

The Indian Child Welfare Act: A Family's Guide

Answers to Your Questions About ICWA

A publication of the National Indian Child Welfare Association

This brochure is not a substitute for legal counsel. You should always contact a lawyer for advice on any legal matter relating to ICWA or child custody issues.

WHAT IS ICWA AND WHY WAS IT PASSED?

“ICWA” stands for the Indian Child Welfare Act, which is a federal law passed in 1978. ICWA was passed in response to the alarmingly high number of Indian children being removed from their homes by both public and private agencies. The intent of Congress under ICWA 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). ICWA sets federal requirements that apply to state foster care, guardianship, termination of parental rights, and adoption proceedings involving an Indian child who is a member of, or eligible for membership in, a federally recognized tribe. You can ask your caseworker or lawyer to find out what court proceedings are coming up for your family.

HOW DOES ICWA PROTECT AMERICAN INDIAN AND ALASKA NATIVE CHILDREN AND THEIR FAMILIES?

When ICWA applies to an Indian child's case, the child's tribe and parents or Indian custodian have an opportunity to be involved in decisions affecting services and placement decisions for the child. A tribe or a parent can also petition to transfer the case to the tribal court of the tribe of which the child is a member or eligible for membership.

ICWA has federal requirements for states regarding removal and placement of Indian children in foster care, guardianship, or adoptive homes and allows the child's tribe to intervene in the case (e.g., participate in court proceedings, access court information, share information with the court).

Note: The terms “Indian” and “American Indian/Alaska Native” are used interchangeably throughout this document. Additionally, the term “tribe” includes all federally recognized Alaska Native villages and tribes located in the United States.

WHO IS COVERED BY ICWA?

Indian children involved in state foster care, guardianship, termination of parental rights, or adoptive proceedings

are covered by ICWA. This includes status offenses involving a juvenile offense that would not be considered a criminal violation if committed by an adult (e.g., truancy, incorrigibility). A person may define themselves as Indian, but in order for ICWA to apply, the involved child must be an Indian child as defined by the law.

ICWA defines an ICWA eligible child as:

- Unmarried;
- Under age 18; and
- Either a member of an Indian tribe OR is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe (25 U.S.C. § 1903).

Only the child's tribe can determine the child's eligibility for membership in their tribe.

ICWA does not apply to:

- Custody disputes between parents (e.g., divorce proceedings or cases determining which parent has custody of a child);
- Juvenile delinquency proceedings (e.g., proceedings involving a criminal violation by a juvenile that would also be a violation if the juvenile were an adult); or
- Cases in tribal court.

HOW DO I KNOW IF MY CHILD IS ELIGIBLE FOR MEMBERSHIP IN A TRIBE?

All tribes have the right to determine who is a citizen or member of their tribe, and different tribes have different requirements for eligibility. In order to understand these requirements for the child's tribe, please contact the tribe's enrollment office. For more information on how to contact the child's tribe, please visit the Bureau of Indian Affairs' (BIA) website at www.bia.gov/bia/ois/dhs/icwa.

WHAT IF MY CHILD IS INDIAN BUT IS NOT A MEMBER OF A FEDERALLY RECOGNIZED TRIBE?

If your child does not meet the definition of “Indian child” outlined in ICWA (see response to the question “Who is covered by ICWA?” above), ICWA would not apply to your child's case. Other federal and state laws, however, may provide other protections, including support for placing your child with relatives and the opportunity to be heard in court. Ask your attorney or caseworker about these laws.

WHAT CONSIDERATIONS SHOULD BE MADE IN AN ICWA CASE?

Caseworkers must make several considerations when handling an ICWA case, including:

1. Providing active efforts to the family (see section on “What are active efforts?” below);
2. Finding a placement that fits the ICWA placement preferences;
3. Notifying the child’s tribe and the child’s parents or Indian custodian of the child custody proceeding; and
4. Working actively to involve the child’s tribe and the child’s parents in the proceedings.

