

## NOTES ON THE INDIAN CHILD WELFARE ACT OF 1978 (25 U.S.C., Sec. 1901-1963)

*Special thanks to Jane Thompson, an Assistant Attorney General for Child Welfare in North Carolina ([Jane.Thompson@ncmail.net](mailto:Jane.Thompson@ncmail.net)), for providing these notes.*

A. The Indian Child Welfare Act (ICWA) was enacted in 1978 to establish uniform, nationwide procedures for the handling of Indian child placements in recognition of the importance of the child/tribe relationship and the history of a disproportionate removal of Indian children from their homes with little, if any, deference to Indian culture.

B. ICWA applies to 1) foster care placements 2) TPR proceedings 3) preadoptive and adoptive placements and 4) juvenile court custody or guardianship of the juvenile.

C. ICWA does not apply to 1) placements arising out of delinquency case or 2) custody disputes arising out of divorce actions.

D. Of course, the most important requirement is that an Indian child be involved in these cases. An Indian child is defined in Sec. 1903(4) as either 1) a member of a federally recognized tribe or 2) eligible for membership and the biological child of an enrolled member.

1. Each tribe decides membership issues and thus must be consulted as quickly as it is believed a child may be an Indian child. Percentage of Indian blood is not the test.
2. The only federally recognized tribe based in N.C. is the Eastern Band of the Cherokee but members of any federally recognized tribe can be found anywhere in N.C.
3. Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe, but is not a member of any of them, the court must determine with which tribe the child has more significant contacts, looking at the following factors:
  - a. Length of residence on or near reservation of each tribe.
  - b. Frequency of contacts/participation in activities of each tribe.
  - c. Fluency in language of each tribe.
  - d. Any previous adjudication of child by court of one of tribes.
  - e. Residence of child's relatives on or near reservation of each tribe.
  - f. Tribal membership by custodial parent or Indian custodian.
  - g. Child's self-identification.
  - h. Response of tribe to notice that child's membership is at issue.

E. Exclusive tribal court jurisdiction exists where a child resides on a reservation (even if visiting elsewhere) or is the ward of the tribal court even if the child does not reside on the reservation.

1. Even if exclusive tribal court jurisdiction exists, a state court may still act in an emergency situation to prevent imminent physical danger or harm to the child (Sec.

1922) but must then initiate proceedings under ICWA or transfer the child to tribal jurisdiction.

F. In all other cases state and tribal courts have concurrent jurisdiction, but the tribe has the right to intervene at any time and the only bar to that intervention is that the child is not an Indian child or the tribe is not the child's tribe.

G. The parent or the Indian custodian (Indian person with legal custody of Indian child under tribal law or custom or state law by agreement of child's parent. Sec. 1903) or tribe can also petition the state court to transfer jurisdiction to the tribal court which must be granted unless:

1. Either parent objects, including non-Indian parent.
2. The tribal court declines jurisdiction or
3. The state court finds "good cause to the contrary" which includes:
  - a. Proceeding was at an advanced stage when transfer petition received and it was not filed promptly after receiving notice of hearing.
  - b. Indian child over 12 years old and objects to the transfer.
  - c. Evidence necessary to the case could not be adequately presented in tribal court without undue hardship to the parties or witnesses.
  - d. The parents of a child over 5 years are not available and the child has had little or no contact with the child's tribe or members of the tribe.

H. Notice is by registered mail, return receipt requested, to the parent, custodian and tribe, with copy to BIA.

1. If the identity or location of the Indian parent, Indian custodian or tribe cannot be determined, written notice by certified mail must be sent to the Secretary of the Bureau of Indian Affairs at the appropriate area office. No provision for service by publication. The BIA must notify the parents or tribe within 15 days.

*Note: "Parent" does not include the unwed father where paternity has not been acknowledged or established. Sec. 1903(9).*

2. Our area office is:

Eastern Regional Director  
Bureau of Indian Affairs  
711 Stewarts Ferry Pike  
Nashville, TN 37214-2634  
(615) 467-1700 (ask for someone who works on Indian child welfare matters)

3. Notice must include specific information, included on attached page.

I. No removal proceeding may be held sooner than 10 days following the receipt of that notice and the parent or tribe shall be granted, upon request, 20 additional days to prepare. May need to ask court to continue 7 day hearing to comply with ICWA. 7A-577(l).

J. When nonsecure custody is granted and the child is later determined to be an Indian child, the ICWA procedures must be followed and the legal case redone.

K. When a state court is removing a child, the court must find that 1) “active efforts” have been made to provide remedial services to prevent breakup of the Indian family and 2) continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (Sec. 25 U.S.C. 1912).

1. The likelihood of damage must be established by clear and convincing evidence.
2. That testimony must come from a “qualified expert witness” who is in priority order a) a member of the child’s tribe recognized by tribe and knowledge in tribal custom b) a lay expert witness with substantial experience in the delivery of family services to Indians and knowledge of tribal child rearing practices or c) a professional person having substantial educational and experience in his specialty.
3. Children placed in foster care will be in the least restrictive setting which approximates a family and meets his special needs. Preference given, in absence of good cause to the contrary, to:
  - a. Member of child’s extended family.
  - b. Foster home licensed or approved by child’s tribe.
  - c. Indian foster home licensed or approved by authorized non-Indian licensing authority or
  - d. Institution for children approved by Indian tribe or operated by Indian organization with program suitable for child’s needs.

*Note: Tribe can have different order of preference by resolution which must be followed as long as placement is least restrictive and appropriate to child’s needs. Can also consider preference of Indian child and parents. Standards to be applied must be those of Indian community of parent or extended family members rather than “best interest.*

L. To terminate parental rights, the state court must make same two findings as in K. above but the likelihood of damage must be established beyond a reasonable doubt.

M. Adoption surrenders of Indian children must be in writing and recorded before a family court judge who certifies that the parent or Indian custodian understood the surrender. The terms must be in his own language if necessary. Sec. 1913.

1. ICWA also applies to private adoptions – relative, stepparent, independent.
2. Adoption consents may not be given prior to or within 10 days after birth of the child.
3. Adoption consents may be revoked at any time for any reason before the final decree and the child must be returned.
4. An adoption of an Indian child can be challenged for up to two years for fraud or duress.
5. When an Indian adoptee reaches 18, the court entering the final decree will inform the adoptee of his tribal affiliation, identity of biological parents and any

other information needed to protect rights flowing from tribal membership. Sec. 1917.

6. No explicit requirement to notify tribe in voluntary surrenders or foster care placements.

*Note: The state court must provide a copy of a final adoption decree (after 11-8-78) involving an Indian child to the Secretary of BIA and information which shows the name and tribal affiliation of the child, name and address of biological parents (unless they have signed court affidavit for anonymity), names and addresses of adoptive parents and agency information relating to adoptive placement. BIA will make this information available to an adult Indian adoptee, a tribe or adoptive parents but will honor request for birth parent anonymity while telling tribe that circumstances warrant the child's enrollment as member.*

N. Adoptive placements, absent good cause to the contrary, must be made, in priority order, with 1) member of the child's extended family 2) other members of child's tribe and 3) other Indian families. Sec. 1915.

1. The tribe can establish a different order of preference to be followed, as in foster care placements.
2. Standard to be applied is that of Indian community of parents or extended family, as in foster care placements.

O. Any state court action which fails to comply with ICWA can be invalidated by petition filed by the parent, Indian custodian or tribe. Sec. 1914.