

# Tribal Child Welfare Codes as Sovereignty in Action:

▶▶▶ A GUIDE FOR TRIBAL LEADERS

This version of the document was prepared for the 2016 NICWA annual conference.



THE UNIVERSITY OF ARIZONA  
**NATIVE NATIONS  
INSTITUTE**

Founded by the Udall Foundation  
& the University of Arizona

*Strengthening Indigenous Governance*

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**NICWA**

National Indian Child Welfare Association  
*Protecting Our Children • Preserving Our Culture*

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Special thanks are owed to the National Indian Law Library of the Native American Rights Fund (NARF) and the University of Oklahoma Law Library. While some codes used for this study were available on tribal websites, we also drew extensively on these institutions' specialized web resources (see <http://www.narf.org/nill/index.html>, the website of the National Indian Law Library, and <http://thorpe.ou.edu/>, the website for the Native American Constitution and Law Digitization Project, a joint project of the National Indian Law Library and University of Oklahoma Law Library). Finally, NARF staff also provided us with codes available at the National Indian Law Library but not available on their website.

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## **A Guide for Tribal Leaders**

Prepared for 2016 NICWA Annual Conference

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## INTRODUCTION

With passage of the Indian Child Welfare Act of 1978 (ICWA), Congress formally recognized Native nations' inherent authority to govern child welfare matters and provided support for tribal self-determination over child welfare. Because ICWA "assumes that a tribal code is the governance mechanism by which a tribe establishes and implements its jurisdiction over all aspects of child well-being,"<sup>1</sup> ICWA's passage also marked the starting point for (re-)establishing tribal laws to govern the protection and care of Indian children and families.

Almost 40 years later, how have tribes responded to this opportunity? How have tribes' child welfare laws and codes<sup>2</sup> evolved? How might tribes strengthen their laws to implement their jurisdiction? How are Native nations enacting their sovereignty to protect their children?

Based on a study of 107 tribal child welfare codes<sup>3</sup> conducted collaboratively by the Native Nations Institute (NNI) at The University of Arizona and the National Indian Child Welfare Association (NICWA), this report focuses on eight core aspects of tribal child welfare policy:

- Jurisdiction
- Mandatory reporting
- Alternative (differential) responses
- Paternity
- Removal of a child from the family home
- Termination of parental rights
- Permanency (guardianships and adoption)
- Best interest of the child

Where relevant, our discussions consider how tribal child welfare codes reflect tribal culture and tradition and how codes can reflect the specific needs of a tribal community. Throughout, the report aims to provide decision-relevant information for tribal leaders working to increase protections for their communities' children and families.

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<sup>1</sup> Cross, Terry L. and Robert J. Miller. 2009. "The Indian Child Welfare Act of 1978 and Its Impact on Tribal Sovereignty and Governance." In *Facing the Future: The Indian Child Welfare Act at 30*, edited by Matthew L.M. Fletcher, Wenona T. Singel, and Kathryn E. Fort, 235-244. East Lansing: Michigan State University Press.

<sup>2</sup> A tribe's child welfare code is its collection of laws that address child welfare.

<sup>3</sup> Codes reviewed were either publicly available online or accessible via the Native American Rights Fund National Indian Law Library. While this study used the most up-to-date codes found in those searches, some tribal codes may have been updated since the searches were carried out. The collection is diverse: it includes both older and more recently developed codes and codes from tribes that vary in geography and population size. The overarching study examined more than 50 possible child welfare provisions, resulting in a dataset containing more than 100 variables.

## AN OVERVIEW OF CHILD WELFARE PROCESSES

Tribal children who have been abused and neglected will be protected and cared for by either a state or a tribal child welfare system. Before addressing the question of jurisdiction (determining whether state or tribe has authority over the case), it is useful to know how child welfare systems work. Figure 1 captures the process employed, with minor variations, by most tribes and states.

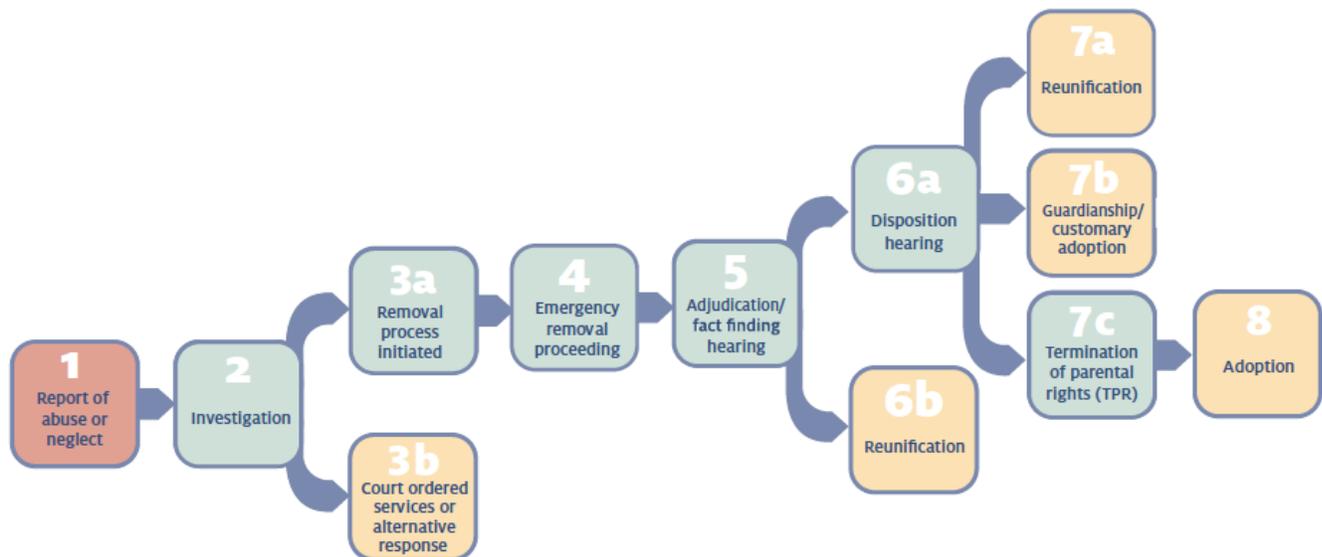


Figure 1. Overview of the Child Welfare System

The process begins with a report of child abuse or neglect (step 1 in Figure 1). When a relevant authority receives a report of child abuse or neglect, the report is then investigated (step 2). If the report is substantiated (if there is evidence to support the claim of abuse or neglect), either removal procedures are initiated (step 3a) or the child welfare program will “wrap” services around the family to keep the child safe at home (step 3b). These services often are court-ordered, although they also can be provided without court involvement through a diversion process termed an “alternative response” or “differential response.” Services may include drug treatment, parenting classes, family therapy, or other programs to improve child safety and well-being. In some tribal systems, alternative responses include traditional practices that help create a safe environment for the child.

If removal procedures are initiated (step 3a) the child is removed from the family home via an emergency removal proceeding (step 4). The court must hold a subsequent formal hearing to examine and determine the validity of the facts and claims in the case and whether or not removal is necessary (step 5). At this stage, if abuse or neglect is not proven to the court’s satisfaction, the family is reunited (step 6b) If the child welfare authorities show that abuse or neglect has occurred and that ongoing removal is necessary, the court schedules a disposition hearing at which a service plan for the family is ordered and a placement of the child is

determined (step 6a). If the family is able to follow the treatment plan and create a safe environment for the child, then the child may be returned home and the family reunified (step 7a). If the family is unable to follow the treatment plan or create a safe environment for the child, then child welfare authorities will seek an alternative permanent placement.

Guardianship, customary adoption, or termination of parental rights (TPR) followed by adoption (steps 7b, 7c, and step 8) are the most common permanency arrangements for children whose parents cannot safely care for them. In contrast to states, many tribes consider TPR incompatible with their traditions and beliefs, and some favor guardianship and customary adoption as alternatives. These arrangements sever a parent's primary caregiving responsibilities but not the parent's relationship to the child. (These topics are covered in more detail in section 7, "Permanency," below.)

## ISSUES IN TRIBAL CHILD WELFARE POLICY AND PROCESS

Within this overall process there are a number of issues that tribal policy and process may need or want to address, either through provisions in codes or via other mechanisms that create policy and govern practice.

### 1. Jurisdiction

The first question asked in any case in any court is whether the court has jurisdiction—the authority—to hear it. If a court concludes that it does not have jurisdiction, it must dismiss the case. If a court has jurisdiction, it can hear the case, make findings, and issue orders and decisions as necessary and required by law.

