on Child Physical Abuse and Neglect,” American Medical Association, 1992.

# CHILD SEXUAL ABUSE

## Facts About Child Sexual Abuse

Child sexual abuse can be defined as the engagement of a child in sexual activities for which the child is developmentally unprepared and cannot give informed consent. Generally, the perpetrator is an adult, but a child may sexually abuse another child. Sexual abuse need not involve sexual intercourse. Often physical force is not used. Rather, the perpetrator uses gradual seduction techniques. The sexual activities may include genital or anal contact by or to the child, or non-touching abuses, such as exhibitionism, voyeurism, or using the child in the production of pornography. Sexual abuse may result in ano-genital (rectal, vaginal, or penis) injury or be accompanied by other signs of physical abuse, such as bruises, or by signs of neglect, such as poor hygiene. Survivors of child sexual abuse often experience long-term adverse effects on their psychological and social well-being and may be more likely to be victimized or perpetrate in later life as well.

Recent studies suggest that approximately twenty percent of children will be sexually abused in some way before they reach adulthood, with this figure cumulating at a rate of about one percent each year (studies vary widely on these numbers). Boys as well as girls may be victims. The abuse may take place within the family or outside it. Although abusers are more often male than female, women also may be perpetrators. Adolescents are perpetrators in at least twenty percent of reported cases. Offenders are more often someone the child knows rather than a stranger. Sexual abuse often continues for a long period of time. Children living in a home where other abuse is ongoing (e.g., spouse abuse) are at particular risk.

Evidence also suggests that the sexual and physical abuse of children often occur in successive generations of families. This “cycle of abuse,” as it is commonly called, rarely ends unless intervention takes place. The problem of sexual molestation by a stranger, although foremost in the minds of many people, actually represents only a small percentage of total cases.

## Behavioral Findings

Presenting behavioral symptoms are nonspecific, and caution must be exercised not to attribute all such complaints to sexual abuse. The symptoms may also be indicators of stressors not related to abuse. Reactions to stressors depend on the age and emotional maturity of the child, the nature of the incident, the duration of the stress, the child’s history, and the manner in which the child relates to the source of the stress.

### The child, depending on age, may:

- Display extremeness of activity (hyperactivity or withdrawal);
- Manifest poor self-esteem;
- Have poor peer relationships;
- Display a distortion of body image (distorted drawings);
- Display regressive behavior;
- Express general feelings of shame or guilt;
- Have enuresis (wetting) and/or encopresis (involuntary bowel movement);
- Appear frightened or phobic, especially of adults;

- Wear excessive layers of clothing;
- Engage in adolescent prostitution;
- Have severe dissociative disorders; or
- Tend to be dreamy, “spaced out,” in a trance, especially in stressful situations.

With appropriate support from important adults and therapy, the outcome for sexually abused children can be very good. Children can be remarkably resilient if someone believes them, intervenes to keep them safe, and helps them succeed at life tasks.

Adapted from “Diagnostic and Treatment Guidelines on Child Sexual Abuse,” American Medical Association, 1992.

## Responsibilities of the GAL Volunteer & the GAL Program Staff

***To make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs.***

<b>Staff</b>	Receives and reviews petition and any background information DCF shares about the case. Determines which available GAL volunteer should be assigned to case.
<b>Staff</b>	Assigns volunteer to case, sending copy of petition and GAL program appointment order to volunteer. Shares any background information available with volunteer.
<b>Staff</b> <b>✓ Volunteer</b>	Reviews petition.
<b>Staff</b>	Notifies volunteer of dates for emergency custody, adjudication, and disposition hearings.
<b>Staff</b>	As needed, assists volunteer in planning the steps and priorities of his/her investigation.
<b>✓ Volunteer</b>	Visits the child regularly, having direct and sufficient contact with the child to carry out an independent and valid investigation of the child's circumstance and what the child wants so as to be able to make sound, thorough, and objective recommendations in the child's best interest.
<b>✓ Volunteer</b> <b>Staff</b>	Interviews parents and family members. The parents' counsel is informed of the GAL volunteer's intent to visit or communicate with the parents.
<b>✓ Volunteer</b>	Gathers and reviews data from various records, including DCF, mental health, education, and other community service providers to ascertain the needs of the child. Determines if child is covered by Indian Child Welfare Act. <sup>1</sup>
<b>✓ Volunteer</b>	Verifies accuracy of information gained during investigation.
<b>Staff</b>	Assists the volunteer as necessary to gather and review data from various records, including DCF, mental health, education, and other community service providers.
<b>Staff</b>	Consults with volunteer to ensure all needs are identified.
<b>✓ Volunteer</b>	Determines what services are necessary to meet the child's needs and whether to recommend that the child return to his/her own home or remain in foster care or other group setting.
<b>Staff</b>	Notifies volunteer of foster care reviews and court hearings.
<b>✓ Volunteer</b>	Identifies which resources are available to meet the child's needs.

