

# INDIAN CHILD WELFARE ACT (ICWA)

## REFERENCES

California Social Work Education Center (2005). Indian Child Welfare Act ("ICWA") Requirements. Retrieved on June 29, 2009 from [http://calswec.berkeley.edu/CalSWEC/04\\_10\\_B\\_ICWA\\_Requirements\\_Judicial\\_Council\\_120106.pdf](http://calswec.berkeley.edu/CalSWEC/04_10_B_ICWA_Requirements_Judicial_Council_120106.pdf)

(K2, K4, K5)

### About the study/citation-

This citation provides information regarding the requirements for ICWA. Information includes applicability, right to counsel, notice, active efforts, placement preferences and standards and other areas of focus.

### Findings/content-

- **Notice** (25 U.S.C. § 1912(a); Cal. Rules of Court, rule 1439(f))  
When: Dependency: Prior to Detention hearing. Emergency removal orders may be required. Delinquency: Prior to Disposition hearing ordering placement.  
How: Party seeking foster care placement or termination of parental rights must notify the parent or Indian guardian, and the Indian child's tribe, of the pending proceedings. The Tribe can intervene in the following ways:
  1. Notice must be sent registered or certified mail with return receipt requested. The return receipt must be filed in the court file.
  2. Notice to the tribe must be to the tribal chairman unless the tribe has designated another agent for service.
  3. Notice must be sent to all tribes of which the child may be a member or eligible for membership.
  4. If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice must be sent to the specified office of the Secretary of the Interior.
  5. Notice must be sent whenever there is reason to believe the child may be an Indian child for every hearing, unless it is determined that the child is not an Indian child.
  6. If, after a reasonable time not less than 60 days following the sending of notice, no response to the notice is received, the court may determine that ICWA does not apply to the case unless and until further evidence is received that ICWA applies.
  7. If an Indian child's tribe has exercised its right to intervene, subsequent notices may be sent as to all other parties.

- **Placement Preferences and Standards** (25 U.S.C. § 1915; Cal. Rules of Court, rule 1439(k))

Placement standards must be the prevailing cultural standards of the Indian community in which the parent or extended family member resides, or with which the parent or extended family member maintains social and cultural contacts.

The tribe may establish a different preference order, which must be followed if it provides for the least restrictive setting. An Indian child may be placed in a non-Indian home only if the court finds that a thorough search has failed to locate an appropriate Indian home.

Foster or Preadoptive Placements: Must be in the least restrictive setting, within reasonable proximity to the Indian child's home, and capable of meeting any special needs of the Indian child. Placement preference is:

1. To a member of the Indian child's extended family;
2. To a foster home licensed or approved by the Indian child's tribe;
3. To a state or county licensed certified Indian foster home;
4. To a children's institution approved by the tribe or operated by an Indian organization and offering a program designed to meet the Indian child's needs.

Adoptive Placements: Preference must be given in the following order:

1. To a member of the Indian child's extended family;
2. To other members of the Indian child's tribe;
3. To other Indian families.

- **Good Cause to Deviate from the Placement Preferences** (25 U.S.C. § 1915; Cal. Rules of Court, rule 1439(k))

The court may modify the preference order only for good cause. This would include the following considerations:

1. Requests of the parent or Indian custodian or Indian guardian;
2. Requests of the Indian child;
3. Extraordinary physical or emotional needs of the Indian child as established by a qualified expert witness; and
4. Unavailability of appropriate families based on a thorough effort to identify families meeting the preference criteria.

- **Jurisdiction and Transfer** (25 U.S.C. § 1911(a); Cal. Rules of Court, rule 1439(c))

Exclusive Jurisdiction: If the Indian child resides on a reservation that exercises exclusive jurisdiction, the petition must be dismissed.

Concurrent Jurisdiction: If the Indian child is residing on a reservation that exercises exclusive jurisdiction, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribal jurisdiction. The court must transfer the proceedings unless there is good cause not to do so. If the tribe does not request transfer, the juvenile court retains jurisdiction and must comply with ICWA.

Implication for CWS-

The worker needs to understand the provisions of ICWA in order to know when to apply ICWA and how ICWA impacts the placement of an Indian child.

