

Topic 9: Indian Child Welfare Acts

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The Indian Child Welfare Act of 1978 (ICWA) establishes federal standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families and for other purposes. This Act:

- ◆ Establishes minimum federal standards for the removal of Indian children from their families and the placement of Indian children in foster or adoptive homes that will reflect the unique values of Indian culture; and
- ◆ Provides for assistance to Indian tribes in the operation of child and family service programs.

This Act authorizes the Bureau of Indian Affairs in the U.S. Department of the Interior to make grants to Indian tribes and organization for the establishment and operation of Indian child and family service programs on or near reservations. The objective of these programs shall be to prevent the breakup of Indian families and to ensure that permanent removal of an Indian child from the custody of his parents or guardian or custodian shall be a last resort.

Such family and child service programs may include:

- ◆ A system for licensing or otherwise regulating Indian foster and adoptive homes.
- ◆ The operation and maintenance of facilities that provide:
 - Counseling and treatment of Indian families,
 - Temporary care for Indian children, and
 - Family assistance of homemaker and home counselors, day care, after school care, employment, recreation activities, respite care, home improvement programs, etc.

In 2003, the Iowa legislature enacted Iowa Code Chapter 232B, titled the "Iowa Indian Child Welfare Act" (Iowa ICWA). The Iowa legislation is designed to complement the federal statute and to confirm Iowa's commitment to protect the rights of Native American children and families who are involved with the child welfare system.

These acts do not generally apply to Native American children who are involved with the juvenile court system because of delinquent acts when the child's offense would be considered a crime if committed by an adult. However, ICWA does apply to a "status offense" that would not be a crime if committed by an adult and for termination of parental rights proceedings.

The protections for Native American children provided in the Iowa ICWA apply to both the voluntary or involuntary placement of Native American children in foster care, pre-adoptive or adoptive settings, and to termination of parental rights proceedings involving Native American children.

The language of both federal and state statutes places high priority on early involvement of tribal representatives, as well as other persons with specific knowledge of Native American culture and child-rearing practices, in child welfare case assessment and case planning for Native American children.

Note: Both the federal and state ICWA statutes state that if another federal or state law applicable to a child custody proceeding provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under the ICWA statutes, the court shall apply the higher standard.

Case Planning Requirements

Under both federal and state statutes, there is a requirement that before pursuing out-of-home placement, the state:

- ◆ Make "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of Native American families, and
- ◆ Document that these efforts were unsuccessful.

The Iowa statute describes active efforts as a "vigorous and concerted level of casework beyond the level that typically constitutes reasonable efforts as defined in [Iowa Code] sections 232.57 and 232.102."

Federal and state ICWA statutes require that preference be given to placing Native American children with relatives and extended family members, as defined by tribal customs and practices, rather than in non-related foster care settings. State child welfare agencies are required to maintain documentation of efforts to identify relatives and explore placement in these settings.

Both federal and state ICWA statutes speak to the vital importance for state child welfare agencies to recognize and preserve cultural connections for Native American children, especially for children placed in non-Native American settings.

Placement preference requirements are the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or maintains cultural ties. In the absence of such law or custom, the extended family shall include a person who:

- ◆ Has reached the age of 18; and
- ◆ Is the child's grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, first or second cousin, or stepparent.

Requirements for Emergency Removals

Note: For children who are residents of a reservation and are residing on a reservation, the state may not intervene because of the tribal court's jurisdiction.

When an Indian child is living temporarily off the reservation, the law allows the state to remove to place the child in emergency foster care. However, such placement must end when it is no longer needed as a preventative measure.

Remove an Indian child from the parental home and place the child in an emergency foster home when the child is in imminent danger or physical danger or harm. If the child must be removed from the child's family, ensure that emergency removal or placement terminates immediately when placement is no longer necessary to prevent harm or injury to the child. If necessary:

- ◆ Initiate a state child custody proceeding subject to ICWA requirements,
- ◆ Transfer jurisdiction over the child to the appropriate tribal court, or
- ◆ Return the child to the child's parent or custodian.

Within three business days following issuance of an emergency removal order on an Indian child, the court issuing the order is required to notify the child's tribe of the emergency removal by registered mail, return receipt requested.

The notice is required to include specific information listed in the statute. Primary requirements center on the names and tribal affiliations of the child and parents, copies of any affidavits, petitions, or orders leading to the removal, and, when available, any reports or other documents from public or private agencies filed with the court and used by the judge in making the removal decision.