<b>Staff</b>	Provides a community resource manual and assists the volunteer in identifying which resources are available to meet the child's needs.
<b>✓ Volunteer</b>	Formulates recommendations for services to meet the child's needs.
<b>Staff</b>	Helps volunteer identify additional resources to meet the child's needs.
<b>Staff</b>	Consults with volunteer prior to hearings to review court report and recommendations.
<b>Staff</b>	Coordinates the sharing of information between the volunteer and attorney for the child prior to the hearing as needed.
<b>✓ Volunteer</b>	Identifies and clarifies issues in the case that are known to be in dispute and agreement.

<sup>1</sup> If the child is an Indian child pursuant to ICWA, it is essential that all the applicable provisions of the law are adhered to by the court. Staff can help volunteers to fully understand this law. The GAL volunteer will need to advocate for the special services and resources that are specified in the law. Culturally relevant services are not optional—they are mandatory.

In addition, the GAL volunteer and/or the attorney for the child should ensure that the child's tribal enrollment rights are protected at all times. If the child is not enrolled, the GAL volunteer should advocate that the child's enrollment be completed.

***To facilitate, when appropriate, the settlement of disputed issues.***

<b>Staff</b> <b>✓ Volunteer</b>	Identifies and clarifies issues in the case that are known to be in dispute and agreement.
<b>Staff</b> <b>✓ Volunteer</b>	Determines the limits within which a settlement can be reached with other parties.
<b>Staff</b> <b>✓ Volunteer</b>	Discusses case issues with other parties to determine areas of agreement.
<b>Staff(GAL Program Attorney)</b>	Communicates with volunteer and/or staff about possible settlements.
<b>Staff</b> <b>✓ Volunteer</b>	Facilitates agreement among parties when possible.

**To offer evidence and examine witnesses at adjudication.**

<b>GAL Program Attorney Staff</b>	Consults with volunteer to determine what evidence is needed for the court hearing.
<b>GAL Program Attorney</b>	Reviews case and clarifies disputed issues.
<b>GAL Program Attorney</b>	Identifies what evidence is needed and ensures that subpoenas are issued and documents secured that need to be introduced.
<b>GAL Program Attorney</b>	Interviews witnesses to prepare them for court, including the child when appropriate.
<b>GAL Program Attorney</b>	Performs legal research on disputed legal questions and prepares court presentation of case.

**To explore options with the judge at the dispositional hearing.**

<b>✓ Volunteer</b>	Writes court report, including the child’s wishes, the child’s needs and the resources available to meet those needs, and recommendations for achieving the goal of a permanent safe home for the child. <sup>2</sup>
<b>Staff</b>	Reviews court report to ensure that it includes the child’s wishes, the child’s needs and the resources available to meet those needs, and recommendations for achieving the goal of a permanent safe home for the child.
<b>GAL Program Attorney</b>	Reviews volunteer court report.
<b>GAL Program Attorney</b>	Advocates for the needs of the child.
<b>GAL Program Attorney</b> <b>✓ Volunteer</b>	Brings the child’s wishes to the attention of the court and lets the court know if the child’s wishes and the child’s best interest are not the same. Many children express the desire to return to their parent, but this may not be in the best interest of the child unless the parent corrects the conditions that led to the placement.
<b>✓ Volunteer</b>	Is present and ready to testify, if necessary, about the court report.

<sup>2</sup> ICWA contemplates that the best interest of an Indian child will be protected by maintaining a tribal identity. The GAL volunteer should put in his/her court report how the best interest of the Indian child is going to be met and what resources are necessary for that purpose.