Institute for Child and Family Policy, Edmund S. Muskie School of Public Service at the University of Southern Maine (2003). The Adoption and Safe Families Act (ASFA) Training Series, Collaboration with Native American Tribes: ICWA and ASFA- Trainer's Guide. Retrieved on June 29, 2009 from <http://www.cphv.usm.maine.edu/pdf/Tribes.pdf>

(K7)

#### About the study/citation-

This citation is a trainer's guide as part of a training series designed to communicate information on the Adoption and Safe Families Act (ASFA) that goes beyond introductory, compliance based topics. This trainer's guide focuses on effective approaches to collaboration, the requirements of ICWA and ASFA, as well as the practice considerations when working with Native American children and families.

#### Findings/content-

- Top Ten Tips for Tribe Collaboration around ASFA Implementation-
  1. Approach tribes with respect as sovereign entities. Treat tribes as partners, not adversaries.
  2. Know the law and tribal agreements.
  3. Inquire whether children/parents are Native American Indian in all cases and at every stage of the case.
  4. Provide tribes with timely notice of ICWA cases, being sure to notify the right contact at the tribe. This is usually the social service provider.
  5. Give tribal court orders and acts full faith and credit. Tribal courts have full authority to conduct Indian child custody proceedings (ICWA, P.L. 95-608, Section 1911 (d)).
  6. Work collaboratively with tribal social workers in implementing ICWA requirements. Also, one should include tribal social workers in all parts of case plan development, including permanency planning.
  7. Keep in mind that the ICWA active efforts requirement is a higher standard of service than the reasonable efforts requirement under ASFA.
  8. Contact extended family members. Also, remember that American Indian extended families are much larger than mainstream families and include relatives beyond grandparents, aunts, uncles, etc.
  9. Follow ICWA or Tribal Placement Preferences.
  10. Do not fast-track possible Indian child welfare cases without promptly involving the tribes and/or extended family members.
- The following are ideas of how to satisfy the "active efforts" requirements of ICWA:

- The worker can develop a case plan with the support of the parent that involves the use of tribal/Indian community resources -- extended family resources, tribal services, and individual Indian caregivers, such as medicine people and ministers.
- The worker needs to document provision of timely and culturally relevant resources on an intense level.
- The worker should assist parents and children in maintaining an ongoing family relationship.
- The worker needs to creatively develop case plans that identify services and programs that will assist the family.
- Tribes can stay involved in case planning if the worker maintains contact with the tribal social worker. The tribal social worker can participate in staffing of cases, and court reviews via a conference call. Both workers can maintain contact with extended family members. Also, official notice of every proceeding must be sent to the Tribe and to the parents.

#### Implication for CWS-

The worker should be aware of the importance of collaborating with tribes and what an integral role the tribal community can play in the lives of Native American children. The worker can use the tribe as a resource to identify resources for the child and family and permanency planning options.

National Indian Child Welfare Association (n.d.). History of the Indian Child Welfare Act. Retrieved on June 29, 2009 from [http://www.nicwa.org/Indian\\_Child\\_Welfare\\_Act/history/](http://www.nicwa.org/Indian_Child_Welfare_Act/history/)

(K1)

#### About the study/citation-

This citation provides some information regarding the historical relationship of Indian children and the child welfare system, which led to the creation of ICWA.

#### Findings/content-

- Historically, in comparison to the general population, a very high percentage of Indian families, have been affected by the often unwarranted removal of their children by non-tribal public and private agencies. A very high percentage of such children have been placed in non-Indian foster and adoptive homes and institutions.

- The special political status of Indian tribes, as well as the history of biased treatment of Indian children and families under child welfare systems, is the foundation for the enactment of ICWA.
- A 1976 study by the Association on American Indian Affairs found that 25 to 35% of all Indian children were being placed in out-of-home care. Eighty-five percent of these children were placed in non-Indian homes or institutions. (Unger, Steven, ed., *The Destruction of American Indian Families*, New York: Association on American Indian Affairs, 1977, p.1.)

### Implication for CWS-

In order to understand how Indian families have been historically treated in the child welfare system, the worker needs to know the historical basis of ICWA. It is also important to understand this historical experience of Indian families and how this might impact the working relationship with such families.

