



The Indian Child Welfare Act

The Indian Child Welfare Act (ICWA) was passed in 1978 in response to the large numbers of Native children who were being separated from their parents, extended families, and Tribes through state child protection and private adoption agencies. Congress declared that ICWA was intended 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). Today, Native children remain much more likely to be involved with OCS than white children.

ICWA applies to **every** child protection case in state court where the child is an Indian child who is either a member of a federally recognized tribe or eligible for membership. It also applies to private adoptions, guardianships, or third-party custody matters (i.e. where a grandparent is asking for custody).

To protect Native children, ICWA **requires** that the state agency:

- Provide active efforts to prevent the breakup of the family
- Notify the Tribe of the case
- Allow the Tribe to be formally involved in the case in state court
- Transfer the case to the Tribal Court if the Tribe accepts jurisdiction, and neither parent objects, in most cases
- Requires that OCS follow specific placement preferences to keep children with their family and Tribe
- Provides greater protections to parents and others standing in their place to ensure that children are not removed unnecessarily

Intervention:

- The Indian Child’s Tribe can intervene, or become a party, to a state case
- Will get to tell the state court what the Tribe wants to see happens throughout the case
- Will get discovery (documentation) from OCS (roughly every 3 months)
- As a party, must disclose to other parties all known relatives and suggested placements for the child, and must summarize tribal services and tribal court actions involving the family

Protections for Parents:

- Must be provided an attorney at the State’s expense, if they cannot afford their own
- State must meet a higher burden of proof to take children away, and to terminate parental rights
- State is required to make greater efforts to promote reunification

Indian Custodians:

- If another Native family member is providing care to a child, OCS should treat them as “standing in” the parents’ shoes, if the Native family member EITHER:
 - Has legal custody of the child under Tribal law or custom, or state law; OR
 - Has been given temporary care custody or control of the child by the child’s parent
- Indian Custodians are entitled to the same right to an attorney, for protection from unwarranted removal, and efforts to reunify as parents

Active Efforts:

- More than just giving parent or Indian Custodian a to-do list; hand-hold through the process
- Must be timely and realistic for the parents or Indian Custodian given their circumstances (i.e. can they access the services or resources where they live)
- Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family

- Should be culturally-appropriate, with Tribal and extended family involvement in creating and implementing any services or supports

Placement preferences:

- Should be least restrictive setting which most approximates a family where special needs, if any, can be met and shall be based on prevailing social and cultural standards of the Tribe
- Tribe defines “extended family”; non-Native and Native family members are considered equal

ADOPTIVE PLACEMENTS	FOSTER HOME PLACEMENTS
1) Member of child’s extended family	1) Member of the child’s extended family
2) Other members of the child’s tribe	2) Foster home licensed, approved or specified by the child’s Tribe
3) Other Indian families	3) Indian foster home licensed or approved by non-Indian licensing authority 4) An institution for children approved by the Tribe or operated by an Indian organization which has a program suitable to meet the child’s needs.

- Tribe can reorder these preferences – but do so cautiously! The Tribe likely cannot set a different order from case to case, so any reordering could apply to *all* cases
- OCS must do a diligent inquiry to identify, locate, and contact relatives, tribal members, and licensed Native foster homes for placement
- If these preferences are not available, the Tribe can agree that there is “good cause” to deviate from the placement preferences (for example: to keep the child near parents for visitation)

Qualified Expert Witnesses:

- When a child is removed, and to terminate a parent’s rights, OCS has to find a qualified expert witness to testify whether a child’s continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child
- Should be qualified to testify as to the prevailing social and cultural standards of the child’s Tribe

Transfer of Jurisdiction:

- The child’s Tribe and either parent can request the case move from state court to Tribal Court throughout a case
- Prior to termination of parental rights, a request to transfer should only be denied for specific reasons:
 - Objection by either parent
 - Tribal Court declines to accept transfer of jurisdiction
 - Or good cause to not transfer
 - This **does not** include: whether it is late in a case; whether there were prior proceedings that did not transfer; whether placement may change; a child’s cultural connections to the Tribe; socioeconomic conditions or negative perceptions of the Tribal Court
 - Could include if the child is old enough and objects.
- After termination of parental rights, transfer may be permitted, but can be denied for any reason

Other Resources:

Alaska Court System: www.courts.alaska.gov
 Complete rules of Alaska Court for Child in Need of Aid Cases, ICWA Statutes, and ICWA Regulations: <https://public.courts.alaska.gov/web/rules/docs/cina.pdf>

Alaska Legal Services Corporation: www.alsc-law.org
 Resources for Alaska Tribes: www.alaskatribes.org

National Indian Child Welfare Association: www.nicwa.org

Native American Rights Fund: www.narf.org