***To conduct follow-up investigations to ensure that the orders of the court are being properly executed. To report to the court when the needs of the juvenile are not being met.***

<b>✓ Volunteer</b>	Reviews the court order.
<b>✓ Volunteer</b>	Visits the child regularly and maintains sufficient contact with parents, relatives, foster parents, tribe, and agency personnel to determine if the orders of the court are being properly executed.
<b>Staff</b>	Notifies volunteer of foster care reviews, court hearings, and any relevant information that they receive regarding the case.
<b>Staff</b>	Maintains awareness of all cases assigned to volunteers and has ready access to information to discuss case when necessary and appropriate.
<b>✓ Volunteer</b>	Verifies accuracy of information gained during follow-up investigation.
<b>✓ Volunteer</b>	Notifies staff and attorney for the child if the orders of the court are not being properly executed.
<b>Staff</b> <b>✓ Volunteer</b>	Contacts those who are responsible for carrying out the orders of the court to address issues surrounding noncompliance.
<b>Staff</b> <b>✓ Volunteer</b>	Identifies facts and changes in situation that may necessitate the case's return to court.
<b>GAL Program Attorney</b>	Files necessary motions and schedules hearings as needed.

***To protect and promote the best interest of the juvenile until formally relieved of the responsibility by the court.***

<b>✓ Volunteer</b>	Regularly monitors the child in his/her home setting, evaluating appropriateness of placement and whether the child is receiving court-ordered services, identifying any unmet needs.
<b>Staff</b>	Consults with volunteer throughout the life of the case to ensure adequate investigation and monitoring of the case.
<b>✓ Volunteer</b>	Ensures that the child's wishes are known to the court at every review hearing and that the child is appropriately informed about relevant case issues (impending court hearings, the issues to be presented, and the resolution of those issues) in an age-appropriate manner.

<b>✓ Volunteer</b>	If the GAL volunteer's recommendations for the best interest of the child are in conflict with the wishes of the child, the volunteer informs the child of the reasons for the recommendations. If there is any question about what should be shared with the child, the volunteer consults with staff and/or appropriate professionals to seek guidance.
<b>GAL Program Attorney</b> <b>✓ Volunteer</b>	Ensures that the child's wishes are known to the court at every review hearing.
<b>✓ Volunteer</b>	Determines whether additional services are needed for the child.
<b>✓ Volunteer</b>	Advocates for interventions and services that are designed to ensure that as soon as possible, the child is in a safe, permanent home and GAL program involvement will no longer be necessary.
<b>Staff</b>	Provides support to the volunteer who advocates for interventions and services designed to ensure that as soon as possible the child is in a safe, permanent home and GAL program involvement will no longer be necessary.
<b>Staff</b> <b>✓ Volunteer</b>	Identifies facts and changes in situation that may necessitate the case's return to court.
<b>GAL Program Attorney</b>	Files necessary motions and schedules hearings as needed.
<b>GAL Program Attorney</b>	Files appeals as necessary.
<b>Staff</b>	Maintains awareness of all cases assigned to volunteers and has ready access to information to discuss case when necessary and appropriate.

From the North Carolina Guardian ad Litem volunteer training curriculum.





## ICWA RESOURCE MATERIALS

It is critical for volunteers to understand that ICWA applies different standards to cases involving Indian children. It is always in the best interest of an Indian child to have ICWA followed. Therefore, volunteers should be trained to ask if the child they are working with has Native American heritage, even if the child does not “look Indian.” By identifying Native American children and monitoring ICWA compliance, volunteers ensure that the Indian child’s cultural and familial needs will be fully considered by the court.

### **Additional resources available to volunteers:**

- ✓ National CASA Association’s website, [www.casanet.org](http://www.casanet.org). An ICWA section provides articles and more in-depth information.
- ✓ National Indian Child Welfare Association, [www.nicwa.org](http://www.nicwa.org). Several excellent packets of ICWA information are available for a small charge.
- ✓ Tribal Court Program Specialist, National CASA Staff. This staff person can answer questions and provide information regarding ICWA.
- ✓ *Adoption and Safe Families Act of 1997: Issues for Tribes and States Serving Indian Children*, David Simmons and Jack Thrope, 1999. This booklet explains how ASFA and ICWA can work together for the best interests of Indian children. Available through NICWA, 503-222-4044. Booklet is also available to download off of the internet at [www.nicwa.org/policy/asfa-issues.pdf](http://www.nicwa.org/policy/asfa-issues.pdf) (Note: Adobe Acrobat Reader is required to view the document).