#### The landscape of Indian child welfare jurisdiction

ICWA was a response to federal and state governments' pattern of ignoring Native nations' authority over child welfare issues. ICWA formally recognizes and protects tribes' inherent jurisdiction over child welfare cases involving member children. The Act specifically recognizes three types of tribal jurisdiction (see Figure 2):

- 1) *Exclusive jurisdiction*: When an Indian child<sup>4</sup> is domiciled (resides) on a reservation or when a child previously has been a ward of the tribal court and P.L. 83-280<sup>5</sup> does not transfer jurisdiction to the state, the tribe has exclusive jurisdiction, and the tribal court is the only court with authority to hear the case.
- 2) *Concurrent jurisdiction*: Where an Indian child is domiciled on a reservation and federal law (P.L. 83-280) recognizes state jurisdiction, the tribe and state both retain jurisdiction, and each has the authority to hear the case.
- 3) *Transfer Jurisdiction*: Where an Indian child is not domiciled on a reservation, the state and the tribe have concurrent jurisdiction, and ICWA empowers the tribe to transfer jurisdiction back to its own court.

*Tribal codes can make explicit statements about jurisdiction that go above and beyond the minimum standards set up by ICWA.*

<sup>4</sup> An "Indian child" for the purposes of ICWA (and, therefore, for the purposes of these jurisdictional rules) is a child who is a member of a federally recognized tribe or a child who is eligible for membership in a federally recognized tribe and has a biological parent who is a member.

<sup>5</sup> PL-280 affects tribal child welfare by providing some states with jurisdiction on certain tribal lands. Tribes and states in this situation share jurisdiction over tribal territory.

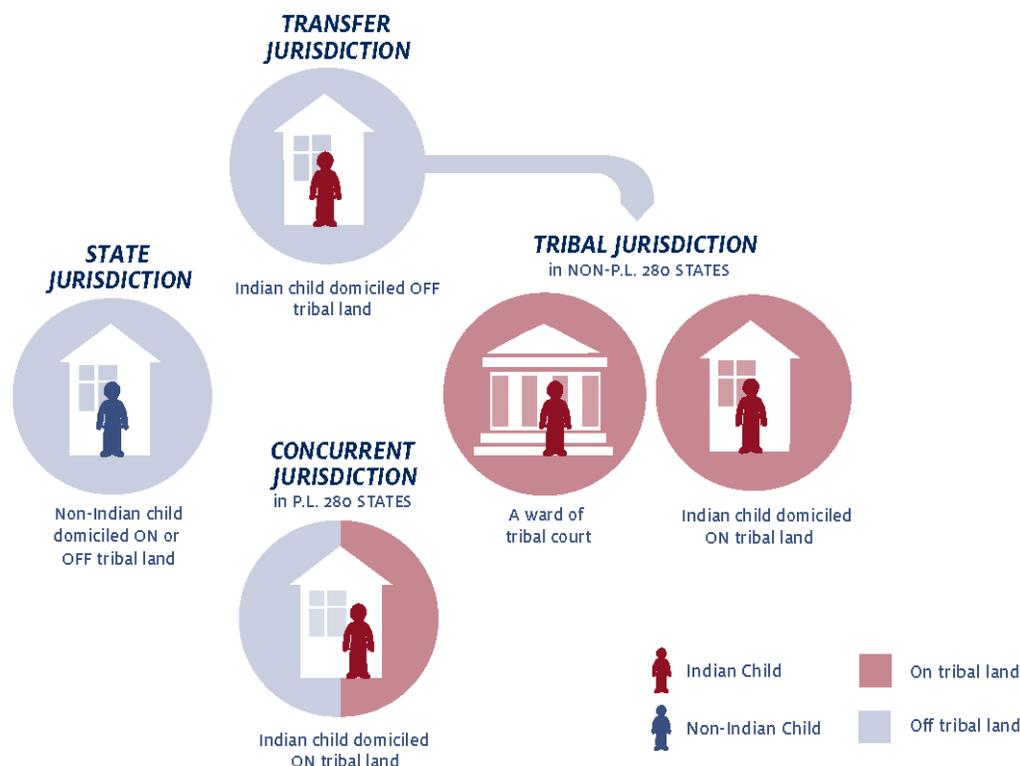


Figure 2. Jurisdiction in Indian child welfare cases

In addition to ICWA, U.S. Supreme Court decisions recognize that when a case arises on tribal land, tribes retain the authority to assert general civil jurisdiction, which includes child welfare, over all Indians or all members of *any* federally recognized tribe.<sup>6</sup>

These jurisdictional rules, recognized by ICWA and described in case law, apply to all tribes regardless of the language in their child welfare codes. Nonetheless, it may be helpful for tribes, in writing their own welfare laws, to reiterate their self-determined choices regarding child welfare jurisdiction and clarify which types of cases their child welfare authorities and courts will manage and which will be left to the state. Furthermore, tribal codes can make explicit statements about jurisdiction that go above and beyond the minimum standards established by ICWA. For example, some tribes assert jurisdiction over all children, Indian or not, who live with tribal members on the reservation; over non-Indian children when an emergency arises; or over the children of families who consent to the jurisdiction of the tribe. Figure 3 illustrates this spectrum of *possible* tribal jurisdictional statements.

<sup>6</sup> See, for example, *United States v. Montana*, 450 U.S. 544 (1981); *United States v. Wheeler*, 435 U.S. 313 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976).

**NO EXPLICIT JURISDICTIONAL STATEMENTS:**

If the tribal code makes no explicit jurisdictional statements, ICWA jurisdictional rules would apply.

**EXPLICIT STATEMENT OF JURISDICTION OVER:**



Figure 3. Progressive assertions of tribal jurisdiction over children in tribal codes

This study found that most tribes are including jurisdictional statements in their tribal child welfare codes. Nearly every code reviewed included a clear jurisdictional statement and fell into the spectrum demonstrated in Figure 3. The content of those statements varied in coverage and detail. As an example, Figure 4 focuses on statements of jurisdiction over Indian children on tribal land. The reviewed codes contained: 1) explicit statements about member children, with no statement about other Indian children; 2) explicit statements about non-member Indian children, but did not mention member children; 3) statements covering a combination of member and non-member Indian children, and 4) no explicit statement.

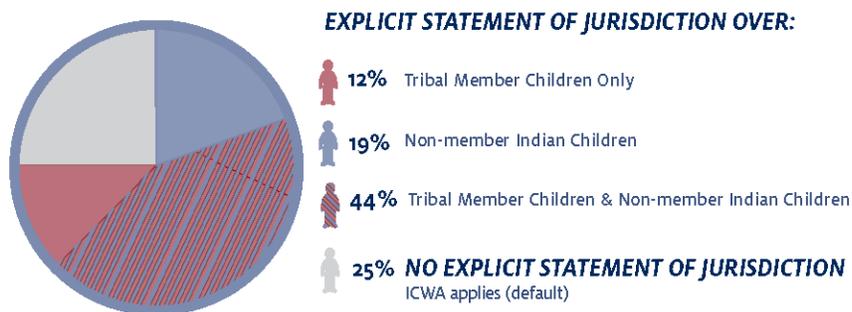


Figure 4. Statements in tribal codes on jurisdiction over INDIAN children domiciled ON TRIBAL LAND

In addition to the scope of claimed jurisdictional authority, a number of other issues arise related to jurisdiction. For example, ICWA includes a definition of who is an Indian child for child welfare purposes. This definition may diverge from tribal definitions governing citizenship, meaning that ICWA may cover some children of concern to the tribe but who do not meet tribal citizenship requirements. To address this situation, a tribe may want to specify eligibility for ICWA in its child welfare code; alternatively, it may wish to make explicit provision in the code for the case-by-case determination of a child’s ICWA eligibility.

**Transferring jurisdiction from state court to tribal court**

ICWA requires that a state notify a tribe any time a member child (or a child who may be a member) is involved in a state child welfare or adoption proceeding. The tribe must then indicate whether the child is in

fact a tribal member or eligible for tribal membership. The tribe also must decide whether to become a participant in the state court proceeding or, alternatively, to pursue a transfer of the case to tribal court.

To facilitate such transfers, tribes have to have two things in place: a designated recipient of state notification (the state has to know whom to notify) and a process for responding. The Bureau of Indian Affairs collects name and contact information of designated notice recipients yearly, but only 35% of the reviewed tribal codes designate a specific tribal office or employee to receive and process such notifications. There are gaps on the processing side as well: only 53% of the reviewed tribal codes included a process for the tribal court, social service departments, or attorneys to use to decide when and how to assert transfer jurisdiction (See Figure 5). To take full advantage of the right to transfer jurisdiction, a tribe will need a formal, codified transfer process that describes who makes the decision to transfer, how that decision will be made, and what factors will be considered.

