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What is included in this guide?

This guide provides an overview of the legal issues that come up in connection with the Indian Child Welfare Act (ICWA). It is **not** a substitute for legal counsel. You should **always contact a lawyer** for advice on any legal matter relating to ICWA.

What is the Indian Child Welfare Act?

The Indian Child Welfare Act (ICWA) is a federal law that was passed in 1978, because an extremely high number of Indian children were being removed from their homes by government and private agencies. Congress wanted to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”¹

ICWA lays out the requirements that must be followed in state child custody cases involving an Indian child who is a member of or eligible for membership in a federally recognized tribe. The law makes it clear that native families often involve broader communities than non-native families and protects these structures by giving rights not only to native children and their parents, but to the child’s tribe, too.

¹ 25 U.S.C. §1902.



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Who is covered by ICWA?

Indian children in state court custody proceedings are covered by ICWA. The law has specific definitions of an “Indian child,” a “parent,” “custodian,” and a “tribe.”² These definitions are narrow. They only apply to federally recognized tribes.

If you are confused by these definitions or want more information about whether you, your child, or your tribe is covered by ICWA, please call NAICOB.

Indian children. The law defines an Indian child as “any unmarried person who is under the age of eighteen and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”

Parent(s) of an Indian child. ICWA defines a parent as “any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.”

Custodian(s) of an Indian child. ICWA defines a custodian as “any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.”

Indian child’s Tribe. “Indian child’s tribe” means “(a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), 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.”

What if more than one tribe has an interest in the child’s case?

The court will have to decide which tribe has greater contact with the child. The court should give deference to the tribe in which the child is already a member, unless already agreed to by the tribes. If the child meets the definition of eligibility for membership in more than one tribe, and the proceeding is involuntary, the court should give the tribes the opportunity to decide which will be designated the child’s tribe for the purposes of ICWA.

² 25 U.S.C. §1903.



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If the tribes cannot agree, the court will have to decide which tribe has more significant contacts with the Indian child. The court should consider:

1. The preference of the parents for membership of the child;
2. The length of past domicile or residence on or near the reservation of each Tribe;
3. Tribal membership of the child's custodial parent or Indian custodian;
4. Whether there has been a previous adjudication with respect to the child by a court of one of the tribes; and
5. Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.³

Notice should be sent to each tribe regardless of the final determination. The tribe that has the lesser contacts could be granted a right of intervention without undermining the right of the tribe with greater contacts. The tribe with lesser contacts could also be given the ability to serve as a placement preference.



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For ICWA to apply, there must be a determination that the case involves an “Indian child.” What does this mean?

This means that someone involved in the case must tell the court that the child is “Indian” and ICWA must be followed. Social services workers should seek out information to find out whether the child is an “Indian” as defined in ICWA **before** you come to court. This includes asking the parents or custodians of the child how they self-identify **during intake**, as well as requesting verification of the child’s status from the BIA or the child’s potential tribe.

At the beginning of the court proceeding, the judge must ask **each** participant in any child-custody proceeding (emergency or voluntary or involuntary) whether the participant knows or has reason to know that the child is an Indian child. This must be done on the record. In Massachusetts, “on the record” means that the recording equipment in the court is on and recording.

The court “has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

1. Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, organization, or agency informs the court that the child is an Indian child;
2. Any participant in the proceeding, officer of the court involved in the proceeding, Indian tribe, organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
3. The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
4. The court is informed that the domicile or residence of the child, the child’s parent, or the child’s Indian custodian is on a reservation or in an Alaska Native village;
5. The court is informed that the child is or has been a ward of a Tribal court; or
6. The court is informed that either parent or the child possesses an identification card indicating membership in an Indian tribe.”⁴

⁴ 25 CFR §23.107(c)(1)-(6).



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What should I tell the social services worker, my attorney, or the court?

At intake (when an investigation involving DCF or social services begins), and before every potential change in custody, the caseworker should **ask your family how you self-identify**. For example, they should ask a question like:

“Which of the following do you consider yourself a member: Asian American, Black/African American, American Indian or Alaska Native or Native American, White, Latino/a?”