# The Indian Child Welfare Act: The Need for a Separate Law

*By B. J. Jones*

Because few federal laws govern the disposition of state court cases involving adoption, guardianship, and abuse and neglect, the existence of the Indian Child Welfare Act (25 U.S.C. 1901 et seq.) may come as a surprise to lawyers handling Indian child custody cases for the first time.

The Indian Child Welfare Act (ICWA), which was adopted by Congress in 1978, applies to child custody proceedings in state courts involving “Indian” children—children of Native American ancestry. The provisions of ICWA represent a dramatic departure from the procedural and substantive laws that most states have enacted to govern child custody proceedings. Because Indian children are treated uniquely in the legal system, and because there is an increasing number of court proceedings involving Indian children, the need for lawyers to understand ICWA is fast becoming imperative. (Since ICWA was enacted, more than 250 state and federal court decisions have been rendered.)

## Ensuring a Future

A look at history reveals why Congress determined a special law was needed to protect the rights of Indian children and their parents. Before 1978, as many as twenty-five to thirty-five percent of the Indian children in certain states were removed from their homes and placed in non-Indian homes by state courts, welfare agencies, and private adoption agencies. Non-Indian judges and social workers—failing to appreciate traditional Indian child-rearing practices—perceived day-to-day life in the children’s Indian homes as contrary to the children’s best interests.

In Minnesota, for example, an average of one of every four Indian children younger than age one was removed from his/her Indian home and adopted by a non-Indian couple. A number of these children were taken from their homes simply because a paternalistic state system failed to recognize traditional Indian culture and expected Indian families to conform to non-Indian ways.

Other children were removed because of the overwhelming poverty their families were facing. Although, admittedly, poverty creates obstacles to child rearing, it was used by some state entities as evidence of neglect and, therefore, grounds for taking children from their homes.

It was not only the high number of children being removed from their homes, but also the fact that eighty-five to ninety percent of them were being placed with non-Indians, that caught the attention of Congress. Congress was actively promoting the continued viability of Indian nations as separate sovereigns and cultures at that time. By enacting the substantive placement preferences in ICWA—which require that Indian children, once removed, be placed in homes that reflect their unique traditional values (25 U.S.C. 1915)—Congress was acknowledging that no nation or culture can flourish if its youngest members are removed. The act was intended by Congress to protect the integrity of Indian tribes and ensure their future.

# When Does the Indian Child Welfare Act Apply?

ICWA applies to four types of Indian child custody proceedings:

## 1. Foster Care Placements

ICWA applies to the temporary removal of an Indian child from his/her home for placement in a foster home or institution, when the parent or Indian custodian (defined as an Indian person with custody of the child under tribal or state law or who has the child pursuant to a parental placement) cannot regain custody upon demand (25 U.S.C. 1903(1)). The latter provision exempts ICWA application from voluntary religious or school placements, as well as voluntary placements with private or public agencies where the parent or custodian can regain custody at any time. However, ICWA would apply to a guardianship in which a child is placed with a nonparent, as this fits the definition of a foster care placement.

*(Note: Be aware that certain state courts have limited the applicability of ICWA by holding that the law does not apply to proceedings involving the removal of an Indian child from a non-Indian family (e.g., a case that involves an Indian child raised by a non-Indian mother). Known as the “existing Indian family” exception, this exception has generated some controversy. Refer to your own state’s laws to determine its status in your state.)*

## 2. Termination of Certain Parental Rights

ICWA applies to any proceeding that may result in the termination of the parental rights of the Indian child’s parent or the custodial rights of the child’s Indian custodian, including stepparent adoption proceedings and delinquency proceedings that lead to an attempt to terminate parental rights. (These generally are not governed by ICWA.)

## 3. Pre-adoption Placements

## 4. Adoption Placements

ICWA applies to proceedings that lead up to and culminate in the adoption of an Indian child. It imposes an obligation on both public and private adoption agencies to comply with its provisions.

ICWA does not apply to custody disputes between divorcing parents or custody disputes related to any other proceedings, nor does it apply to delinquency proceedings involving an Indian child who has committed an act that would constitute a crime if it were committed by an adult (except where the state is using the delinquent act as the grounds for a termination of parental rights petition). However, it would apply if the act committed by the child did not constitute a crime (e.g., an act of truancy or incorrigibility).