National Indian Child Welfare Association (2002). *ICWA Implementation Problems Addressed by H.R. 4733: "Indian Child Welfare Act Amendments of 2002."* Retrieved on June 29, 2009 from [http://legislativewww.ncai.org/ncai/advocacy/hr/docs/HR4733\\_Problems\\_and\\_Solutions.pdf](http://legislativewww.ncai.org/ncai/advocacy/hr/docs/HR4733_Problems_and_Solutions.pdf)

(K3, K6)

### About the study/citation-

This citation provides information regarding problems with implementation of ICWA. The provisions of H.R. 4733, which addressing these problems, are discussed. H.R. 4733 addresses various issues that, since the enactment of ICWA, have affected the ability of Indian tribes, families, and children to obtain the full protections of the ICWA and that have complicated adoptions involving Indian children. In the next section, a brief review of some of these problems and solutions are discussed.

### Findings/content-

- Problem- Under ICWA, tribes have a right to intervene in voluntary Indian child custody proceedings. However, even though tribes have the right to intervene, ICWA does not require that tribes be given a notice of the proceedings.  
Solution- H.R. 4733 requires notice to Indian tribes in all voluntary child custody proceedings and to parents as well as tribes in all involuntary proceedings.

- Problem- Although under ICWA extended family members are a preferred placement for Indian children who need foster or adoptive placement, ICWA does not require that notice be given to extended family members regarding children who may be placed in foster care or for adoption.

Solution- H.R. 4733 requires notice be given to extended family members and recognizes the right of these family members to intervene in state child custody proceedings.
- Problem- Under ICWA, consent to adoption or termination of parental rights may be revoked at any time before the entry of a final decree of adoption or courts have found that once a termination of parental rights is considered final and the parent has consented to that termination, there is no parental right to object to an adoption, even when the adoption is yet to be final.

Solution- H.R. 4733 limits parents' rights to withdraw consent to an adoption to 6 months after relinquishment of the child or 30 days after the filing of an adoption petition. This would require parents to be notified of the exact, final date on which the parents have the right to withdraw.
- Problems-ICWA provides for certain proposed ICWA violations to be reviewed by "any court of competent jurisdiction." Generally, federal courts have used jurisprudential and other reasons to not review alleged ICWA violations.

Solution- H.R. 4733 provides for federal court review of certain ICWA violations. H.R. 4733 also provides for federal agency review of state ICWA compliance and a method for enforcing state compliance with ICWA requirements in the event non-compliance is determined.
- Problem-In a number of cases, child custody proceedings involving Indian children have been held when the court was not informed that the child was Indian despite knowledge of that fact. As a result, ICWA was not applied in the proceeding.

Solution- H.R. 4733 provides for criminal sanctions for anyone who assists a person to lie about their Indian ancestry for the purposes of applying ICWA.
- Problem- Under ICWA, a tribally approved foster or adoptive home is equal to that of a state approved home for purposes of federal financial assistance. This facilitates the use of tribal foster or adoptive homes by states. However, conflicts and discrepancies in federal law have made it more confusing and difficult for states to use tribal foster care and adoptive homes.

Solution- H.R. 4733 provides that a tribally approved foster or adoptive home is considered equal to a state approved home, regardless of conflicts in the law.

### Implication for CWS

The worker needs to understand the provisions of ICWA and be informed of the potential consequences of not following those provisions. The worker should also be aware of the impact that this noncompliance issue may have on Indian children in the child welfare system.

National Indian Child Welfare Association (n.d.). Indian Child Welfare Act (ICWA) FAQ. Retrieved on June 29, 2009 from [http://www.nicwa.org/Indian\\_Child\\_Welfare\\_Act/faq/](http://www.nicwa.org/Indian_Child_Welfare_Act/faq/)

(K2, K4)

#### About the study/citation-

The information provided in this citation includes frequently asked questions regarding ICWA. These questions cover ICWA content, eligibility and compliance.