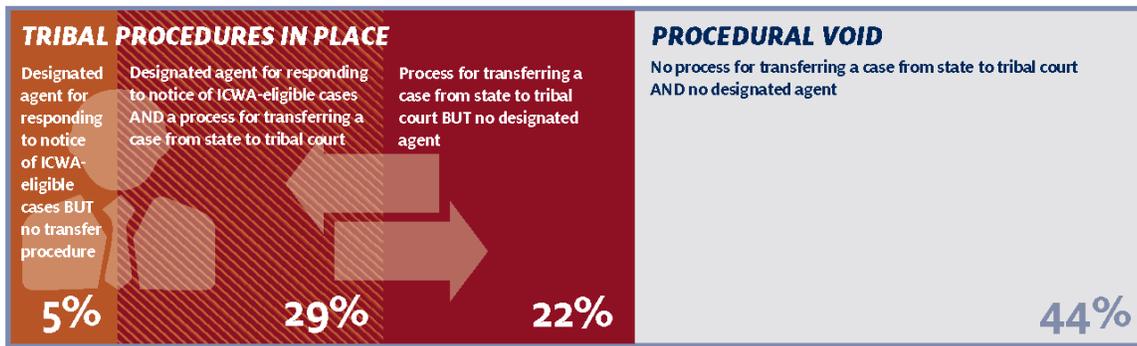


Figure 5. Transferring cases to tribal court: Percentage of codes with responses to state notice of ICWA-eligible cases and processes for transfer from state to tribal court

Transfer of jurisdiction in P.L. 83-280 states requires a preliminary step—retrocession of child welfare jurisdiction from the state government. ICWA explicitly allows tribes affected by P.L. 280 to apply for retrocession of child welfare jurisdiction. Retrocession reinstates exclusive tribal jurisdiction and prohibits a state from exerting jurisdiction over Indian children who are domiciled or reside on the reservation. Nonetheless, this decision has resource and capacity implications for both the tribal court system and the child welfare program: retrocession and exclusive jurisdiction mean that more children will be the sole responsibility of the tribe.

### Tribal policy considerations: Jurisdiction

- Has the tribe determined the extent of child welfare jurisdiction that it wishes to assert? Is the extent of jurisdiction made clear in the tribe’s child welfare code?
- If the tribe is located in a P.L. 280 state, has it considered applying for retrocession of child welfare jurisdiction?
- Has the tribe examined whether ICWA definitions of child welfare eligibility overlap with or depart from tribal requirements for citizenship? Does the tribe’s child welfare code address such eligibility issues?

- Does the tribe have a tribal-state agreement that describes its jurisdiction? Does the tribe’s code reflect this agreement?
- Has the tribe identified a designated recipient for state notification of state cases involving tribal-member children? Is that designation included in the Bureau of Indian Affairs listing?
- Has the tribe specified a process for transferring jurisdiction?
- As the number of cases rises, tribes will need additional resources to cover the court and social service costs generated by these cases. Has the tribe considered the resource implications of expanded jurisdiction?

## 2. Mandatory Reporting

To protect children and support families, a child welfare system must have a process for recognizing abuse and neglect. Such a process depends substantially on individuals who come into frequent contact with children and may become aware of child abuse or neglect (or the potential for them) in a child’s home. “Mandatory reporting” rules in state and tribal laws typically identify certain individuals who are required to report known abuse or neglect to appropriate authorities. Usually, mandated reporters are professionals who interact with children and who have the necessary training and knowledge to recognize abuse or neglect. Their failure to report often is penalized.

Of course, *any* community member may witness or suspect child abuse or neglect. This assignment may reflect the cultural teaching that all tribal members share responsibility for the well-being of a community’s children. A tribal code provision establishing broad responsibility for mandatory reporting can make a strong statement that the tribe will not tolerate abusive or neglectful behavior toward children. However, a smaller penalty may be appropriate for failure to report by those who do not carry professional responsibilities for children’s welfare.

Providing anonymity to reporters of child abuse or neglect is a crucial part of a mandatory reporting statute. Potential reporters may be afraid of retribution if they report child abuse or neglect. Promising them anonymity not only protects mandated reporters but removes a barrier to reporting. Other steps that can support appropriate reporting of abuse or neglect include clarifying how anonymity will be assured for both reporters and affected families, clarifying where reports should go (for example, to child welfare departments or law enforcement, or to a dedicated child abuse and neglect hotline), and clarifying who will or will not have access to report details.



*Figure 6. Frequency of particular mandated reporters in tribal child welfare codes (codes may have included more than one category of mandated reporter).*

The majority of tribal codes reviewed (70%) contained mandatory reporting provisions. Common mandated reporters in these tribal codes are shown in Figure 6.

In general, the mandated reporters in tribal codes are the same reporters found in state codes: child care personnel, school personnel, medical professionals, etc. In addition to designating specified categories of persons who must report child abuse and neglect, a small proportion (11%) of the reviewed child welfare codes with mandatory reporting provisions assign all community members the responsibility of reporting.

### Tribal Policy Considerations: Mandatory Reporting

- Who should be required to report possible child abuse and neglect to authorities? Are mandated reporters specified in the tribe’s child welfare code?
- What should the penalties be for failure to report known child abuse or neglect? Should expectations or penalties for professionals be different from those for other community members?
- How will reporter anonymity be protected?

## 3. Alternative (Differential) Responses

As noted in the child welfare flowchart above (Figure 1, step 3b), court intervention is not the only option for responding to child abuse or neglect. Early in the process there is the possibility of an “alternative response” (sometimes called a “differential response” or referred to generally as “wrap-around” preventative services). Such responses are intended to support children’s safety and preserve families without court intervention through the provision of family support services of various kinds (Figure 7). It is distinct from the policing and punitive model that mainstream child welfare systems typically follow. Based on engagement and partnership, it is designed to build and repair relationships within families and communities and prevent more drastic interventions such as removal, termination of parental rights, and adoption.

In general, an alternative or differential response occurs when a case worker determines that a family is at high risk of entering the child welfare system and, prior to any court involvement, arranges for support services that “wrap around” the family. Such services may range from counseling and substance abuse programs to employment services, mental health programs, social services, parenting classes, or other services developed by the tribal community. Alternative responses also often engage parents and extended kin or other community members as partners in the effort to address the specific familial problems that are leading to abuse or neglect.

Alternative response efforts have to provide for continued case monitoring to determine whether or not the response is having the desired effect. If such efforts fail, court intervention may become necessary. But the alternative response option, assuming it is backed up by sufficient, available, and effective family support

*A caseworker determines that a family is at high risk of entering the child welfare system. Prior to any court involvement, arranges for support services that “wrap around” the family.*

services, may address underlying problems in ways that both protect children *and* strengthen families.

This project assessed whether or not tribal codes include the option of alternative, non-court responses. Approximately one-third of the codes reviewed included such an option.