They should follow up by asking whether you have any Native American, American Indian, or Alaska Native ancestry. If you say yes, they should ask you which tribes you identify with/are a member of/are enrolled in. They should also fill out a family tree or genealogy form that includes this information and put it into your case file.

If they don't ask you these questions, you should **tell the caseworker that you and/or your child are American Indian/Native American/Alaska Native**, and whether you and/or your child are enrolled in a tribe. You should also **give this information to your attorney (or the judge)** if no one else brings this up when you are in court for the first time.

What rights do I have as a parent/custodian of an Indian child? What rights does the child's tribe have? What rights does my child have?

1. **Right to Intervene**. When the court makes a decision on a foster care placement or regarding parental rights of an Indian child, the parent/custodian and the child's tribe both have the right to intervene at any point in the case. This means that you can become involved in the case at any time.
2. **Notice**. If the removal of the child is involuntary (against your wishes), **both you and the child's tribe must be given notice that there is a case involving the custody of the child**. The party seeking the foster care placement or termination of parental rights must mail the notice. Usually, that party is the social services agency in your state. In Massachusetts, this is the Department of Children and Families (DCF).

Some tribes have created their own departments to handle child welfare. For example, the Mashpee Wampanoag Tribal Human Services Department has an ICWA Department, which handles cases relating to the welfare of enrolled members.

The notice must tell you that there is a case involving you and the child and that you have the right to intervene. You have thirty days to respond to the notice.

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If you get a notice in the mail and don't understand what it says or want advice about what to do, please call NAICOB at 617.232.0343. You can make an appointment to meet with an advocate about your case.

3. **Legal Representation.** If the removal of the child is involuntary (against your wishes), both you and your child have the right to be represented by lawyers even if you cannot afford to pay for legal help.

In Massachusetts, when you come to court for the first time, a lawyer will be assigned to represent your child. Separate lawyers will represent you and any other parent/custodian.

If you live in a state where a lawyer is not automatically assigned, ICWA says that you have the right to a lawyer. You should ask for a lawyer to be appointed to represent you. The law also says that you do not have to pay for your lawyer.

You can choose not to be represented by a lawyer. If you do this, you will have to sign a waiver. A waiver is a legal document that says: (1) you understand that you have the right to a lawyer; (2) you have been told what this right means in a way that you are able to understand; and (3) knowing all of these things, you are freely saying that you do not want a lawyer.

4. **Transfer to Tribal Court.** If your child's tribe has a tribal court that handles ICWA cases, you, another parent, the tribe, or the child can petition to have the case transferred to tribal court. If you or your child is a member or eligible for membership in the tribe, you can ask for the case be moved to the tribal court. If a case is transferred to a tribal court, the tribe's laws and procedural rules will apply instead of ICWA.

In Massachusetts, the Mashpee Wampanoag Tribal Court handles ICWA cases.

5. **Access to Reports.** If the removal of the child is involuntary (against your wishes), you, any other parent or custodian, the child, the tribe, and the social services agency have the right to examine all of the documents filed with the court that may be used when the court makes its decision.

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If my child is removed from my custody, what does ICWA say about where s/he can be placed by the state?

ICWA was designed to make sure that Indian children stay close to their families and members of their tribe. ICWA lays out the placement options that the court is required to follow when placing children in foster care and pre-adoptive or adoptive homes.

Adoption. ICWA requires the state to place the Indian child with one of the following:

1. members of the child's extended family,
2. other members of the same tribe, or
3. "other Indian families."⁵

The state cannot place an Indian child in another adoptive family unless there is "good cause to the contrary." This is meant to keep placement choices from being based on "a white, middle-class standard, which in many cases forecloses placement with [an] Indian family."⁶

Foster Care or Pre-adoptive Placements. ICWA requires that placement of an Indian child be made preferentially with:

1. the child's extended family,
2. a tribally licensed and approved foster home,
3. an Indian foster home licensed by a non-Indian agency, and
4. an institution for children approved by a tribe or operated by an Indian organization that is suitable for the child's needs.⁷

These preferences **must** be followed unless there is "good cause to the contrary." The placement must be in the least restrictive setting resembling a family, and in reasonable proximity to the child's home, taking into account any special needs of the child.

