

INDIAN CHILD WELFARE ACT (ICWA)

Bench Card

PURPOSE ¹

To protect the best interests of Indian children and promote the stability and security of Indian tribes and families by establishing minimum federal standards - in addition to the Idaho CPA standards - for the removal of Indian children from their homes for placement in foster care or for adoption.

WHEN ICWA APPLIES ²

ICWA applies to child custody proceedings involving Indian children.

1. Child Custody Proceeding: foster care placement, termination of parental rights, pre-adoptive placements, guardianships and adoption but not custody disputes in divorce proceedings, placement of delinquent Indian children (except status offenses) or voluntary placements where the Indian parent can reclaim the child upon demand.
2. Indian Child: An unmarried person under 18 who is either: (1) a member of an Indian tribe or (2) the biological child of a member and eligible for membership. Each tribe determines its own rules for eligibility.

JURISDICTION ³

1. Exclusive: Pursuant to ICWA, the tribe has exclusive jurisdiction if a child resides or is domiciled on the reservation or is a ward of the tribal court, except where such jurisdiction is otherwise vested in the State by existing Federal law. Idaho Code §67-5101 and Public Law 280 vest in state courts jurisdiction for civil enforcement of state laws and regulations concerning dependent, neglected, and abused children. In Idaho, it is an open question whether this constitutes an exception to the provisions of ICWA.
2. Concurrent Jurisdiction: All other ICWA cases have concurrent state and tribal court jurisdiction.
3. Transfer Jurisdiction: Upon request of a parent, the Indian custodian, or the tribe, the state court must transfer jurisdiction to the tribal court unless: 1) a parent objects; 2) the tribal court declines or 3) the state court finds good cause not to transfer. The burden of establishing good cause to the contrary is on the party opposing the transfer.
4. Temporary/ Emergency Jurisdiction: A state court may take temporary, emergency jurisdiction for a child who resides on the reservation while a child is off reservation if clearly necessary to prevent the child from suffering imminent risk of abuse or neglect. Jurisdiction shall terminate immediately when it is no longer necessary to prevent imminent physical damage or harm to the child. If the child cannot be transferred to the tribe or returned safely to the parent, the case may proceed in state court.⁴
5. Intervention: If the case remains in state court, the tribe can intervene at any stage of the proceedings.

NOTICE ⁵

Where IDHW either knows or has reason to believe that the child may be an Indian child, notice must be provided in accordance with ICWA even if no conclusive determination that ICWA is applicable.

1. Notice must be given to the child's parents, Indian custodian and the child's tribe by registered mail or by personal delivery.

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2. If the identity or location of the parent or tribe is unknown, notice is given by registered mail to the Bureau of Indian Affairs.
3. The Notice must: identify the child, include a copy of the petition, include the name and address of petitioner and their counsel, a statement regarding right to intervene, appointment of counsel, location and other information regarding court including next hearing date/time, right to seek transfer; potential future legal consequences regarding custodial rights and information regarding confidentiality.

TIMING⁶

No foster care placement or termination proceeding can be held until at least ten days after receipt of notice by the parent, tribe and Indian custodian. The adjudication (jurisdiction) hearing is most likely the applicable proceeding regarding the 10 day requirement and not the shelter care/temporary custody hearing. Upon receiving notice of the proceedings, the tribe, parent or Indian custodian has the right upon request to be granted twenty (20) days from the date notice is received, to prepare for the proceeding.

APPOINTMENT OF COUNSEL ⁷

1. Indigent parent(s) and indigent Indian custodian(s) have the right to appointed counsel in any removal, placement or termination proceeding.
2. Counsel for the child may be appointed in discretion of court upon a finding that such appointment is in the best interests of the child.

FINDINGS

In addition to any state law findings and federal findings required under ASFA, there are two additional findings the court must make in an ICWA case (in a CPA case at the adjudication and in a TPR case at the termination trial). If necessary, a separate ICWA hearing can be set to address these issues. These findings cannot be waived or found by way of stipulation.

1. **Active Efforts Finding:** The state must show that **active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful.**⁸ “Active efforts” is not defined under the Act but is believed to be something more than “reasonable efforts.” Aggravating circumstances is not an exception to the active efforts requirement.
2. **Serious Physical or Emotional Harm Finding Supported by Expert Testimony:** The state must show, by **clear and convincing evidence** in a CPA case, and **beyond a reasonable doubt** in a termination of parental rights proceeding including testimony of a **qualified expert witness**, that **continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.**⁹

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Who qualifies as an expert?¹⁰

1. A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices;
2. A lay person having substantial experience in the delivery of child and family services to Indians and extensive knowledge of the prevailing social and cultural standards and child rearing practices with the child's tribe; or
3. Professional person having substantial education and experience in the area.

PLACEMENT PREFERENCES¹¹

ICWA sets forth placement preferences when placing Indian children in foster care or an adoptive placement. A tribe may change the order of preference via tribal resolution.

1. Foster Care or Pre-adoptive Placement: The child must be placed in the least restrictive setting which most approximates a family and meets any special needs of the child. A preference must be given, in absence of good cause to the contrary, to placement with (in the following order):
 - a. A member of the Indian child's extended family;
 - b. A foster home licensed or approved or specified by the Indian tribe;
 - c. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
 - d. An institution for children approved by an Indian tribe.
2. Adoptive Placement: A preference must be given, in absence of good cause to the contrary, to placement with:
 - a. A member of the child's extended family;
 - b. Other members of the Indian child's tribe;
 - c. Other Indian families.
3. Good Cause to Deviate: Request of biological parent or child of sufficient age; 2) extraordinary physical or emotional needs of the child (need expert testimony); 3) unavailability of suitable families for placement after diligent search. Burden is on party seeking deviation.¹²

VOLUNTARY CONSENT TO FOSTER CARE OR TERMINATION OF PARENTAL RIGHTS¹³

A parent who voluntarily consents to foster care placement or termination of parental rights must do so in writing and have it recorded before a judge. The judge must certify that the terms and consequences of the consent were fully explained and understood by the Indian parent or custodian in English or interpreted into a language that the parent or custodian understands. No consent may be executed within ten days of the child's birth. A parent or custodian may withdraw consent to foster care placement at any time. In any voluntary proceeding for termination of parental rights or adoptive placement, the consent may be withdrawn at any time prior to the entry of a final decree of termination or adoption. After the final decree of adoption, consent may be withdrawn on grounds consent was obtained through fraud or duress.

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ENDNOTES

¹ 25 U.S.C. §1902.

² 25 U.S.C. §1903, BIA Guideline B.3.

³ 25 U.S.C. §§1911 and 1922; BIA Guidelines B.4, B.7, C.1-C.4.

⁴ BIA Guidelines C.3(d).

⁵ 25 U.S.C. §1912 and BIA Guidelines B.1, B.5, B.6.

⁶ 25 U.S.C. §1912(a); BIA Guideline B.6.

⁷ 25 U.S.C. §1912(b).

⁸ 25 U.S.C. §1912(d); BIA Guideline D.2.

⁹ 25 U.S.C. §1912 (e) and (f); BIA Guidelines D.3 and D.4.

¹⁰ BIA Guideline D.4.

¹¹ 25 U.S.C. §1915, and BIA Guidelines F.1–F.3.

¹² BIA Guidelines, F.3.

¹³ 25 U.S.C. §1913, and BIA Guidelines E.1-E.4