ICWA does not address the right of the Department or court to make emergency removal and placement of an Indian child living off the reservation. However, the Act was not intended to not provide protection for these children.

Therefore, the Department worker and court must proceed in providing any Indian child with the same protection and services that is afforded any resident of the state in an emergency.

Placement of an Indian Child

1. When any Native American child is accepted for foster care or pre-adoptive placement, consult with tribes at the earliest opportunity to identify extended family and possible tribal foster care resources. If you do not know the contact person for the tribe, obtain this information from the Division of Child and Family Services.
2. Ensure that the placement is:
 - ◆ In the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met; and
 - ◆ Within reasonable proximity to the child's home, taking into account any special needs the child has.
3. In the absence of good cause to the contrary, give preference to a placement with:
 - ◆ A member of the child's extended family, or
 - ◆ A foster home licensed, approved or specified by the child's tribe, or
 - ◆ An Indian foster home licensed or approved by the Department, or
 - ◆ 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.
4. Determine if the child's tribe has established a different order of placement preference. (See [Iowa Placement Preference Hierarchy](#) and [Sac and Fox Tribe Placement Preference Hierarchy](#).) If so, the court and the Department shall follow that order so long as the placement is the least restrictive setting appropriate to the particular needs of the child.

5. Consider the placement preference views of the child and parents. Where appropriate, the preference of the Indian child or parent shall be considered. If the consenting parent evidences a desire for anonymity, the court or agency shall give way to such desire in applying the preference.
6. Make a diligent effort to secure placement for the child according to the established order of preference. This effort shall include:
 - ◆ Discussion with the child and the child's parents or custodian regarding preference of placement.
 - ◆ Contact with the designated person from the child's tribe and discussion regarding available placements.
 - ◆ Use of expert witness testimony to help determine the placement that will be most beneficial for the child.
7. A decision to deviate from the placement preferences set out above must take into consideration:
 - ◆ The request of the biological parents or of the child when the child is of sufficient age.
 - ◆ The special needs of the child, including education, emotional, cultural, physical, and medical needs.
 - ◆ The availability of suitable families for placement after a diligent search has been completed.
8. Maintain a record *C. Child Placement Plan* of all efforts to comply with the established order of preference as well as a record of all resulting placements.
 - ◆ Document your efforts to place the child within the Tribally recognized placement preference order.
 - ◆ Explain and document any reasons why the child, because of specialized needs or other considerations, cannot be placed in accordance with the preferred placement order.

Iowa Placement Preference Hierarchy

The Iowa ICWA provides a preferred placement preference order for various types of out-of-home placements, as follows:

1. For the **emergency removal, foster care, or preadoptive placement** of an Indian child, ensure that the placement is in the least restrictive setting which:
 - ◆ Most approximates a family situation.
 - ◆ Can meet the child's special needs, if any.
 - ◆ Is within reasonable proximity to the child's home, taking into account any special needs of the child.

Note: The placement preference order also applies to emergency removals. To meet the expectation of exploring family members and foster homes licensed or approved by tribes, ongoing state agency/tribal partnerships are needed to identify available emergency foster home resources, and prompt communication with tribes to explore relative placements is necessary.

2. In any **foster care or preadoptive placement**, give preference to the child's placement with one of the following in descending priority order:
 - ◆ A member of the child's family, as defined by tribal custom and regulations.
 - ◆ A foster home licensed, approved or specified by the child's tribe.
 - ◆ An Indian foster home licensed or approved by an authorized non-Indian licensing authority (i.e., the state child welfare agency).
 - ◆ A child foster care agency approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.
 - ◆ A non-Indian child foster care agency approved by the child's tribe.
 - ◆ A non-Indian family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe.

3. In the **adoptive or other permanent placement** of an Indian child, give preference to placement with one of the following, in descending priority order:
 - ◆ A member of the Indian child's family
 - ◆ Other members of the Indian child's tribe
 - ◆ Another Indian family
 - ◆ A non-Indian family approved by the Indian child's tribe
 - ◆ A non-Indian family that is committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe

Note: In making placement decisions and considering the placement preference statutory guidelines, courts can consider the best interests and special needs of the child.

Sac and Fox Tribe Placement Preference Hierarchy

On December 7, 2005, the Sac and Fox Tribe notified the Department that their Tribal Council adopted a Placement Preference Order different than the order contained in the federal and state Indian Child Welfare Act statutes. The Tribal Placement Preference Order is contained in Tribal Code 7-1105[b].