# Is the Child an Indian?

To apply the provisions of ICWA to a particular child custody proceeding, the court must first determine that the child is an Indian. Much litigation has ensued over this distinction. ICWA defines “Indian child” as a child who is a member of a federally recognized Indian tribe or is eligible for membership in such a tribe and the biological child of a member (25 U.S.C. 1903(4)). Parties to a state court proceeding must defer to Indian tribes on questions of membership.

There are a variety of ways Indian tribes determine membership, ranging from blood quantum requirements to residency requirements; no set formula applies to all tribes. At present, there are more than four hundred Indian tribes and Alaskan native villages that are recognized by the U.S. Department of the Interior and, therefore, governed by the provisions of ICWA. (A list is published annually in the Federal Register.) Children who are members of Canadian tribes or tribes that have state-government recognition only are not governed by the act.

## Procedural Recognition

The provisions of ICWA require that lawyers adhere to numerous specific procedures. First and foremost, because the act vests Indian tribal courts with exclusive jurisdiction over Indian children who live on Indian reservations (25 U.S.C. 1911(a)), state courts, with limited exceptions, cannot exercise jurisdiction over child custody proceedings that involve such children or children whose custodial parents were living on a reservation immediately prior to a foster care or adoption placement. These types of proceedings must be adjudicated through the tribal court of the relevant tribe.

If the Indian child lives off the reservation, the state court may exercise jurisdiction over the child custody proceeding, but the party invoking the state court's jurisdiction must comply with certain procedures: if the proceeding involves the involuntary removal of a child, the petitioning party must notify the Indian child's tribe and the Department of the Interior by certified mail of the pendency of the state court action if the party knows or has reason to believe that the child is Indian.

When a child's tribal affiliation is unknown, the party must notify all tribes that may have some connection to the child as well as the Department of the Interior, which may have information that would help determine the child's tribal status. If the proceeding is voluntary—for example, the mother is voluntarily seeking to terminate her rights so she can place the child for adoption—notice may not be necessary; need will be dictated by the court decisions of that particular jurisdiction.

In situations where notice is required, notice must be completed at least ten days before the state proceedings may advance and it must apprise the tribe of the following: its unconditional right to intervene in the state court proceeding, its right to examine all relevant documents, and its right to request that the start of the proceeding be delayed. Notice also must inform the tribe of its right, and the right of the child's parent or Indian custodian, to request a transfer of the proceedings to the tribal court. The law requires that state courts grant such requests except when one of the following occurs: one of the parents objects to the transfer, the tribal court declines the transfer, or the state court finds good cause not to transfer.

Much of the case law interpreting ICWA has arisen from situations in which one of the parties to a state court child custody proceeding claims "good cause" for not transferring the case to a tribal court. Although "good cause" is not defined under the law, its meaning is made somewhat clear in the guidelines for state courts enacted by the Department of the Interior (44 Fed. Reg. Vol. 44, No. 228, p. 67584 (Nov. 26, 1979)). The guidelines state that a party opposing a transfer to tribal court has the burden of showing good cause by clear and convincing evidence.

Examples of good cause grounds to deny a transfer request include the absence of a tribal court for the tribe in which the Indian child is a member, an objection by the Indian child to a transfer (if he/she is older than age twelve), a history of minimal contact between the child and the Indian tribe and reservation, a situation in which the request for transfer is not timely and the proceedings are at an advanced stage, and evidence that a transfer would impose hardship on the parties and witnesses because of the distance to the tribal court (forum non conveniens ground).

In addition, some state courts have adopted a “contrary to the best interest of the child” standard when deliberating a transfer request—even though such a standard is not included in the law or guidelines—and have invoked it as grounds to deny a transfer when the Indian child has already “bonded” to his/her foster caretaker(s). (Be aware that some other state courts have condemned the use of this standard to deny a transfer.)

## More Procedures

Whatever the reason, if transfer to a tribal court is denied and the case remains in state court, various other procedural protections of ICWA will apply. For example, a party attempting to achieve the involuntary foster care placement of an Indian child must establish, by showing clear and convincing evidence, that an active effort has been made to provide remedial and rehabilitative services to the child’s family and that it was unsuccessful; and continued custody by the parent or Indian custodian likely will result in serious emotional or physical damage to the child.

The latter showing must be supported by the testimony of one or more “qualified” expert witnesses, persons who have substantial knowledge of traditional Indian child-rearing practices or substantial experience working with Indian children. In states with small Indian populations, finding such a person may be problematic, but the alternative—allowing the child’s future to ride on the opinion of experts who may be ignorant and, therefore, biased against Indian parents—is more problematic.