#### Findings/content-

- ICWA is a federal law passed in 1978. It was passed in response to the high number of Indian children being removed from their homes by both public and private agencies. The intent of Congress under ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902). ICWA details federal requirements that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe.
- Indian children involved in state child custody proceedings are covered by ICWA. ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe" (25 U.S.C. § 1903). In order for ICWA to apply, the child must be a member of or eligible for membership in a federally recognized tribe. ICWA does not apply to divorce proceedings, intra-family disputes, juvenile delinquency proceedings, or cases under tribal court jurisdiction.
- Caseworkers must make certain considerations when handling an ICWA case, including:
  1. Providing active efforts to the family
  2. Identifying a placement that fits under the ICWA preference provisions
  3. Notifying the child's tribe and the child's parents of the child custody proceeding

4. Working actively to involve the child's tribe and the child's parents in the proceedings

- States are required to provide active efforts to families. The definition of "active efforts" is left open in the Indian Child Welfare Act to accommodate individual case decisions. However, federal guidelines do exist. ICWA mandates the state to make active efforts in every ICWA case in two areas:

1. Provide services to the family to prevent removal of an Indian child from his or her parent or Indian custodian

2. Reunify an Indian child with his or her parent or Indian custodian after removal

A cornerstone in the application of active efforts is active and early participation and consultation with the child's tribe in all case planning decisions. Also, active efforts is more intensive than "reasonable efforts." Whereas reasonable efforts might be only a referral for services, active efforts can include arranging for the best-fitting services and helping families engage in those services.

#### Implication for CWS-

The worker needs to understand and follow the provisions set forth in ICWA and make certain considerations when dealing with an ICWA case. Failing to do so, may result in noncompliance with a federal law.

Native American Rights Fund (2007). A Practical Guide to the Indian Child Welfare Act. Retrieved on June 29, 2009 from <http://narf.org/icwa/print/all.pdf>

(K1, K2, K4, K5)

#### About the study/citation-

The guide is intended to facilitate compliance with ICWA and is intended for educational and informational purposes. The guide includes information on the following: FAQs (application, jurisdiction, notice, placement, termination of parental rights, etc.), ICWA legislative history, flow charts and forms.

#### Findings/content-

- A brief overview of the historical relationship between Indian children and the child welfare system which has led to ICWA:
  - In the 1890s, the purpose of the charter of the first boarding school on the Navajo reservation was “to remove the Navajo child from the influence of his savage parents.”
  - In the 1950s and 1960s, the federal government worked with non-Indian organizations, such as the Child Welfare League of America, to remove Indian children from their homes and place those children in non-Indian homes.
  - In the 1960s, the federal government focused on a new federal Indian policy of tribal self-determination. This new policy fosters tribal self governance by allowing tribes to operate programs which were once operated only by the federal government. It also increased federal services and benefits available to tribes to enhance their capabilities.
  - ICWA was enacted in 1978.
  
- Two prerequisites must be satisfied for the Indian Child Welfare Act (ICWA) to apply. The first requirement is the presence of an Indian child as defined by § 1903(4). This defines an Indian child as an “unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . . .” The second requirement is that the child custody proceeding be one as defined by § 1903(1); that is, a “foster care placement”; “termination of parental rights”; “pre-adoptive placement”; or “adoptive placement.”
- The Existing Indian Family exception (EIF) is an exception to the ICWA that originated in *In re Baby Boy L.*, 643 P.2d 168 (Kan.1982). In that case, the court held that the ICWA did not apply to “an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be.” The court inferred the ICWA as being only concerned with “removal of Indian children from an existing Indian family unit.”
- 25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings
  - (a) Exclusive jurisdiction
 

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of a tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall have exclusive jurisdiction.
- 25 U.S.C. § 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception
 

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall return the child to his parent or Indian custodian, unless returning the child to his parent or custodian would subject the child to immediate danger or threat of such danger.

- Section 1912(d) provides that: Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child shall satisfy the court that active efforts have been made to provide services and rehabilitative programs designed to prevent the dissolution of the Indian family and that these efforts have proved unsuccessful.
- The Indian Child Welfare Act (ICWA) provides that “no termination of parental rights may be ordered in such proceedings in the absence of a determination, supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- This citation also includes flow charts regarding whether ICWA will apply to a case, jurisdiction and the ICWA, notice requirements of ICWA, checklist for removal or termination, placement preferences, voluntary consent to TPR, withdrawal of consent, and emergency removal. Also, there is a ICWA/CPS flow chart,

#### Implication for CWS-

The worker is legally responsible to follow ICWA; therefore, the worker needs to be aware of how and when to apply ICWA. Also, in order to follow ICWA, the worker needs to understand the basic provisions and legal basis of ICWA.