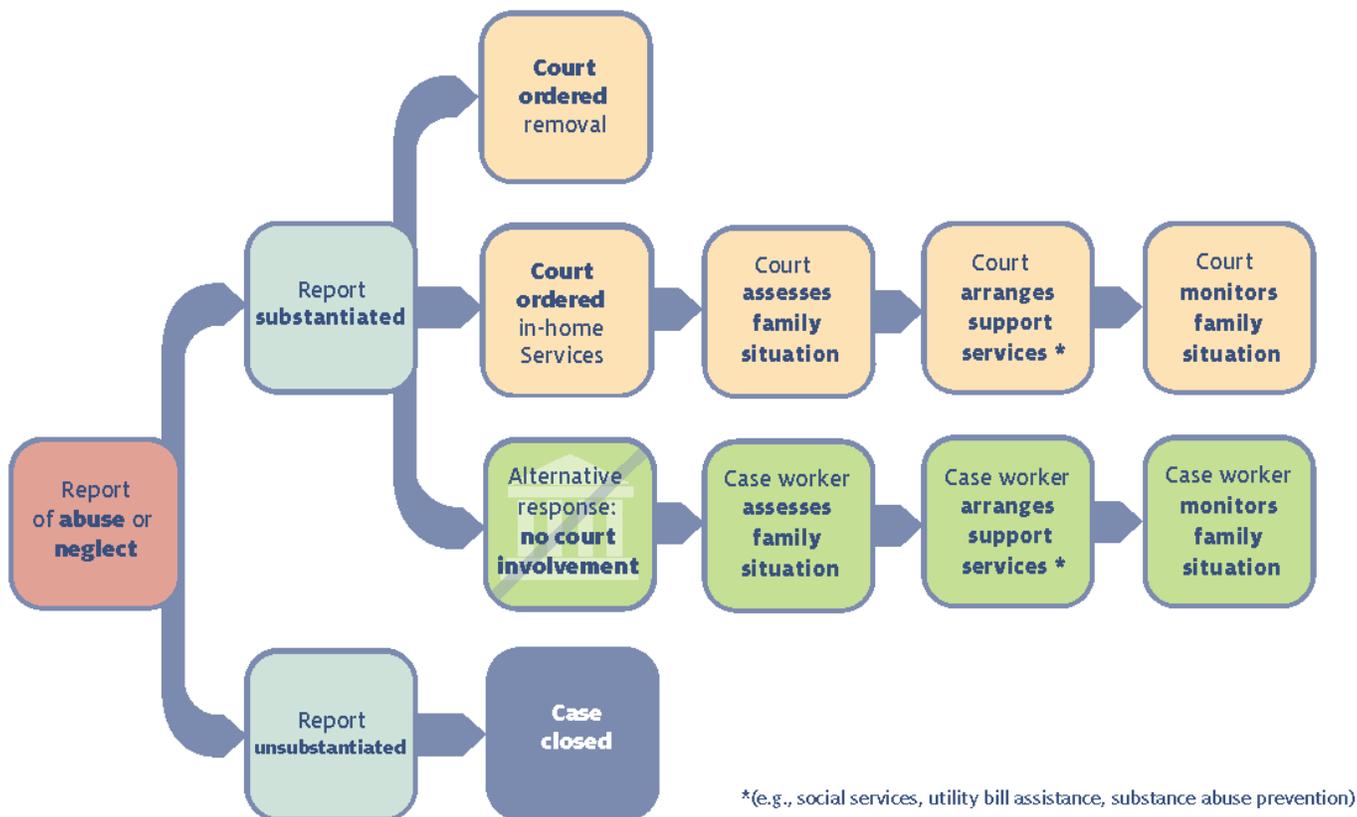


Figure 7. Process for responding to reported child abuse or neglect

### Tribal Policy Considerations: Alternative Response

- Does your tribe’s child welfare code include an alternative response option?
- Does your tribe have sufficient, available, and effective family support services or related programs in place that make it realistic for case workers to consider the alternative response option?

## 4. Paternity

It is important in child welfare cases to know who holds parental rights. This can be particularly complicated in the case of paternity: who is recognized legally as the father of the child? Only legally recognized fathers have rights and protections under state laws, federal laws (such as ICWA), and in child welfare proceedings. But the definition of “legal father” varies across jurisdictions. For example, in some jurisdictions if a child’s natural or biological father is not married to the child’s mother, he may not be considered the legal father of that child; in such cases, the child is considered fatherless. In other jurisdictions, marital status may not matter in the

determination of paternity. Furthermore, the legal father of a child is not necessarily the child’s biological or natural father. The legal father is simply the person holding parental rights.

Jurisdictions also vary in how easy or difficult they make it for an individual to be recognized as the legal father of a child. In some jurisdictions it may be relatively easy to do, involving little more than the filing of paperwork with the appropriate authorities. In others, it may involve extensive court processes before paternity is legally recognized.

Making paternity easy to establish (that is, making the formal legal or administrative procedures necessary to establish paternity relatively simple) not only protects parental rights but also makes it easier for a government to hold a father financially responsible and accountable for caregiving. Making paternity difficult to establish (making formal legal or administrative procedures necessary to establish paternity relatively complex and involved) may limit the ability of a government to hold a father responsible and accountable and may make it particularly difficult for those who are not biologically related to a child but are responsible for caregiving to secure the legal right to determine what happens to the child.

Because of such complexities, many state child welfare codes define grounds for presumptions of paternity—that is, for the presumption of who a child’s legal father is—and processes for establishing and acknowledging paternity. Many tribal child welfare codes, facing the same challenges, include such provisions as well. Forty percent of the reviewed codes specified grounds for the presumption of paternity, and 30% included processes for establishing and acknowledging paternity. Figures 8 and 9 summarize the data.

In general, states are making paternity—legal fatherhood—more and more difficult to establish, particularly if a child is to be adopted. Tribal child welfare codes that provide clear grounds and processes for presuming or establishing paternity can strengthen paternity claims in state courts.

Paternity also is an area where it may be important to take customary tribal practices into account in tribal child welfare codes. Tribal customs—for example, those involving the role of extended kin in child care—may depart significantly from state provisions. Including customary practices in tribal child welfare codes may help

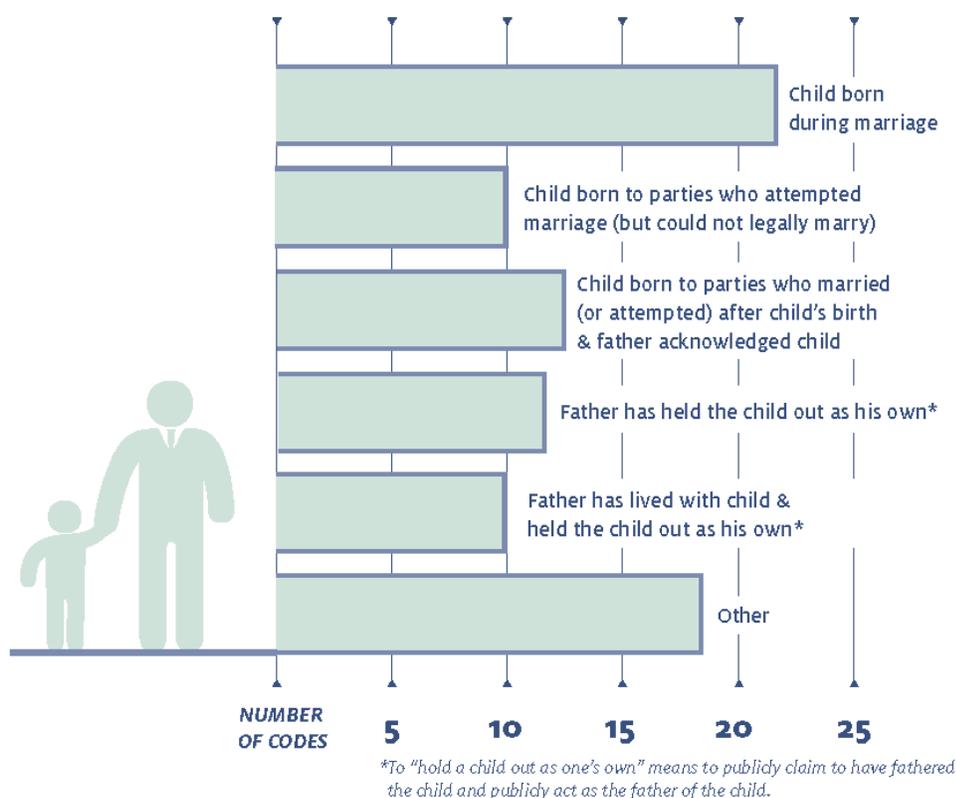


Figure 8. Common ways to presume a man is the father of a child in tribal codes. Note: To "hold a child out as one's own" means to publicly claim to have fathered the child and publicly act as the father of the child.

clarify paternal (and, more broadly, parental) rights in state courts and better protect Native children from culturally inappropriate court determinations.

**Tribal Policy Considerations: Paternity**

- Does the tribe’s child welfare code address paternity issues? Does it make clear what the grounds are for presuming paternity? Does it specify the process by which potential legal fathers can establish paternity?
- Should the tribe’s child welfare code and its processes for establishing paternity take into account the tribe’s concepts of fatherhood and of who should hold parental rights (if those differ from the concepts in mainstream codes)?

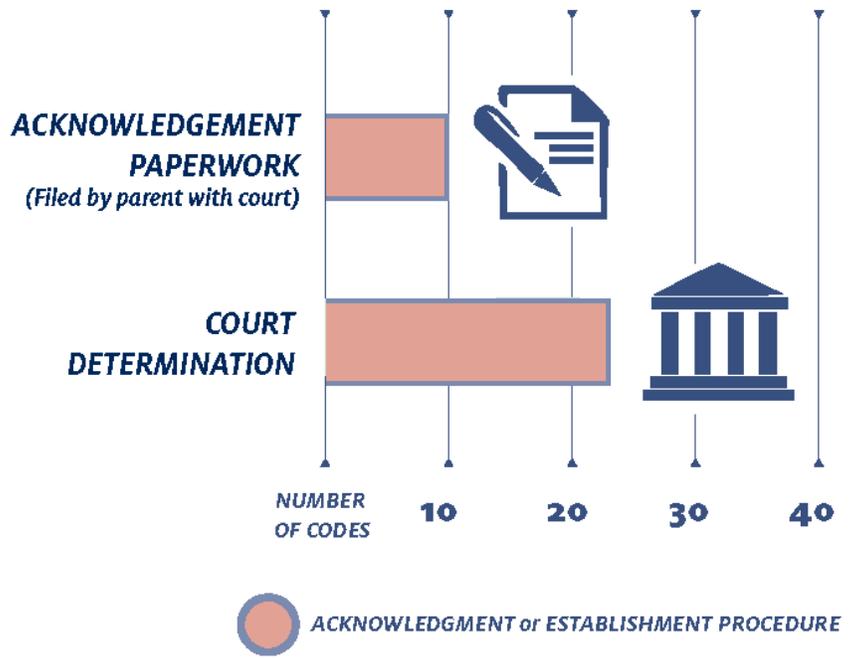


Figure 9. Methods for acknowledging or establishing paternity in tribal codes

**5. Removal of a Child from the Family Home**

Historically, state child welfare systems—driven by biases against American Indian parents and desires to assimilate American Indian children—removed tribal children from their homes with little or no legal justification. These children then were placed in non-Native foster and adoptive homes. Although ICWA’s recognition of tribal jurisdiction is designed to prevent children and families from being mistreated in state systems, these historic practices have left many tribal communities, families, and individuals traumatized. For this reason, removal and foster care are a particularly delicate part of tribal child welfare law.

