

Ute Family Services

INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act Summary

The Indian Child Welfare Act, 12 U.S.C. 1901 et., recognizes that there is a government to government relationship between the United States and Tribes. This law, passed in 1978, affirms that special political relationship, and is not based on race or ethnic factors. Responding to reports that 25-35 % of Indian children nationwide (as high as 50-75% in some states) had been removed from their families and placed at a rate of nearly 90% in non-Indian homes. Congress found that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children...” Congress also determined that states “... often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

ICWA Summary

Congress declared that it is the policy of this nation to protect the best interest of Indian children and to promote the stability and security of Indian Tribes and families by the establishments of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.

ICWA Summary

Purpose of the Indian Child Welfare Act

To protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children ... and placement of such children in ... homes which will reflect the unique values of Indian culture... 25 U.S.C. 1920

ICWA Summary

- ▶ ICWA regulates States regarding the handling of child abuse and neglect and adoption cases involving Indian children-State courts, State Child Protection agencies and adoption agencies;
- ▶ ICWA sets minimum standards for the handling of these cases;
- ▶ ICWA affirms the rights of Tribal Courts to adjudicate child abuse and neglect and adoption cases involving children on the reservation;

ICWA Summary

- ▶ ICWA establishes a preference for Tribal courts to adjudicate child abuse and neglect cases in situations of concurrent jurisdiction; and
- ▶ ICWA affirms and supports Tribal jurisdiction in child welfare proceedings.

ICWA Summary

Typical Parties in an ICWA Case

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

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

ICWA Summary

Indian Child's Rights

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

ICWA Summary

Tribe's Rights

- ▶ To receive notice of a child custody proceedings involving an “Indian child” as defined by ICWA, 25 U.S.C. 1912 (a);
- ▶ To intervene at anytime until the case is dismissed: 25 U.S.C. 1911 (c);
- ▶ To request transfer of jurisdiction to Tribal court from State: 25 U.S.C. 1911 (b)

ICWA Summary

- ▶ To get records; 25 U.S.C 1912 (c);
- ▶ To establish child welfare programs; 25 U.S.C 1931
- ▶ To petition the Secretary of Interior for resumption of jurisdiction. 25 U.S.C. 1918
- ▶ To full faith and credit from Federal and state courts for any child custody processing in Tribal court, 25 U.S.C. 1911 (d).

ICWA Summary

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

ICWA Summary

Parent or Indian Custodian Rights

- ▶ To designate an Indian custodian (who then has the same rights as the parent under ICWA 25 U.S.C. 1930 (6))
- ▶ To a court appointed attorney in any removal, placement or termination of parental rights 25 U.S.C. 1912 (b)
- ▶ To notice of proceedings 25 U.S.C. 1912 (a)

ICWA Summary

- ▶ To have State make ACTIVE EFFORTS to provide remedial services to PREVENT the break-up of the family (State must prove efforts were unsuccessful)
25 U.S.C. 1912 (d) and (e)
- ▶ To a translator, 25 U.S.C. 1913 (a).

ICWA Summary

Rights of Adoptive Indian Children 25 U.S.C. 1917

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

ICWA Summary

Burdens of Proof

ICWA establishes burdens of proof that are higher than those applied in non-Indian cases. When an Indian child is involved, the court must find that the children are dependent by using the **CLEAR and CONVINCING** evidence standard used in state court. Using **EXPERT WITNESSES**, there must be a finding that “continued custody of the child by the parent of Indian custodian is likely to result in serious emotional or physical damage of the “. 25 U.S.C. 1912 (e)

ICWA Summary

Major Provisions of ICWA

- A. Identification of ICWA cases 25 U.S.C. 1903 (1) and (4). ICWA applies to cases in **State courts ONLY** (not **Tribal** courts) in specific situations: (1) child custody proceedings- foster care placements, termination of parental rights, pre-adoptive and adoptive placements (2) involving an Indian child- any person under the age of 18 who is a member of an Indian tribe or is the biological child of a member of an Indian tribe and is eligible for membership in the tribe. **ONLY A TRIBE CAN DECIDE MEMBERSHIP**- sometimes membership in a tribe is not the same as a enrolled member.

ICWA Summary

Major Provisions of ICWA

B. Jurisdiction 25 U.S.C. 1911 (a); also see 25 U.S.C. 1918. Where an Indian child resides or is domiciled on his/her reservation or is the ward of the tribal court, only the Tribal court may properly exercise jurisdiction. There are special issues in Public Law 280 states where Tribes may need to complete a re-assumption process to achieve exclusive jurisdiction over children. For all other children, the State court may exercise jurisdiction, but the State court is required to transfer the case to the Tribal court if the Tribe or parent request transfer except when there is “good cause” not to transfer.

ICWA Summary

Major Provisions of ICWA

C. Placement 25 U.S.C. 1912, 1915, also see 25 U.S.C. 1913 (b). No placement (away from biological parents, adoptive parents, or Indian custodian) can be made without (1) active efforts to preserve the family through remedial and rehabilitative services designed to “prevent the breakup of the Indian family; and (2) clear and convincing evidence that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. A “**Qualified Expert Witness**” is required to establish the “**Clear and Convincing**” standard. The “social and cultural standard of the Indian community is which the parent or extended family reside” must be applied to placements. 25 U.S.C. (d)

ICWA

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

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

ICWA Summary

Adoptive preference Placement (when parental rights have been terminated or relinquished) 25 U.S.C. 1915 (a)

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

ICWA Summary

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

ICWA Summary

D. Criteria for Termination of Parental Rights 25 U.S.C. 1912 (f). In proceedings to terminate parental rights to an Indian child, there must be (1) evidence “beyond a reasonable doubt”, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child; (2) a qualified expert witness. NOTE: where a parent or Indian custodian voluntarily consents to termination of parental rights, the consent must be signed before a judge and the judge must certify that the consequence of the consent were fully understood by the parent or Indian custodian 25 U.S.C. 1913

ICWA Summary

E. Consequences for Failing to Follow ICWA: 25 U.S.C. 1914. If any of the requirements in 25 U.S.C. 1911, 1912, and 1913 are not met, the violations of ICWA may be grounds for a tribe, parent, Indian custodian or a child to ask the court to vacate court orders and require new proceedings.

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Indian Child Welfare Act Summary

Information provided by Tribal Law and Policy
Institute

West Hollywood, Ca.

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

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