

Navigating the INDIAN CHILD WELFARE ACT ("ICWA")

25 U.S.C. § 1901 et seq. & 25 C.F.R. § 23.1 et seq.

Why: to protect the best interest of Indian Children and to promote the stability and security of Indian tribes and families.

What: to establish minimum Federal standards for the removal of Indian children and placement of Indian children in homes which will reflect the unique values of Indian culture.

12 Questions to Navigate the Indian Child Welfare Act

☐ 1. Is this an Indian Child under ICWA? (§ 1903 & §§23.2, 23.103, 23.107,23.108)

- Unmarried, under 18 at the commencement of the proceeding, and member of a federally recognized tribe, OR
- Unmarried, under 18 at the commencement of the proceeding, and eligible for membership in a federally recognized tribe and a biological child of a member.
- Indian child status is based exclusively on statutory definition – no exceptions.
- The tribe has sole authority to determine whether a child is a member or eligible.
- Court must ask each participant, at the beginning of each proceeding and on the record, if they know or have reason to know the child is an Indian child.
- If the court has reason to know the child is an Indian child, it must treat the child as an Indian child pending verification.

☐ 2. What actions are covered by ICWA? (§ 1903 & §§ 23.2, 23.103)

- Guardianship or custody of a minor, either temporary or permanent to a non-parent.
- Any case where DCF is given custody, including care and protection and CRA cases.
- Surrender for adoption and consent to a termination of parental rights or guardianship.
- Termination of parental rights.
- Adoption, including private adoptions.
- Placement in foster care; DCF must follow placement preferences.
- Pre-adoptive placement; DCF or adoption agency must follow placement preferences.

☐ 3. What court has jurisdiction? (§ 1911 & §§ 23.110, 23.115-118)

- Tribal Court has exclusive jurisdiction where child is a ward of a tribal court or resides or is domiciled on reservation or Indian lands, except in emergencies where child is off reservation.
- State and Tribal court have concurrent jurisdiction in all other cases. If parent and tribe want case transferred to Tribal Court, then it should be transferred unless either parent objects, the Tribal Court declines jurisdiction, or good cause exists for denying transfer.

☐ 4. Have the proper formal notices gone out? (§ 1912 & §§ 23.11, 23.111)

- Petitioner must send notice to each tribe where the child may be a member or eligible for membership if a biological parent is a member, and to the parents, and Indian custodian if applicable.
- In cases where DCF has custody or is seeking custody DCF provides notice.
- Notice must be sent by registered or certified mail with return receipt requested, in clear and understandable language, and contain the information required by § 23.111(d).
- Petitioner must file with the court an original or copy of each notice and any return receipts or other proof of service.
- Petitioner must send a copy of each notice to the appropriate BIA Regional Director by registered or certified mail with return receipt requested or by personal service.

☐ 5. What are the requirements for emergency removal? (§ 1912 & § 23.113)

- Where state law provides greater legal protection, state law applies (e.g. parents and child have a right to 72 hour hearing within 72 hours).
- Petition for emergency removal should contain information required by §23.113(d).
- If child is removed or not returned, court must make a finding on the record that removal/placement is necessary to prevent imminent physical damage or harm to child.
- Court must immediately end the emergency removal once it has sufficient evidence to determine the removal/placement is no longer necessary to prevent imminent physical damage or harm.
- Emergency proceeding ends by returning the child, case is transferred to appropriate Tribal court, or child custody proceedings commence in compliance with ICWA.
- Emergency removal/placement should not last longer than 30 days unless the court makes findings required by §23.113(e).

☐ 6A. What are the requirements to grant temporary custody to someone other than a parent? (§ 1912 & §23.121) Follow all state law, PLUS petitioner must establish:

- “Likely to result in serious emotional or physical damage,” if returned to parent.
- Causal link between conditions in home and likely damage to child.
- “Active efforts” were made to prevent removal and were unsuccessful.
- ***Proof must be by clear and convincing evidence.***
- Requires testimony of expert witness qualified under § 23.122.

☐ 6B. What are the requirements to grant permanent custody to someone other than a parent? (§ 1912 & §23.121) Follow all state law, PLUS petitioner must establish:

- “Likely to result in serious emotional or physical damage,” if returned to parent.
- Causal link between conditions in home and likely damage to child.
- “Active efforts” were made to prevent removal and were unsuccessful.
- ***Proof must be by clear and convincing evidence.***
- Requires testimony of expert witness qualified under § 23.122.

☐ 7. What are the requirements to terminate parental rights? (§ 1912 & § 23.121) Follow all state laws, PLUS petitioner must establish:

- “Likely to result in serious emotional or physical damage,” if returned to parent.
- Causal link between conditions in home and likely damage to child.
- “Active efforts” were made to prevent removal and were unsuccessful.
- ***Proof must be by evidence beyond a reasonable doubt.***
- Requires testimony of expert witness qualified under § 23.122.