**Standards for Removal**

In child welfare systems, children are removed from their homes when abuse or neglect has occurred, the safety of the child in the home cannot be guaranteed, and activities to preserve the family have been unsuccessful. Among other things, ICWA specifies what states must do to remove an ICWA-eligible Indian child from the home:

*Tribes need to decide what standard of proof should be required before a child can be removed from the home.*

1. The state must show that there was “clear and convincing evidence”<sup>7</sup> that abuse or neglect occurred and that removal was necessary for the safety of the child. This is known as a “standard of proof.” Standard of proof<sup>8</sup> refers to a degree of evidence and level of certainty required to make a legal decision. The graphic below shows different standards of proof.
2. Evidence must show that “active efforts” have been taken to keep the family safely intact but that these efforts were unsuccessful, necessitating removal.

Should tribal codes include comparable requirements? Including such requirements not only promotes consistency in court practices, but it also can ensure that the values of the community drive court decisions. Leaving the tribal code silent on such requirements allows judges to decide cases as they see fit. Such discretion may be advantageous in some situations, but the risk is that consistency may be lost, and some decisions may not reflect community values.

Tribes also will need to decide what the required standard of proof should be before a child can be removed from the home. A higher standard of proof may decrease the number of unnecessary removals and help keep families together, but it also may leave some children at risk of further abuse and neglect.

This study assessed the standard of proof that tribal codes require for determinations of abuse, neglect, and safety, and the efforts tribal codes require to keep the family intact before a child can be removed (Figure 10). Close to 68% of the tribal child welfare codes reviewed here made statements about the standard of proof necessary to remove a child from the home. The codes included a variety of standards of proof, from the lowest (probable cause, 7% of all the codes) to the highest (beyond a reasonable doubt, 4% of all the codes). Thirty percent used the same standard (clear and convincing evidence) that ICWA requires state child welfare courts to meet when removing an Indian child from the home.

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<sup>7</sup> This standard is required by ICWA.

<sup>8</sup> Beyond a reasonable doubt is the highest standard and is “defined to mean that evidence must be so conclusive and complete that all reasonable doubts are removed.” The next highest standard is “clear and convincing evidence requires the trier of fact (judge or jury) to have a ‘firm belief’ that the facts have been established.” Then is a preponderance of the evidence, which “is a body of evidence that is of greater weight or more convincing than the evidence offered in opposition. It is evidence that as a whole shows that the facts asserted by the plaintiff and sought to be proved are more probable than not. The lowest standard is probable cause, “the fact of believing that it is likely that a crime has been committed and by an identified person.” (See “Burden of Proof.” *World of Criminal Justice*. 2002; and “Probable Cause.” *Dictionary of Law*. 2007.)

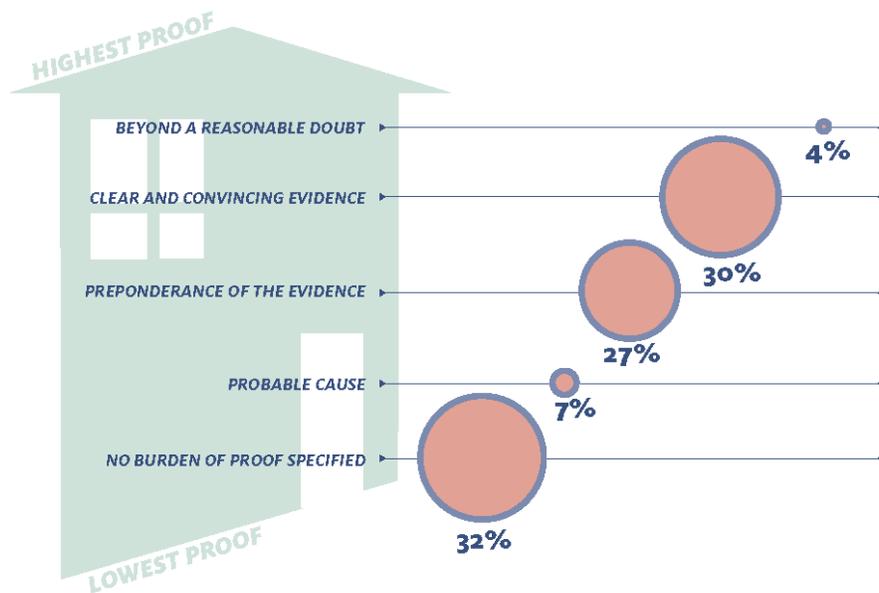


Figure 10. Standards of proof required for removing child from the home in tribal codes

The study also assessed requirements concerning evidence that efforts had been made to keep the family together (Figure 11). Two-thirds of codes required no proof that services had been provided to the family before removal by a tribal court; just over a quarter of the codes (27%) required that reasonable efforts had been provided, and the remaining codes (6%) required the same standard—active efforts—that ICWA requires.

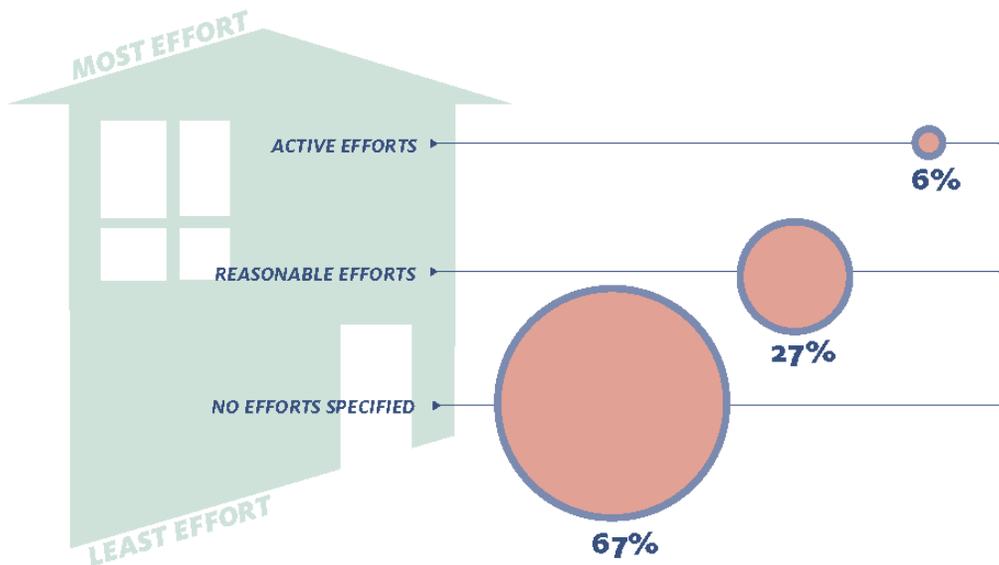


Figure 11. Efforts to prevent removing a child from the home in tribal codes

### Tribal Policy Considerations: Removal

- Does your tribal child welfare code specify a standard of proof required before a child can be removed from the home? What should that standard be? How much discretion over removal decisions do you wish to leave in the hands of tribal courts?
- Does your tribal child welfare code specify the degree of effort that should be made to keep families together and resolve issues of abuse and neglect before the court can remove a child?

## 6. Termination of Parental Rights

Termination of Parental Rights (TPR) is a standard practice in state child welfare systems. When a parent's rights are terminated, the parent's legal relationship to the child is severed, ending all of their parental rights. This frees the child for adoption, which in such systems is the preferred permanent placement. When this happens, the child's kinships relations, such as to extended family or, in the case of American Indians, to a clan or to the tribe as a whole, are not necessarily protected.

### Standards for terminating parental rights

In the past, states often stepped in and ended the rights of Indian parents without any tribal involvement, removing children permanently from their families and out of tribal communities. In response to this pattern and its damaging effects on Indian children and communities, ICWA requires states attempting to end parental rights of ICWA-eligible children to do two things:

1. The state must show evidence that severing the parent-child bond is necessary because it is "beyond a reasonable doubt"<sup>9</sup> that the parent is unfit to safely care for the child.
2. The state must show that "active efforts" have been provided to keep the family safely intact but these efforts were unsuccessful.

