

## **ICWA**

How often have you heard this story. A State Agency, usually the Department of Social Services, removes an Indian child(ren) from their home and puts them in foster care because the child's parents were allegedly neglecting them and at some later point the parent's parental rights are terminated and the child is placed for adoption with a non-Indian family. This page will explain what ICWA is, how it is applied and when it should be applied.

## **WHAT IS ICWA**

ICWA stands for Indian Child Welfare Act. It is legislation created and passed by the United States Congress in 1978. Many states have also codified ICWA into state law. In its legislative findings Congress found that removals of Indian children were often based on Anglo standards that did not recognize the cultural and social mores prevailing in Native families and communities. Congress also found that Indian children were being removed from their homes and placed into foster care and adoptions with non-Indians. As a result, Congress passed ICWA and declared that it was policy to protect the best interest of Indian children and to promote stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. ICWA establishes standards for removal of and placement of Indian children in foster care or adoptive homes to prevent the break up of Indian families.

## **WHEN DOES ICWA APPLY**

ICWA only applies to foster care placement, termination of parental rights, pre-adoptive placement and adoptive placement of Indian Children. ICWA does not apply to divorce proceedings, custody proceedings between parents and family, or juvenile delinquency proceedings. For example, if an Indian child was removed from his or her family by the state and placed in foster care ICWA could apply. If a white father and an Indian mother of a child are fighting in court over custody, ICWA would not apply.

## **WHAT IS AN INDIAN CHILD**

For ICWA to apply there must be an Indian child who was removed from his or her home by the state and placed in foster care or adoptive placement. An Indian child is an unmarried person, under the age of eighteen and is a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

## **WHAT IS AN INDIAN CHILD'S TRIBE**

The Indian tribe in which the Indian is a member or eligible for membership. In the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.

## **WHO HAS JURISDICTION TO HEAR FOSTER CARE PLACEMENT, TERMINATION OF PARENTAL RIGHTS, PRE-ADOPTIVE AND ADOPTIVE PLACEMENTS OF INDIAN CHILDREN**

The answer to this question depends on several factors.

Tribes have exclusive jurisdiction over the state court to hear these types of cases if the Indian child(ren) reside on or is domiciled (living) within the exterior boundaries of the reservation of an Indian tribe. The Indian child's tribe, parent(s) or Indian custodian can request the case be transferred to tribal court. This will be done unless there are good cause reasons not to transfer the case to tribal court or if the child, parents, or Indian custodian or tribe object to the transfer.

If the Indian child(ren) is not domiciled (not living) within the reservation boundaries of an Indian tribe, state courts and tribal courts have concurrent jurisdiction. In the absence of good cause, the state court should transfer the case to tribal court. Either parent or the Indian custodian or the Indian tribe may object to transfer to the Indian child's tribe. The tribal court of the Indian child's tribe can decline to have the case transferred from state to tribal court.

In any state court proceeding for the foster care placement of, or termination of parental rights to and Indian child, the Indian custodian of the child and the Indian child's have the right to intervene at any point in the state court proceedings. This means the proceedings stay in state court and the Indian child's custodian and tribe can participate and be heard in the state court case.

#### **WHAT REQUIREMENTS MUST THE STATE COURT FOLLOW IF AN INDIAN CHILD IS INVOLVED IN THESE TYPES OF CASES**

In any involuntary proceedings in a State court (involuntary termination of parental rights, foster care or adoptive placement), where the court knows or has reason to know that an Indian child is involved, the court or the party seeking placement or termination must notify the parents or Indian custodian and the Indian child's tribe, by registered mail of the pending proceedings and of their right of intervention.

#### **WHAT ARE SOME GOOD CAUSE REASONS FOR NOT TRANSFERRING A CASE TO TRIBAL COURT WHEN THE INDIAN CHILD IS NOT DOMICILED ON THE RESERVATION**

If an Indian child is the subject of a state court proceeding and the child is not domiciled (not living) on his or her reservation and there is a request (by the Indian child's tribe or parent or Indian Custodian) the state court can deny the transfer based upon good cause. Good cause for denying transfer to tribal court include:

1. The Indian child's tribe does not have a tribal court.
2. The Indian child's parents object to the transfer.
3. The Indian child is over twelve years of age and objects to the transfer.
4. The evidence necessitates that the case could not be adequately presented in tribal court without undue hardship to the parties or the witnesses.
5. The parents of the child over the age of five years are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.
6. The proceedings are at an advanced stage when the petition to transfer was received.

#### **WHAT STANDARDS OF EVIDENCE MUST THE STATE COURT USE IF THE CASE IS NOT TRANSFERRED TO THE TRIBE**

This depends on what type of proceeding is in the state court.

In foster care placement proceedings, the state must show or prove by clear and convincing evidence 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 proved unsuccessful. The state must also prove by clear and convincing evidence which must include the 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.

In termination of parental rights proceedings, the state must show or prove beyond a reasonable doubt 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 proved unsuccessful. The state must also prove beyond a reasonable doubt which must include the 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.

### **WHAT ARE ICWA'S PLACEMENT PREFERENCES**

In foster care placement proceedings, ICWA sets out a list of preferences where an Indian child should be placed by the state. The state must place the child in the least restrictive setting as close to the child's home as possible. Absent good cause, preference is to be given in the following order to:

1. Member of the child's extended family.
2. A foster care home that is licensed, approved or specified by Indian child's tribe; whether on or off the reservation.
3. A foster care home that is approved by the state.
4. An institution for children approved by the Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

In adoptive placement, ICWA sets out a list of preferences of who should adopt an Indian child. Absent good cause, preference is to be given in the following order to:

1. A member of the Indian child's extended family.
2. Other members of the Indian child's tribe.
3. Other Indian families.

Good cause to modify these preferences include:

1. Request of the biological parents or the child if the child is of sufficient age.
2. Extraordinary physical or emotional needs of the child.
3. Unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

More ICWA links:

[www.dlncoalition.org/dln\\_issues/2003\\_icwaresolution.htm](http://www.dlncoalition.org/dln_issues/2003_icwaresolution.htm)

[www.nicwa.org](http://www.nicwa.org)