

**Indian Child Welfare Act
"ICWA"**

Nuts & Bolts

Contact Information

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Applicability of ICWA

- Applies to "child custody proceedings" involving "Indian children"
- "Indian child" – under 18, unmarried, member of tribe or eligible for membership & biological child of member
- Tribal determination on membership or eligibility is conclusive

ICWA Requirements

- Inquiry
- Notice
- Timelines
- Tribal jurisdiction or intervention
- Right to Counsel
- Active efforts
- Evidentiary burdens
- Qualified Expert Witness
- Placement preferences

Inquiry

- Who? – social worker, probation officer, petitioner & court have affirmative & ongoing duty to inquire about Indian status
- When? – at removal or as soon as possible thereafter
- What? – ask if child has Indian ancestry
- How? – ask child, parents, guardian, Indian custodian & extended family
 - Document on petition
 - Complete & attach ICWA-010 Indian Child Inquiry Attachment
 - Complete & file ICWA-020(s) Parental Notification of Indian Status

Reason to Know & Further Inquiry

- Reason to know child is Indian include:
 - Person or organization with interest in child provides information suggesting child, parent, grandparent or great-grandparent are or were tribal members;
 - Child or family live in a predominantly Indian community; or
 - Child or family receive services generally available only to Indians.

Reason to Know = Duty of Further Inquiry

- What?
 - Interview parents
 - Interview Indian custodian
 - Interview extended family
 - Contact BIA and State DSS
 - Contact tribes and other people reasonably expected to have information on heritage.
- Who? – Social worker, probation officer, court investigator or petitioner (depends on case type)

Notice

- When? – If there is "reason to know" an Indian child is involved. In delinquency and status offense cases when you have reason to know & child is at risk of entering foster care or is in foster care
- Whose duty? –
 - Juvenile Cases - social worker or probation officer
 - Family Cases - petitioner/attorney
 - Probate Cases Where the Petitioner has an Attorney- attorney
 - Pro-per Probate Cases- court clerk

Notice

- What? – ICWA-030 *Notice of Child Custody Proceeding for Indian Child*, Petition & attachments
- How? – Registered or certified mail return receipt requested
- To whom? –
 - Tribe(s) addressed to tribal chairman or designated agent for service
 - To BIA regional office if you don't know tribe.
 - Copy to Secretary of Interior by regular mail if you do know tribe

Notice

- Send to all tribes of which the child may be a member or eligible for membership until determination made
- If tribe tells you definitively child not a member or eligible for membership you can stop sending that tribe notice
- If court makes a determination as to which is child's tribe only send notice to that tribe

Notice – How Long

- For every hearing unless court makes determination that ICWA does not apply
- If notice sent and no determinative response after 60 days, Court may rule ICWA does not apply

Notice – Proof

- Court file must contain:
 - Copies of all notices sent;
 - Original registered/certified mail receipts as well as delivery receipts; and
 - Copies of all responses received from tribe(s) or BIA

Notice – Timeline

- General Rule
 - 10 days after receipt of notice before any hearing may proceed & parents or tribe entitled to extra 20 days upon request.
- Exceptions:
 - Detention hearing;
 - Jurisdiction in delinquency where conflicts with speedy trial; and
 - Disposition in delinquency where good cause to deny, including moving a child to less restrictive setting.

Tribal Jurisdiction

- Exclusive if child already ward of tribal court or resident or domiciled on reserve of tribe that exercises exclusive jurisdiction
- Concurrent if not exclusive
- If exclusive tribal jurisdiction state court must transfer
- If concurrent, state court must transfer upon request unless good cause not to transfer

Tribal Intervention

- If matter not transferred to tribal court, child's tribe may intervene **at any point**
- Intervention not required to be in writing or on pleading paper
- If tribe does not intervene ICWA still applies and tribe still has rights under ICWA

Rights of Intervening Tribe

- To examine and obtain copies of all court documents
- To have agent sit at counsel table
- To direct & cross-examine witnesses
- All other rights of a party to the proceedings

Rights of Nonintervening Tribe

- May have a representative present at hearings
- Receive notice of hearings
- Address the court
- Examine court documents
- Submit reports and recommendations to the court

Full Faith & Credit

- State local court must give full faith & credit to public acts, records and judicial proceedings of tribe

Right to Counsel

- Indigent parents & Indian custodians have right to appointed counsel in all ICWA proceedings
- Tribe – may hire attorney at own expense but may designate non-attorney agent to appear in court

Active Efforts

- Prior to foster care placement or TPR must provide “active efforts” to prevent the breakup of the Indian family
- Active efforts must be culturally appropriate
- Active efforts must make use of available tribal resources & be consistent with tribes social & cultural standards

Burden of Proof

- Foster care placement – requires clear and convincing evidence including testimony of at least one qualified expert witness
- Termination of parental rights – requires evidence beyond a reasonable doubt including testimony of at least one qualified expert witness

Qualified Expert Witness

- Person qualified to address whether continued custody will result in serious emotional or physical damage to child
- Requires knowledge of tribal culture, family & childrearing practices
- Cannot be employee of agency seeking foster care placement or TPR

Placement Preferences

Foster care placements:

1. Member of child's extended family
2. Foster home licensed or approved by child's tribe
3. Indian foster home licensed by state or county
4. Children's institution approved by the tribe or other Indian organization with program designed to meet child's needs

Placement Preferences

- Adoptive placements:
 - Member of child's extended family
 - Other member of child's tribe
 - Other Indian family

Placement Preferences

- Court must follow placement preferences unless good cause not to follow
- Tribe may provide by resolution for different order of preference
- Standards for complying with placement are prevailing social & cultural standards of tribe

Good Cause to Deviate

- Parent, Indian custodian or guardian asks
- Child asks
- Extraordinary needs of child established by testimony of qualified expert witness
- No placement meeting preferences found after documented diligent search

Rights of Adopted Indian Child

- Adopted Indian person upon turning 18 has the right to learn of all information necessary to protect rights flowing from person's relationship with tribe

Invalidation of Proceedings

- Tribe, child, parent or Indian custodian may petition to invalidate proceedings for violations of ICWA