Unless these facts are established, a judge may not order the termination of parental rights of an ICWA-eligible child.

This study asked whether tribal child welfare codes included similar requirements for TPR. As shown in Figure 12, three quarters of the reviewed codes required some level of evidence of parental unfitness to care for the child. The standards varied, ranging from the lowest, "probable cause" (3%), to that required by ICWA and used by states, "beyond a reasonable doubt" (3%). Seven percent required "a preponderance of the evidence," while 35% required "clear and convincing evidence." Higher levels of evidence tend to lead to fewer terminations of parental rights but may lead to higher levels of damage to children before TPR is initiated. Lower levels of evidence may

*Many tribes believe that a child's identity and best interest is deeply rooted in the interconnectedness and interdependency with the tribe.*

<sup>9</sup> ICWA requires this standard for Indian children.

better protect children but may also make it more difficult to keep families together.

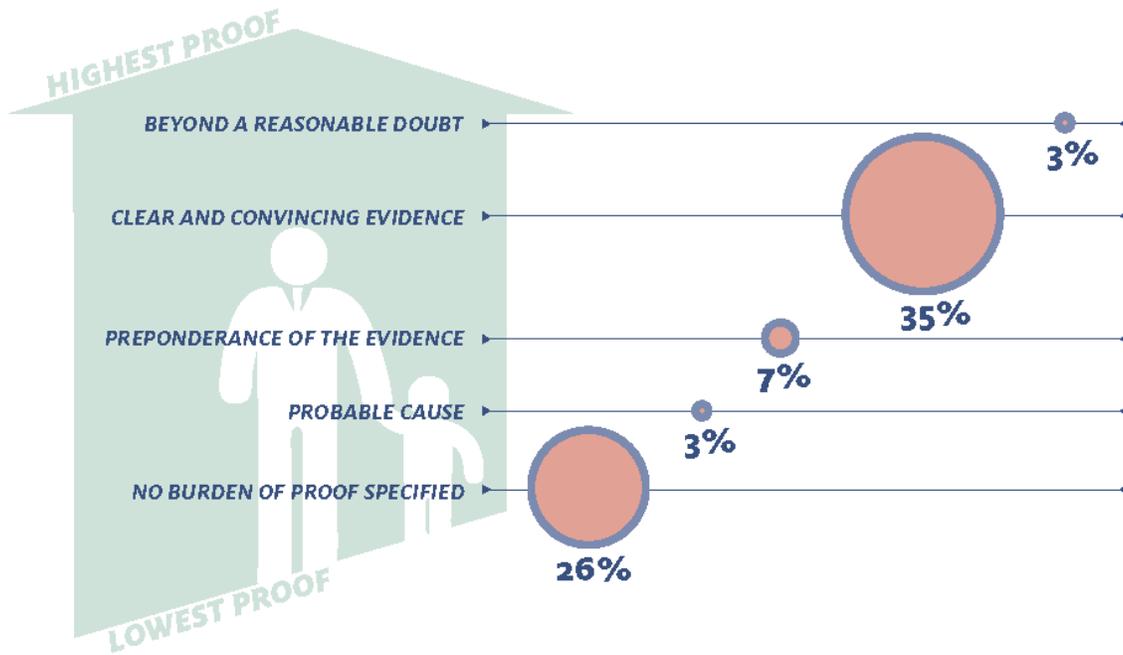


Figure 12. Burden of proof that termination of parental rights is necessary for the safety and wellbeing of the child in tribal codes

As shown in Figure 13, more than one-third of the tribal codes reviewed required the tribe to make efforts to rehabilitate and reunify the family before a parent’s rights could be terminated. Ten percent required “active efforts,” the same efforts required by ICWA and used by states; 26% required “reasonable efforts,” and 2% used unique standards. More than 60% of the codes did not specify any efforts.

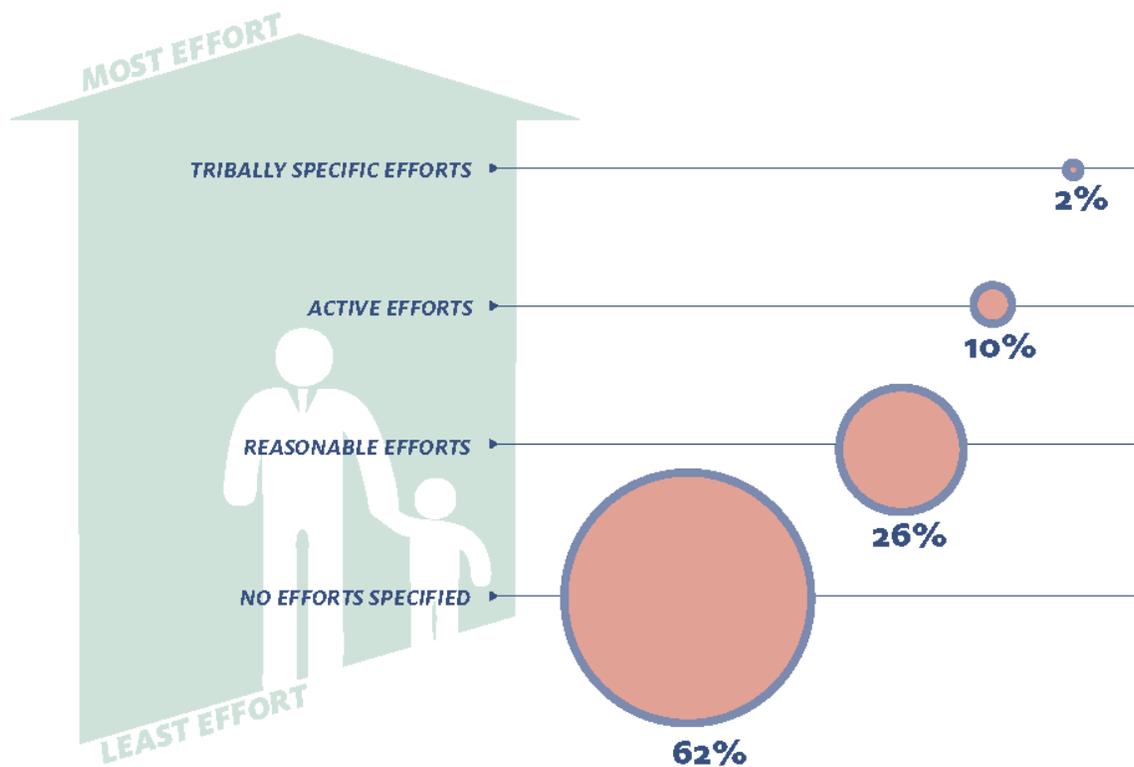


Figure 13. Effort to prevent termination of parental rights in tribal codes

One issue that commonly arises in tribal communities has to do with the protection of the rights of grandparents. In mainstream child welfare systems, the rights of grandparents to their grandchildren often are tied to parental rights. In such cases, when parental rights are terminated, so are the rights of the grandparents. But in tribal communities grandparents are more likely to play a critical role in the lives of children, a role that may be different from but complementary to the role of parents. They often are directly involved in childcare, child rearing, and the integration of children into tribal culture and community.

While the codes reviewed in this study did not specify grandparent rights or roles in child welfare processes, some tribes may want to consider providing legal protections of the rights of grandparents or find other ways of assuring that, if it is perceived as beneficial in a given situation, grandparents continue to play prominent roles as guardians, mentors, or teachers in the lives of the children involved. Such provisions may need to provide mechanisms to manage potential conflicts among parents, guardians, adoptive parents, and grandparents.

### Alternatives to TPR

Some tribes, finding TPR to be culturally incongruent with their traditions, beliefs, and practices, have sought alternatives that would have a less extreme effect on parent-child relationships. Many tribes believe that because a child's identity and best interest is so deeply rooted in the interconnectedness and interdependency with the tribe, to sever these ties in any way is a cultural violence to the child. This study found that a handful of tribes have created statutes that allow several levels of restriction on parental rights, such as suspension, modification, or complete cessation, while some either specify TPR as only a last resort in addressing abuse and neglect problems or have disallowed TPR altogether (although the Social Security Act Title IV-E funding program previously required tribes to include TPR in their codes, specified alternatives to complete termination of parental rights may be sufficient for funding purposes).

These codes embed cultural concerns or values into tribal practice in various ways. Examples include allowing for a continued relationship between the parent and child even if the child has a different permanent caregiver; creating and protecting specific parental rights even where a parent can no longer provide primary care for a child; allowing parents to have rights and primary caregiving responsibilities reinstated if they are rehabilitated; and retaining the child’s tribal citizenship even when a child is no longer the legal child of a tribal citizen. Tribes also can provide for customary adoptions or other traditional childcare practices.