What is "Good Cause to the Contrary"? These words are not defined anywhere in the law. BIA guidelines give possible reasons for finding good cause, including the requests of the biological parents or children of suitable age, the child's extraordinary physical or emotional needs as established by qualified experts, and the unavailability of suitable families meeting the preference criteria despite "diligent search." Whoever is asking for the placement guidelines to be ignored has to show that there is "good cause to the contrary."

⁵ 15 U.S.C. §1915(a)

⁶ See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36-37 (1989).

⁷ 25 U.S.C. §1915(b).

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Consent for Placement. If the state decides to place your child in foster care, you do **not** have to consent to (agree with) the placement. If you decide to consent to a foster care placement or to the termination of your parental rights, your consent is **not** valid **unless** it is done “in writing and in front of a judge of a court of competent jurisdiction.” This means that you must tell a judge in writing that you agree to the placement and/or accept DCF’s request to terminate your parental rights. The judge must then accept your consent.

To accept your consent, the judge is required to find “that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.” This means that the DCF worker and your lawyer must have told you in detail about where your child will be placed, what it means in legal terms to agree to the placement, and how agreeing to the placement affects or changes your legal rights. If you are consenting to termination of your parental rights, you must be told how this will affect your access to your child and your legal rights.

You should be given this information in a language you understand. It should be communicated using words that are easy for you to understand.

You **cannot** legally consent to a placement before your child is born, or within ten days after their birth.⁸

What if I change my mind and don’t want to agree to the placement?

In a voluntary situation involving removal of the Indian child from foster care: ICWA allows a parent or Indian custodian to withdraw (take back and cancel) consent for **any** reason, resulting in the child being returned to their custody.

In a termination of parental rights situation: the right to withdraw (take back and cancel) your consent exists until a judge enters the order terminating your rights. It does **NOT** continue until an order of adoption is entered for your child.

In an adoption case: the right to withdraw (take back and cancel) your consent exists until the final decree of adoption is entered in court. However, if you were fraudulently convinced or forced to consent to adoption, you can ask the court to withdraw your consent even after the adoption decree has been entered.

If a judge accepts your withdrawal of consent, the child will be returned to your custody.⁹

⁸ 25 U.S.C. §1913(a).

⁹ 25 U.S.C. §1913(b).



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In an ICWA case, what questions must the court answer and what kind of proof does it consider?

Active Efforts: DCF/the social services agency must make “active efforts” to provide services that will prevent the breakup of the Indian family. The court will determine whether DCF has made active efforts in each case.

The BIA has stated that active efforts are “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family... To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child’s Tribe and should be conducted in partnership with the Indian child and the Indian child’s parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case.”¹⁰

If an agency (for example, DCF) is involved, active efforts “must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.”¹¹ Active efforts are required regardless of the child’s tribe’s participation in the case.

Active efforts are **NOT** the same as “reasonable efforts.” For example, reasonable efforts might be a referral for services, but active efforts would be to arrange for **culturally-appropriate** services **and** helping families to overcome obstacles in order to engage in those services. Other examples include:

1. Conducting a comprehensive assessment of the circumstances of the Indian child’s family, with a focus on safe reunification as the most desirable goal;
2. Identifying, notifying, and inviting members of the Indian child’s Tribe to participate in providing support and services to the Indian child’s family and in family team meetings, permanency planning, and resolution of placement issues;
3. Conducting or causing to be conducted a diligent search for the Indian child’s extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child’s parents;
4. Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child’s Tribe;

¹⁰ 25 CFR Part 23, §23.2 Definitions (2016).

¹¹ 25 CFR Part 23, §23.2 Definitions (2016).