This Placement Preference Order shall apply when the Department obtains custody of a child of the Sac and Fox Tribe for purposes of placing the child in an out-of-home setting, including shelter, emergency, foster care, and adoptive placements.

When taking custody of a Sac and Fox child for placement purposes, the Department shall make every effort to follow the Sac and Fox Tribe's recognized placement preference order. In descending order, the preferred placement setting is as follows:

1. Placement of the child with a member of the child's family.
2. Placement of the child with a member of the child's clan, as determined by the Tribe.
3. Placement of the child with another member of the child's Tribe who has been licensed by the Tribe to provide care for a Tribal child.

4. Placement of the child in an Indian foster home located off the Meskwaki Settlement and licensed or approved by the Tribe.
5. Placement of the child with another Indian family.
6. Placement of the child with a specialized care provider for children approved by the Tribe or operated by an Indian organization which has a program suitable to meet the child's special needs.

The Tribal Code contains the additional guidance that " within each of the above placement preference categories, preference shall be given to placing the child on the Meskwaki Settlement."

The primary differences between the Sac and Fox Tribe's placement preference order and the order in the federal and state statutes are:

- ◆ Tribal preference to maintaining Tribal children on the Meskwaki Settlement;
- ◆ Tribal recognition of and support for placements within the child's "clan" as defined by Tribal customs; and
- ◆ Tribal preference for placements with Indian families before placements in non-Indian settings are considered.

Efforts to Identify and Place Children With Relatives

1. Work with the family, and tribal ICWA specialists, or other representatives to identify potential relatives for placement exploration as early in the case planning process as possible. This exploration should begin as soon as the decision is made that the child will need to be placed outside the child's own home.
2. Provide information on potential relative placement resources to the county attorney, other attorneys involved, and the juvenile judge.
3. Arrange for completion of assessments and home studies through tribal social service agencies or state child welfare programs as quickly as possible to determine if relative placement is a safe and viable option.
4. Document efforts to identify and explore relative placement for Native American children in the out-of-home section of the case plan.

Interstate Transfer of an Indian Child

When working with a child who is involved in an initial [child custody proceeding](#) and the child has tribal heritage with a tribe whose residence is in a state other than Iowa:

- ◆ Send a notice to the parents or custodian, the tribe, and the Bureau of Indian Affairs.
- ◆ Initiate transfer proceedings to the tribe.

Follow Interstate Compact on the Placement of Children (ICPC) procedures only if there is continuing jurisdiction of an Iowa state court. If the child comes under any of the provisions of the Indian Child Welfare Act that do **not** involve continuing jurisdiction of an Iowa court, the ICPC does **not** apply.

Notify the Iowa Interstate Compact Unit in writing when an Indian child is placed in another state, and not under the provisions of the ICPC. Include in this notification:

- ◆ Statistical data on the child.
- ◆ Name and address of the placement and relationship to the child.
- ◆ Documentation that the Indian Child Welfare Act applies.

Note: Children referred to the Iowa Interstate Compact Unit for placement from another state who appear to come under the purview of the Indian Child Welfare Act shall not be approved for placement in Iowa until the sending state can document that the placement is being made in accordance with the mandates of the Act.

If the placing state proceeds with placement without Iowa's approval, the Interstate Compact Unit will refer the case to the Attorney General for legal action.

Voluntary Placements or Release of Custody

Any parent or Indian custodian may voluntarily consent to foster care placement or termination of parental rights. Such consents must be executed in writing and executed before a judge in the appropriate court of jurisdiction. Such consents shall also:

- ◆ Be recorded before a judge of court of competent jurisdiction.
- ◆ Be accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or guardian.
- ◆ Be certified by the court that either the parent or Indian custodian fully understood the explanation in English or that it has been interpreted into a language that the parent or Indian custodian understood.

No such consent given before or within ten days after the child's birth shall be valid. Consent to a voluntary foster care placement can be withdrawn at any time, and the child shall be returned to the parent or Indian custodian.

In voluntary consents for termination of parental rights or in adoptive placements, the parents can withdraw their consent for any reason at any time before the entry of a final decree of termination or adoption, and the child shall be returned to the parent.

