

Navigating the INDIAN CHILD WELFARE ACT ("ICWA")

25 U.S.C. § 1901 et seq.

Why: To ensure that the courts and states in child custody proceedings are taking action necessary to protect and preserve Indian Tribes and their children, a vital resource to the continued existence and integrity of the Tribe.

What: Enhanced procedures and protections. Failure to follow ICWA may result in a successful motion to invalidate a court's judgments and orders.

9 Questions to Navigate the Indian Child Welfare Act

☐ 1. **Is this an Indian Child under ICWA? (§ 1903) If possibility exists, Petitioner must inquire.**

- Unmarried, under 18 and member of or enrolled in a federally recognized tribe, OR
- Unmarried, under 18 and eligible to be enrolled in a federally recognized tribe and a biological child of a member
- The tribe determines that a child is a member or eligible

☐ 2. **What court actions are covered by ICWA? (§ 1903)**

- 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 cases and CRA cases
- Surrender for adoption in the context of a child custody proceeding and consent to a termination of parental rights or guardianship
- Termination of parental rights (TPR)
- Adoption, including private adoptions
- Transfer between foster care placements; when DCF performs such a transfer, it must follow the placement options
- Pre-adoptive placement; when DCF or any adoption agency conducts such a placement, it must follow the placement options

☐ 3. **What is the correct jurisdiction? (§ 1911)**

- Child is already a ward of a tribal court or child resides or is domiciled on reservation or Indian lands → Exclusive tribal court jurisdiction except in emergencies where child is off reservation
- Child does not live on reservation → Both State court and tribe have concurrent jurisdiction, presumptively tribal. If parent and tribe want it transferred to tribal court, then it should be transferred.

☐ 4. **Have the proper formal notices gone out? (§ 1912)**

- Party seeking custody (DCF or other petitioner) must send notices to parents, Indian custodian, and tribe by registered mail return receipt requested
- Petitioner must show court that parents, Indian custodian, and tribe received proper ICWA notification.

☐ 5. **What are the ICWA requirements at the Temporary Custody Hearing? (§ 1912)**

Whichever provides more protection, State or Federal law, applies.

Court proceedings must include:

- a) For emergency removal, parent has right to hearing within 72 hours.
- b) Qualified expert witness testimony is required in most cases. (See Welfare of J.A.S.).
- c) If child is removed or not returned, court must find that "Likely to be serious emotional or physical damage" if child is not removed or returned."
- d) Absent an emergency, Petitioner must make "active efforts" to prevent breakup of family/removal of children.
- e) Clear and convincing burden of proof
- f) No hearing may be held until at least 10 days after notice received. Parent or tribe may request additional 20 days.

References

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

DCF Regulation, 110 C.M.R. §1.07

Adoptive Couple v. Baby Girl, 570 U.S. ____ (2013), 133 S. Ct. 2552 (2013)

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

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 Guidelines (www.bia.gov)

National Indian Child Welfare Association (www.nicwa.org)

A Practical Guide to the Indian Child Welfare Act (www.narf.org/icwa)

☐ 6. **What are the relevant federal and Massachusetts laws for state courts to accept a surrender for adoption, consent to foster care or guardianship, or stipulation to a TPR of an ICWA child? (§ 1913) Follow all state laws, PLUS:**

- a) Must be executed in writing and before judge
- b) Certified by judge that it was fully explained and understood by parent
- c) In the language that the parent understands
- d) Must be more than 10 days after child's birth
- e) Parent can revoke (but with some limitations)

☐ 7. **What are relevant federal and Massachusetts laws to accomplish TPR of parents of an ICWA child? (§ 1912) See Adoptive Couple v. Baby Girl for limitations. Follow all state law, PLUS**

- a) Qualified expert witness testimony
- b) "Likely to be serious emotional or physical damage," if returned to parent
- c) Petitioner must make "active efforts" to return child to family
- d) Beyond a reasonable doubt burden of proof for TPR

☐ 8. **What are the placement preferences for a placement of an ICWA child out of the home? (§ 1915)**

Absent good cause to the contrary, the placement preferences are:

- Least restrictive, most family-like setting, based on child's needs
- Reasonable proximity to child's home taking into account the special needs of the child
- Placement preferences in order:
 - a) Extended family members
 - b) Tribe's foster home
 - c) Indian foster home
 - d) Indian institution

☐ 9. **What are the placement preferences for placement of an ICWA child for adoption? (§ 1915) (See Adoptive Couple v. Baby Girl for limitations)**

- Extended family members
 - Members of the tribe (Tribe can alter preferences to include now reformed parent whose rights were terminated, however a court can disregard such alternation with "good cause")
- Other Indian Families

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SEND NOTICE BY REGISTERED MAIL, RETURN RECEIPT REQUESTED. BRING TO COURT PROOF OF SERVICE TO PARENTS, TRIBE, AND/OR INDIAN CUSTODIAN

The petition for custody of an Indian child must be mailed with notice to the parents, Indian custodian and tribe with a copy of the petition, date filed, and the date, time and location of the scheduled hearing including the name, address and phone number of the court. Also include the following information:

Child's parents, Indian custodian and the child's tribe have the right

1. To intervene and be made a party in the proceeding
2. To be granted an additional 20 days to prepare for the hearing.
3. To examine all documents or other material that may be used to make a decision in this matter.
4. To petition the court to transfer this proceeding to the tribal court.
5. To notice that this matter may affect the future custodial rights of the tribe, the parents and the Indian custodians of the named child, and may result in the temporary or permanent removal of the child from the child's home, the termination of parental rights and the permanency placement or adoption of the child.

The information contained in the notice and the attached Petition is confidential and should not be disclosed or revealed to any person or agency which is not necessary for proper notification of the parents.

In the notice to the tribe, include, if known:

- Name (first, middle, last) of child with date and place of birth
- Attach birth certificate if available.

Names (first, middle, maiden, last) of:

- Mother, Father, Grandparents, and Great-Grandparents
- Current address of each of the above relatives
- Former address of each of the above
- Birthday of above and place of birth
- Tribe or band, location of each of above
- Tribal membership or enrollment number, if known
- If deceased, date and place of death

DESIGNATED TRIBAL AGENTS FOR SERVICE IF YOUR CHILD IS A MEMBER OF:

Wampanoag Tribe of Gay Head (Aquinnah)
Bonnie Chalifoux, Director Human Services
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, Director
ICWA & Human and Social Services
483 Great Neck Road South
Mashpee, MA 02649
Phone: (508) 477-0208 Ext: 144
Cell: (774) 255-0119
Fax: (508) 477-1652
Email: catherinehendricks@mwtribe.com

Notice should also be sent to:

Eastern Area Director
Bureau of Indian Affairs
3701 N. Fairfax Drive, Suite 260
Arlington, VA 22201

CONTACT ABOVE Bureau of Indian Affairs for address of other tribes you may need to serve.

ICWA CHILD AND FAMILY SERVICE PROGRAMS OBJECTIVES

- Prevent the breakup of Indian families.
- Ensure that the permanent removal of an Indian child from the custody of the Indian parent or Indian custodian shall be a last resort.

Tribal services which may be available to family

- a. homemaker and home counselors
- b. protective day care and afterschool care
- c. recreational activities
- d. respite care
- e. employment support services
- f. counseling, education and services

Contact Mashpee or Aquinnah ICWA office as listed above.