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5. Taking steps to keep siblings together whenever possible;
6. Supporting regular visits with the parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety, and welfare of the child;
7. Identifying community resources, including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents, or, when appropriate, the child's family, in utilizing and accessing those services;
8. Monitoring progress and participation in services;
9. Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
10. Providing post-reunification services and monitoring.

A determination regarding active efforts must be made by the court when dealing with:

1. adjudications,
2. post-adjudication disposition hearings,
3. review hearings,
4. at trial in termination proceedings,
5. a parent who attempts to withdraw consent to a voluntary adoption and the state initiates termination proceedings on grounds of abandonment, or
6. one parent who seeks to adopt and the other parent resists.

An Indian child **CANNOT** be placed in foster care and/or parental rights cannot be terminated **UNLESS** the court finds that:

1. active efforts were made by the social services worker **and**
2. these efforts were unavailing (unsuccessful).

DCF/the social services agency has to prove to the court that active efforts were made and that they did not work. It is not good enough for the agency to say that they tried and it did not work. They must be able to specifically show what they attempted to do and how it did not work.

The judge must decide whether this question has been proved **beyond a reasonable doubt**. This is the highest legal standard of proof. It is stronger than what is required in non-ICWA cases.



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Involuntary Foster Care Placements: If the agency is trying to place your child in foster care without your consent, a judge must determine that continued custody of the child by you, any other parent or the Indian custodian is “likely to result in serious emotional or physical damage to the child.”

The evidence “must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.”¹² Evidence that “shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or non-conforming social behavior” is **not** enough.¹³

A judge must find that there is **clear and convincing** evidence supporting the likelihood of serious emotional or physical damage.

The social services agency has the burden of showing that the parent(s) or custodian cannot be persuaded to change their behavior. This evidence must also include testimony by a **qualified expert witness**. An explanation of the expert witness is provided later in this guide.

¹² 25 CFR §23.121(c) (2016).

¹³ 25 CFR §23.121(d) (2016).



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Termination of Parental Rights: If the agency is asking the judge to terminate your parental rights, a judge must determine that continued custody of the child by you, any other parent or the Indian custodian is “likely to result in serious emotional or physical damage to the child.”¹⁴

Statements from a **qualified expert witness** are required. An explanation of the expert witness is provided later in this guide.

The evidence “must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.”¹⁵ Evidence that “shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or non-conforming social behavior” is **not** enough.¹⁶

The judge must find that the evidence supports this conclusion “**beyond a reasonable doubt.**” This is the strongest legal standard of proof.

¹⁴ 25 CFR §23.121(b) (2016).

¹⁵ 25 CFR §23.121(c) (2016).

¹⁶ 25 CFR §23.121(d) (2016).



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Qualified Expert: To meet ICWA requirements, when an agency seeks to terminate parental rights or place a child in foster care, at least one qualified expert witness must testify.

“Qualified expert” is not defined anywhere in ICWA. However, **testimony from a regular social worker does not meet this requirement.**¹⁷ BIA guidelines state that the following categories of people are likely to meet the requirements to testify as an expert witness:

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 or organization in childrearing practices.
2. A lay expert witness having substantial experience in the delivery of child and family services to Indians and an extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
3. A professional having substantial education and experience in the area of his or her specialty.¹⁸

The BIA and your child’s tribe should be able to help find people who have qualified as experts in ICWA cases in the past.

Evidence at Trial: All of these decisions will be based on statements made by witnesses and evidence introduced at trial. The lawyer for DCF/the social services agency will call witnesses, including the social worker(s) assigned to your case. Your attorney and the attorneys for any other parents, the child, and the tribe can also call witnesses.

You can testify. Your attorney should talk to you about how testifying could affect your case and what your rights are. Make sure to ask him/her about this if s/he does not volunteer this information.

¹⁷ See 25 CFR §23.122(c) (2016); In the Matter of the Welfare of JAS (Minn. Appeals case) - regular social worker testimony is not sufficient.

¹⁸ Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,583, 67,593 (Nov. 26, 1979).