When the petitioning party’s objective is the termination of parental rights to an Indian child, the party has the burden of demonstrating beyond a reasonable doubt that serious emotional or physical harm will befall the child if parental rights are not terminated, and that active efforts to provide remedial and rehabilitative services have been unsuccessful. Again, the findings must be supported by the testimony of a qualified expert witness, one who is versed in the ways of traditional Indian child-rearing practices.

## Voluntary Placements & Adoptions

In recognition that a substantial number of Indian children have been removed from their homes under the guise of “voluntary placements,” ICWA regulates the voluntary placement of Indian children and the voluntary termination of parental rights for adoptions. Its stringent requirements on parties who seek voluntary placements represent an attempt to abolish a longtime pattern by many public and private agencies of abusing the rights of Indian parents.

The act mandates that the valid placement of an Indian child in foster care or the valid termination of parental rights requires the consent of the Indian parent in writing before a judge of competent jurisdiction (either a state court judge, if the child is domiciled off the reservation, or a tribal court judge) who certifies that he/she has explained to the parent the consequences of his/her actions in a language the parent understands, or has had the consent translated into a language the parent understands.

A consent to the termination of parental rights cannot be executed until after the child is ten days old. If the consent is not obtained pursuant to the provisions of ICWA, the termination will not be legal. The party obtaining custody will be barred from invoking a state court's jurisdiction to further place the child, and the child will be ordered returned to the parent, unless returning the child would subject him/her to immediate danger.

An Indian parent or custodian can revoke his/her consent at any time during the foster care placement and before the decree of termination or adoption has been entered. After doing so, he/she will be entitled to the automatic return of custody of the child. In the case of an adoption, however, if the court has already entered an order accepting the voluntary termination of parental rights, the parent cannot revoke his/her consent. In cases where an Indian child has been in the home of an Indian custodian, not only must there be a termination of the parental rights, but also a termination of the custodial rights before the adoption will be legal.

## Placement Provisions

A second, and equally important, goal of Congress in enacting ICWA was to ensure the placement of Indian children in homes that would reflect the unique values of Indian culture. This was achieved by the placement provisions of ICWA, which govern both voluntary and involuntary placements of Indian children and define placement preferences that public and private agencies must follow. (*Note: Indian tribes are permitted under ICWA to change the order of the act's placement preferences, so you must investigate with each tribe you encounter the order of its particular preference scheme.*)

According to ICWA, when an Indian child is placed in foster care, the placement agency or party must place the child, in the absence of good cause to deviate, with (1) a member of the Indian child's extended family (including non-Indian members of the family), (2) a foster home licensed or approved by the child's tribe, (3) an Indian foster home licensed or approved by a non-Indian agency or authority, or (4) an institution for children that has the approval of an Indian tribe.

To determine which placement option best meets the intent of ICWA, the placement agency must consider the need to approximate the child's family setting as closely as possible, to keep the child as near as possible to his/her family's home, and to place the child in the least restrictive environment.

When an Indian child is placed for adoption, ICWA requires that, in the absence of good cause to deviate, the child be placed with (1) a member of his/her extended family, (2) other members of his/her tribe, or (3) other Indian families. In this situation, too, it is necessary to determine whether the tribe involved has altered the standard preference scheme.

In either a foster care or adoption placement, if the party advocating a deviation from the placement preferences demonstrates good cause to deviate, the state court can sanction a placement that does not conform to the standard placement criteria.

The Department of the Interior's guidelines for state courts lists the following as examples of good grounds to deviate: (1) a request to deviate that comes from the biological parents or the child (provided he/she is of "sufficient" age), (2) extraordinary physical or emotional needs of the child (as established by qualified expert testimony), and (3) the determination—after a diligent search for a family that meets the placement preferences—that a "suitable" family is not available.

## Is It Working?

The standard by which any law should be judged is whether it has achieved its stated legislative objective. The Indian Child Welfare Act was enacted to prevent the continued removal by state agencies, courts, and private agencies of large numbers of Indian children from their families and—equally important—their culture.

At the very minimum, the existence of the act has brought attention to the unique needs of Indian children and provided state agencies and judges with a valuable, cross-cultural educational tool. Although the removal of Indian children from their homes continues to occur at an alarming rate, ICWA mandates a process that, if adhered to over time, will eventually ensure the survival of Indian tribes and cultures well into the future.

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