

INDIAN CHILD WELFARE ACT

STATUTORY AUTHORITY

25 U.S.C. 1901 through 1923

ICWA applies when the child is an “Indian child” which is defined as:

- Unmarried person under age of 18; and
- Child is member of a federally recognized Indian tribe; OR
- Child is biological child of a member of a federally recognized Indian tribe AND child is eligible for membership in any federally recognized Indian tribe.

PRIOR TO REMOVAL

Active remedial efforts must be offered before removal. Active efforts have been defined as when the caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. 891 P.2d 815 (1995)

PLACEMENT

- **Foster Care Placement** (in order of preference)
 - Extended Family
 - Tribal Home (licensed or specified by Tribe)
 - Indian home licensed by non-Indian agency
 - Institution approved by Tribe or operated by Indian organization
- Placement must be least restrictive setting and reasonable proximity
- Record of Placement must include:
 - Efforts to meet placement requirements
 - Judicial finding of “good cause to the contrary” for placement, other than in compliance with preference list
- **Adoptive Placement** (in order of preference)
 - Extended Family
 - Other members of Tribe
 - Other Indian families

NOTICE OF HEARING

- Must notify parent or Indian custodian and the Indian child’s tribe by registered mail, return receipt requested, of the pending proceedings and their right of intervention.
- If identity of parent or Indian custodian and tribe cannot be determined, such notice shall be given to the Secretary of Interior in like manner, who has 15 days after receipt to provide the requisite notice to the parent or Indian custodian and tribe.
- To get address for tribe or Secretary of Interior, look at cherokeeekids.org under FAQ’s for Federal Indian Child Welfare Act, subheading, Notification Responsibilities.
- Tribe must receive notice at least 10 days prior to any hearing
- Tribe may request additional 20 days before hearing

ADJUDICATION HEARING

Burden of Proof: Clear and Convincing

Elements:

- Unsuccessful active efforts
- Continued custody would result in serious emotional or physical damage
- Must show causal relationship between existing conditions and the damage that is likely to result

Qualified Expert Witness must testify

- Member of Tribe recognized as knowledgeable in tribal customs;
- Someone with substantial experience in delivery of child & family services to Indians AND extensive knowledge of practices within child’s tribe
- Professional person having substantial education and experience in his or her speciality.

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TERMINATION OF PARENTAL RIGHTS

Burden of Proof: Beyond a Reasonable Doubt

NOTE: No immediate fast tracking, cannot file TPR petition until at least 90 days after adjudication/disposition

Elements:

- Unsuccessful active efforts
- Continued custody would result in serious emotional or physical damage
- Must show causal relationship between existing conditions and the damage that is likely to result

VOLUNTARY RELINQUISHMENT

- Consent must be in writing, before a judge
 - Certificate that terms and consequences of consent were explained in detail in language understood by parent
 - Child's name, birth date, Tribe, tribal membership number
 - Name and address of consenting individual
 - Name and address of entity through whom or by whom placement was arranged.
- Consent to TPR may be withdrawn at any time prior to final decree.
- Relinquishment as part of an involuntary action requires expert testimony.
- Adoption after voluntary relinquishment is subject to invalidation for 2 years after effective date of adoption for fraud or duress.
- Placement in voluntary foster care must be done before a judge and child must be returned immediately upon withdrawal of consent.
- Must give timely notice to Tribe.
- Indian child must be at least 11 days old before consent is signed.