After the entry of the final adoption decree for an Indian child, parents can seek to withdraw their consent on the grounds that it was obtained improperly. If the court finds that the consent was obtained through fraud or duress, the court shall vacate the decree and return the child to the parent.

However, an adoption that has been in effect for at least two years shall not be invalidated under ICWA, unless invalidation is permitted under some other state law.

Standards of Evidence in Child Custody Proceedings

Federal and state ICWA statutes establish more stringent standards of evidence for child custody proceedings involving foster care, termination of parental rights, or preadoptive or adoptive placement of Native American children.

The standard of evidence for foster care placements of Native American children is "clear and convincing" evidence that continued custody of the child by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

For termination of parental rights and preadoptive or adoptive proceedings, the evidentiary standard is "beyond a reasonable doubt."

Indian Tribal Proceedings

Indian Child Welfare Act, Section 101D provides that full faith and credit is to be given to the public acts, records and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that Indian tribes give to state court proceedings.

The Department and state courts shall give complete credibility to Indian tribal court actions regarding child custody proceedings.

Court-Appointed Counsel

Indian Child Welfare Act, Section 102B, requires the court to appoint legal counsel if the parents or Indian custodian are unable to afford counsel. The court shall also appoint counsel for the child.

If no funds are available for such through state law, the court shall notify the Bureau of Indian Affairs upon counsel appointment and, upon certification by the presiding judge, the Department shall pay reasonable fees and expenses out of any funds which have been appropriated pursuant to the Act.

Examination of Reports

Indian Child Welfare Act, Section 102C, requires that each party to a foster care placement or termination of parental rights of a child shall have the right to examine all reported documents filed with the court upon which any decision with respect to such action was based.

Confidentiality Preserved

Where the court records contain an affidavit wherein the biological parent or parents request that their identity remain confidential, the court shall include such affidavit with the other information. The confidentiality of such information shall be maintained, and such information shall not be subject to release under the Freedom of Information Act (5 U.S.C. 552) as amended.

Termination of Parental Rights Proceedings

If the Department is seeking to terminate parental rights of an Indian child:

- ◆ Notify the parent, custodian, and tribe by registered mail.
- ◆ Make and document active efforts to provide remedial services and rehabilitative programs.
- ◆ Substantiate action by documenting that beyond a reasonable doubt, the continued custody of the child by the parent or Indian custodian is likely to result in emotional or physical damage to the child.

Adoption Vacated Upon Voluntary Consent of the Adoptive Parents

Whenever a final decree of adoption of an Indian child has been vacated and the adoptive parents have voluntarily consented to termination of their parental rights, consult with the county attorney to ensure that the child is appointed a temporary custodian and guardian pending final court action.

If the Department is given temporary custody or guardianship, act in the best interests of the child and present information to the court regarding these best interests.

If the court finds that the best interests of the child would be served by not returning to the biological parent or former Indian custodian, locate an adoptive placement for the child considering the established order of preference in an adoptive placement of an Indian child.

Child Welfare Records Retention

Maintain the records for Native American children who have been placed in voluntary or involuntary foster care or in preadoptive or adoptive placement in "perpetuity" or forever.

Ensure that these records contain comprehensive information about the child and family, the agency's involvement in the case, case plans and reports showing efforts to rehabilitate and preserve the family, and documentation of efforts to place within the placement preference hierarchy.

Note: The state ICWA adds a requirement that the Department establish an automated database in which a permanent record is maintained of every voluntary or involuntary foster care, preadoptive, or adoptive placement of an Indian child ordered by a court of this state in which the Department was involved.

The automated database is to contain the placement record of each Indian child and the location of the local Department office that maintains the child's original case record and case documents.

These records on specific Indian children must be made available within seven days of a request for the record by the Indian child's tribe or the Bureau of Indian Affairs.

Disclosure of Information From Adoptive Record

An adopted Indian child over the age of 18, the adoptive or foster parents of an Indian child, or an Indian tribe may request information as may be necessary for the enrollment of an Indian child in the Tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership.

The Bureau of Indian Affairs shall disclose such information upon request. If the requested documents contain an affidavit from the biological parent or parents requesting anonymity, the Bureau shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by the tribe.

Request by Adult Adoptee

If an Indian person who was the subject of an adoptive placement is 18 and requests information of the court, the court shall:

- ◆ Inform the person of the tribal affiliation or, if any, the person's biological parents.
- ◆ Provide other information as may be necessary to protect any rights flowing from the person's tribal relationship.