☐ 8. What are the requirements for a parent to agree to temporary custody or permanent custody? (§ 1913 & §§ 23.124-127) Follow all state laws, PLUS:

- Must be executed in writing, recorded before a judge, and contain information required by §23.126.
- Judge must certify that terms and consequences, including the right to withdraw consent, were explained fully in a language that the parent understands, and parent understood.
- Parent can withdraw consent at any time in writing and the court must ensure that the child is returned as soon as practicable unless a new action is filed.

☐ **9. What are the requirements for a parent to surrender parental rights? (§ 1913 & §§ 23.124-128)** Follow all state laws, PLUS:

- Must be executed in writing, recorded before a judge, and contain information required by §23.126.
- Judge must certify that terms and consequences, including the right to withdraw consent, were explained fully in a language that the parent understands, and parent understood.
- Must be more than 10 days after child's birth.
- Parent can withdraw consent in writing at any time prior to the entry of a final decree of termination or adoption and the child shall be returned as soon as practicable unless a new action is filed.

☐ **10. What are the placement preferences for a placement of an Indian child out of the home? (§ 1915 & § 23.131)** Absent good cause to the contrary, preferences are:

- Least restrictive, most family-like setting possible to meet child's needs and taking into consideration sibling attachment, within reasonable proximity to child's home, extended family, or siblings.
- Placement preferences in descending order: (1) extended family (including non-Indian family); (2) Tribe's foster home; (3) other Indian foster home; (4) Indian institution.
- OR Tribe's placement preferences if different.
- Court must, where appropriate, consider the preference of the child and parent.

☐ **11. What are the placement preferences for placement of an Indian child for adoption? (§ 1915 & § 23.130)** Absent good cause to the contrary, preferences are:

- Placement preferences in descending order: (1) extended family members (including non-Indian family members); (2) members of the Tribe; (3) other Indian families.
- OR Tribe's placement preferences if different.
- Court must, where appropriate, consider the preference of the child and parent.

☐ **12. What recordkeeping is required? (§§ 23.140, 23.141)** Court or DCF must:

- Maintain a record of *every* placement of an Indian child, including information required by § 23.141(b), and make record available within 14 days of request by tribe or BIA.
- Provide BIA with adoption decree of each adopted Indian child, with information required by § 23.140(a), in envelope marked "confidential," within 30 days of entry.

Selected References

25 U.S.C. § 1901 et seq.; 25 C.F.R. §23.1 et seq.
DCF Regulation, 110 C.M.R. §1.07
Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)
Adoption of Uday, 91 Mass. App. Ct. 51 (2017)
Adoption of Arnold, 50 Mass. App. Ct. 743 (2001)
In the Matter of the Welfare of J.A.S., 488 N.W. 2d 332 (1992)
Bureau of Indian Affairs, ICWA Regulations and Guidelines (www.bia.gov)
National Indian Child Welfare Association (www.nicwa.org)

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NOTICE REQUIREMENT

NOTICE OF PROCEEDING MUST BE SENT BY REGISTERED OR CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO PARENTS, INDIAN CUSTODIAN, AND TRIBE.

NOTICE MUST INCLUDE the following information:

- Child's name, birthdate, birthplace
- Names (including maiden, married, and former names or aliases), birthdates, birthplaces, and tribal enrollment numbers of parents and other direct lineal ancestors of child, e.g. grandparents, if known
- Name of each tribe in which child is a member or may be eligible for membership if biological parent is a member
- Copy of petition and date, time, and location of scheduled hearing
- Name of petitioner and name and address of petitioner's attorney
- Statement of right of parent, Indian custodian, and tribe to intervene and be made a party to the proceeding
- Statement that indigent parent or Indian custodian has right to court-appointed counsel
- Statement of right to be granted up to 20 additional days to prepare for the hearing
- Statement of right of parent, Indian custodian, and tribe to request proceeding be transferred to tribal court
- Mailing addresses and telephone numbers of court and information related to all parties
- Statement of potential legal consequences of the proceedings on the future parental and custodial rights of the parent or Indian custodian
- Statement that all parties notified must keep the information contained in the notice and attached petition confidential and that the notice should not be handled by anyone not needing the information to exercise rights under ICWA

BRING TO COURT: original or copy of each notice sent with any return receipts or other proof of service.

Whatever tribe the child may belong to, a copy of each notice must be sent to the BIA Regional Director by registered or certified mail, return receipt requested. Contact this office for the address of other tribes you may need to serve or use BIA link in References section.

**Eastern Area Director
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214**

DESIGNATED TRIBAL AGENTS FOR SERVICE TO MASSACHUSETTS TRIBES

Wampanoag Tribe of Gay Head (Aquinnah):

Bonnie Chalifoux
Human Service Director
20 Black Brook Road
Aquinnah, MA 02535
Phone: (508) 645-9265 Ext. 133
Fax: (508) 645-2755
Email: bonnie@wampanoagtribe.net

Mashpee Wampanoag Tribe:

Catherine Hendricks
ICWA Director
483 Great Neck Road South
Mashpee, MA 02649
Phone: (508) 477-0208 Ext. 144
Fax: (508) 477-1652
Email: catherinehendricks@mwtribe.com