Such alternatives not only integrate tribal values and cultural practices into the most drastic resolution of abuse and neglect issues, but they also allow either temporary or permanent placement with a relative or adoptive parent without completely severing the child’s relationship with natural parents and extended family.

The following chart (Figure 14) illustrates the variation in TPR provisions in the child welfare codes analyzed in this study.

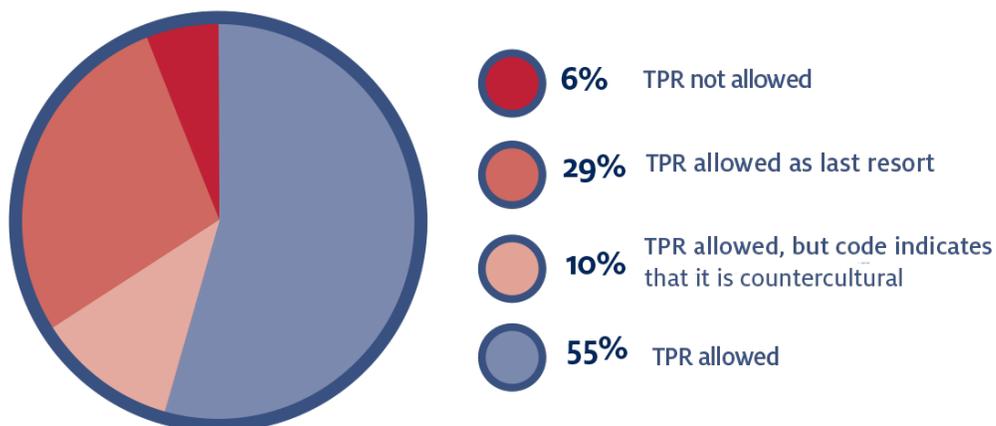


Figure 14. Termination of parental rights in tribal law

### Residual rights

In the context of TPR and adoption, residual rights are those rights that remain with a natural parent, child, or extended family member after termination of parental rights. Such rights may include, among others, reasonable contact between parent and child, the opportunity to consent to adoption, the right to determine a child's religious affiliation, and the responsibility for support of the child. Twenty-six of the codes reviewed (25%) designated certain residual rights to be maintained either after TPR or via an alternative to TPR (Figure 15).

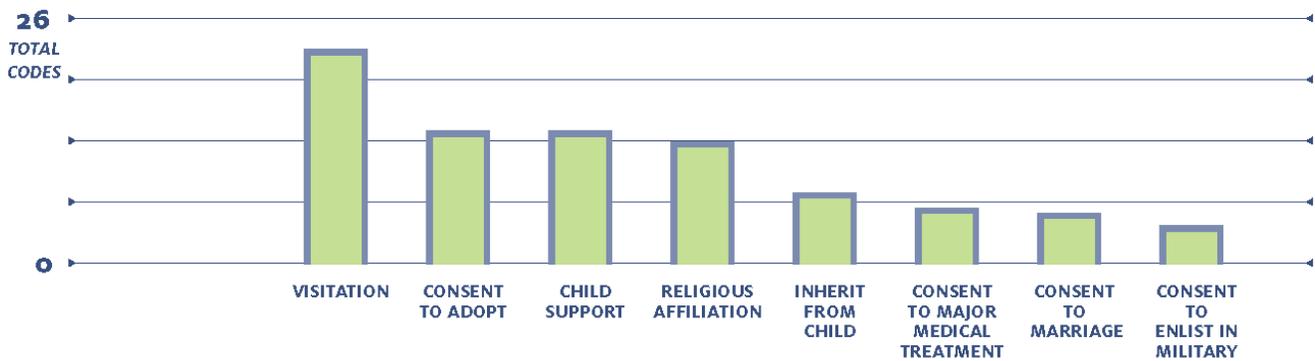


Figure 15. Residual parental rights after TPR or TPR alternative

### Tribal Policy Considerations: Termination of Parental Rights

- Does your tribal child welfare code allow for the termination of parental rights (TPR)? Do your people believe that TPR is an appropriate response to at least some cases of child abuse or neglect?
- If they do, what level of evidence should your code require before parental rights can be terminated? What level of effort to keep the family together and find alternatives ways of addressing abuse should the code require before parental rights can be terminated?
- Should your tribe’s child welfare code include alternatives to complete termination of parental rights? What alternatives will the community believe are appropriate?
- Does your tribe’s child welfare code take into account and protect cultural understandings and practices in the relationships of children to other kin and to the tribal community? For example, should it address the rights of grandparents in cases of TPR?

## 7. Permanency

Once a state or tribe has decided that it will have to take custody of a child because of child abuse or neglect, it then must determine a safe permanent plan and placement for that child. The best and most common permanent placement for a child is in her own home with supportive services to keep her safe—this is known as reunification. When reunification is not possible, an alternative permanent placement must be arranged. Common alternatives include guardianship, adoption, and customary adoption.

Guardianship does not include TPR and preserves both the parent-child relationship and, typically, the child’s relationships with extended family. The guardian has full control over caring for the child without child welfare agency involvement and with minimal (typically yearly) court involvement. Nearly every tribal child welfare code reviewed (95%) included procedures for some form of guardianship.

Conventional adoptions, also known as closed adoptions, require terminating the natural parent’s legal rights, effectively severing the relationship between child and parent. Some tribes, wishing to sustain child-parent relationships of some kind, have developed two creative statutory solutions: 1) open adoptions, where TPR still occurs but continued contact between child and natural parent is allowed, and 2) customary adoption, which involves establishing new primary caregivers for the child but does not involve TPR, thus preserving—to

the extent appropriate in a given case—the parent-child relationship. Because customary adoption does not require TPR, tribes using this practice often couple it with provisions that modify or suspend parental rights. The majority of the codes reviewed (82%) provided for some form of conventional adoption requiring TPR, however some tribal codes allowed only open adoptions. Nineteen codes (15%) included tribal customary adoption, some in addition to conventional adoption and some in place of conventional adoption.

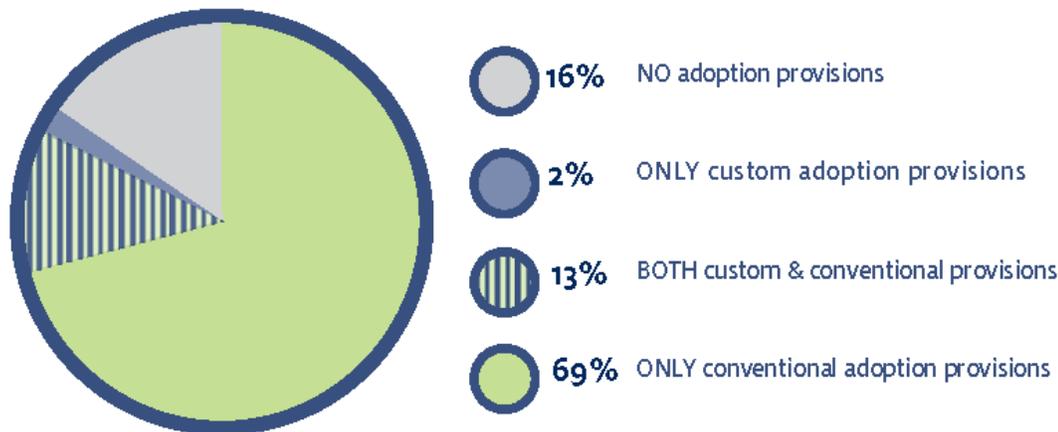


Figure 16. Conventional and customary adoption provisions in tribal codes

ICWA specifies the preferred adoption placements. Whenever possible, children should be placed with family members; if that is not possible, then with another family within their tribe; if that is not possible, then with another American Indian family (25 U.S.C. Section 1915(a)). ICWA also allows tribes to change these placement preferences in their tribal codes. If a tribe changes its placement preferences, state courts must respect those changed preferences in state court proceedings.

Just under half of the tribal codes in this study specified placement preferences for tribal child welfare cases. Some were similar to those specified in ICWA, and some were unique.