Your caseworker should be able to explain your rights under ICWA and any other case actions for you.

WHAT ARE ACTIVE EFFORTS?

States are required to provide active efforts to families of Indian children, and the court will be asked to determine whether active efforts have been made. Under the federal regulations, “active efforts” mean the active and engaging, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. They also address the unique culture of the Indian child and family and extended family (25 C.F.R. § 23.2). The federal regulations give 11 examples of active efforts, including providing culturally appropriate services, actively engaging and consulting with the Indian child’s extended family and community (e.g., inviting them to family team meetings, involving them in the development of the case plan), and supporting regular visitation with the parents.

ICWA mandates the state make active efforts in every ICWA case in two areas:

1. To provide services to the family to prevent removal of an Indian child from his or her parent or Indian custodian, and
2. To reunify an Indian child with his or her parent or Indian custodian after removal.

A cornerstone of active efforts is active and early participation and consultation with the child’s tribe in all case planning decisions. Additionally, active efforts are different from “reasonable efforts.”

For example, reasonable efforts might be only a referral for services, but active efforts would be to arrange for culturally appropriate services and help families overcome obstacles (e.g., transportation, finances, childcare, etc.) in order to engage in those services. ICWA and the federal regulations (25 C.F.R. Part 23) apply whether or not the child’s tribe is involved in the child custody proceedings.

HOW DOES ICWA APPLY TO FOSTER CARE PLACEMENTS?

ICWA requires that any Indian child placed in foster care be placed according to ICWA’s foster care placement preferences. ICWA defines foster care as any foster care, guardianship, or institutional/residential placement that is temporary and the parent cannot have their child returned upon demand.

The foster care placement preferences are:

1. a member of the Indian child’s extended family,
2. a foster home licensed or approved by the Indian child’s tribe,
3. an Indian foster home licensed or approved by a non-Indian authority (state), and
4. an institution approved by the Indian child’s tribe.

While the Indian child’s tribe may assist the state in locating a placement preference home, it is the responsibility of the state to identify and secure the placement preference home.

HOW DOES ICWA APPLY TO VOLUNTARY ADOPTIONS?

ICWA requires that in a voluntary adoption of an Indian child, the parent’s or Indian custodian’s consent to the adoptive placement must be executed in writing and provided before a judge to be valid. This means the consent must be performed in front of the state court judge. The judge must certify that the terms and consequences of the consent were fully explained and understood by the parent(s) or Indian custodian. The consent will not be valid if given sooner than 11 days after the birth of the child. The parent(s) or Indian custodian may withdraw their consent prior to the termination of their parental rights for any reason, and the child shall then be returned to them.

ICWA also requires that an Indian child placed for adoption be placed within ICWA’s adoptive placement preferences, which are:

1. a member of the Indian child’s extended family,
2. a member of the Indian child’s tribe, or
3. another Indian family.

These requirements help ensure that parents have good information that can inform their decision to place their child for adoption and to consider the lifelong importance of the child’s connection to their tribe and tribal culture. If you are involved in a voluntary adoption and don’t feel that ICWA’s requirements are being complied with, contact the Indian child’s tribe or an attorney.

WHO SHOULD YOU CONTACT IF YOU FEEL THAT YOUR RIGHTS UNDER ICWA ARE BEING IGNORED?

If you feel that ICWA is not being applied correctly in your child’s case, you should contact the following people as soon as possible:

- A lawyer (with Indian law experience preferred)
- The child’s tribe (ICWA tribal contacts are listed on the BIA website, www.bia.gov/bia/ois/dhs/icwa)

You may also contact your caseworker’s supervisor or a state ombudsman liaison that hears complaints about state child welfare cases. Ask your caseworker or caseworker’s supervisor for information regarding a state ombudsman or related position that handles complaints. The court may order additional hearings, different services, or a different placement if it decides that ICWA is not being applied correctly.

For more information on ICWA and a list of Frequently Asked Questions, visit us online at: www.nicwa.org.