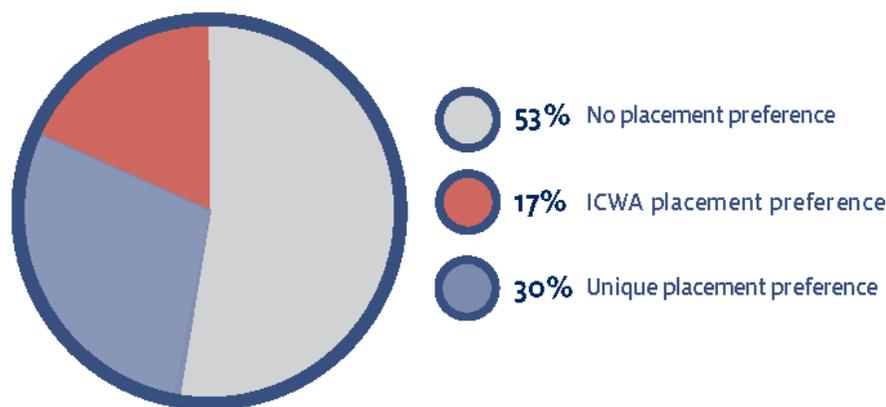


Figure 17. Placement preferences in tribal welfare codes

### Tribal Policy Considerations: Permanency

- Does your tribal welfare code include guardianship provisions? If not, should it?
- What adoption possibilities does your tribal welfare code provide for: conventional (closed) adoption, open adoption, customary adoption? Where termination of parental rights (conventional or closed adoption) is viewed as a last resort or as unacceptable, other adoption options may provide suitable alternatives.
- Does your tribal child welfare code specify preferred placements for children whose parents can no longer care for them? Do those placements reflect the community's views of appropriate placements for such children?

## 8. Best Interest of the Child

In making decisions about child welfare—from safety, custody, or removal to termination of parental rights and ultimate placement—courts typically must take into account “the best interest of the child.” Defining the best interest of the child, therefore, is an important part of a child welfare code. It tells the court what to consider in its decisions.

Tribes often want state or tribal courts to consider things that might well be ignored in mainstream cases. For example, some tribes may braid customs and traditions, cultural considerations, kinship ties, or other distinctive aspects of tribal life and relationships into specific code provisions.

This study assessed whether or not a tribal code defined the best interest of the child and, if so, whether the definition included aspects of tribal culture, custom, or tradition. As shown in Figure 18, the vast majority of tribal codes reviewed (78%) do not define the “best interest of the child.” However, among the 22% that did, most (15 out of 22) included the consideration of culture, custom, or tradition as part of the definition—that is, as an integral part of the best interest of the child.

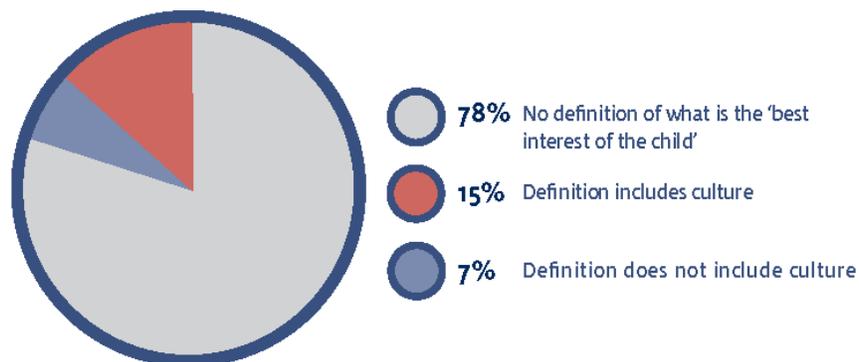


Figure 18. Culture as part of the definition of 'best interest of the child'

Including such considerations in tribal child welfare codes introduces a number of other issues into the tribal child welfare process and the writing of codes. For example, should a code simply require that cultural

principles, values, or practices be taken into account in decisions, or should it specify in detail what those principles, values, or practices are? Including such considerations also may affect the desired qualifications of judges or the role of other persons, such as elders, in decisions. Judges in tribal child welfare cases either will need to understand the cultural considerations and be able to integrate them effectively into decision-making or will need access to respected elders or other culture-bearers who can advise on how such considerations should be taken into account. Alternatively, should decisions that have a prominent cultural component be referred to a specialized court of some sort, more qualified to make such decisions?

### **Tribal Leader Considerations: Best Interest of the Child**

- Including a definition of “the best interest of the child” in a child welfare code provides courts with guidelines for their decisions. Does your tribal child welfare code define the best interest of the child?
- Are cultural considerations part of your community’s conception of the best interest of the child? If so, should your child welfare code include such considerations in its definition of that interest?
- If you include cultural considerations in the definition of the best interest of the child, have you thought through the implications for the decision process? Do you have judges qualified to implement that definition? Do you need an alternative means of being sure that the definition is effectively applied?

## COMMUNITY AND CULTURE IN TRIBAL CHILD WELFARE

### LAWS AND CODES

One purpose of this study was to determine how common it is for tribes to include aspects of their own cultures and traditions in their child welfare codes. While some tribes are using aspects of their cultures in their codes, such use was rare in the 107 codes reviewed here, and few tribes made consistent use of aspects of Native culture or tradition throughout their codes. The majority of codes echoed the prevailing child welfare laws and practices in the United States.

This is not necessarily a weakness. Many tribes may believe that those laws and practices effectively serve their child welfare needs. However, the Indian Child Welfare Act reaffirmed tribes' inherent right to govern how their children are treated in the child welfare system. In doing so, it opened up jurisdictional space for tribes to design their own systems that reflect, if they wish, their own distinctive ways of addressing child welfare issues.

Tribes that want to take advantage of this opportunity can do so in various ways. The preamble or opening statements in a code can set the tone of the code and define its ultimate purposes, including not only the protection of children but the preservation of families and of the tribal community, its values, and its cultural practices.

Definitions offer another area where cultural understandings may be important. The previous section discussed definitions of the best interest of the child that might include aspects of culture. Other definitions may also depart from mainstream practices. For example, some tribes may define a "family" using their own cultural norms instead of state specifications, focusing less on the nuclear family and instead on extended kin, grandparents, and other relatives.

Tribal placement preferences also may depart from state requirements, reflecting tribal understandings of who should be an active part of a child's life. Some tribes may wish to include traditional healing practices in their efforts to keep families together or to address the underlying issues that lead to child abuse and neglect—and so forth.

If the child welfare code does not explicitly incorporate the use of culture and tradition, tribal courts and child welfare officials could be empowered to do so by other means (for example, court rules, general provisions about the role of customary law in other sections of the tribal code, a separate peacemaking court, etc.). Tribes can also modify mainstream child welfare provisions and processes to make them more consistent with cultural values.

*The preamble or opening statements in a code can set the tone of the code and define its ultimate purposes, including the protection of children and the preservation of families and of the tribal community, its values, and its cultural practices.*



Figure 19 identifies some of the key places—but only some—where cultural considerations can be introduced in tribal child welfare codes.

- **Governing law - general statements about how law is applied (e.g., customary law)**
- **Full faith and comity**
- **Jurisdiction**
- **Termination of parental rights**
- **Family (e.g., definition of extended family)**
- **Burdens of proof**
- **Child welfare committees**
- **Social work practice and processes**
- **Placement and permanency (e.g., customary adoption)**
- **Definition of best interest of child**
- **Processes for transferring ICWA cases from state to tribal court**
- **Child abuse and neglect**

*Figure 19. What common sections of child welfare codes reference tribal culture?*

## CONCLUSION

Tribal child welfare laws and codes present tribes with an opportunity to enact the sovereignty that they claim, and to do so in a critical area of tribal life: the care and protection of their children. Especially since the passage of ICWA, which formally recognized tribes' inherent jurisdiction over child custody proceedings involving member children, a large number of tribes are taking advantage of that opportunity, claiming and exercising jurisdiction over their children's welfare. Importantly, because ICWA provides for transfer jurisdiction and in some circumstances requires that state courts defer to tribal child welfare law, tribal code writing can also be a way to affect state action involving Native American children.

Tribes are strengthening their governance over child welfare in diverse ways. Some have developed child welfare codes that largely replicate the codes of the states where those tribes are located. Others—although only a minority—are pushing against the norms of mainstream child welfare systems by, among other things, redefining the family, putting responsibility for reporting abuse or neglect on the community as a whole, creating alternatives to removal and the termination of parental rights, and introducing cultural considerations into “the best interest of the child.”

Overall, however, cultural considerations were used inconsistently or only rarely in the codes reviewed in this study. This is an area where tribes may wish to push further, recognizing that their own cultural understandings and practices can play a key role in the success of their child welfare systems and in the long-term health and safety of their children.

Many tribal communities have technical experts (for example, tribal judges, lawyers, social workers, and community leaders) who understand current tribal child welfare policies and practices. They know the challenges, they know what works, and they understand the financial considerations involved. Their expertise will assist in creating strong and meaningful child welfare codes. But the success of child welfare codes may depend as well on those citizens of Native nations who are culture-bearers and understand the key role that Native cultures can play in child welfare. Through a community engagement process, their expertise on community values, traditional culture, and current needs can be gathered and put to use.

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