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*And Why It Matters*



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A group of children are playing in a forest with autumn foliage. The scene is bathed in warm, golden light, suggesting late afternoon or early morning. The children are dressed in casual, warm clothing. One child in the foreground is wearing a light-colored, quilted jacket and dark pants, and is captured in a dynamic pose, possibly jumping or running. Other children are visible in the background, some smiling and looking towards the camera. The ground is covered with fallen leaves, and the trees in the background have vibrant autumn colors.

# Indian Child Welfare Act: Protecting the Next Seven Generations

By Elise McGowan-Cuellar, J.D.



Today there is a grandmother who spends as much time as she can with her great-grandchildren. She picks them up from school, takes them to the playground, and then cooks their dinner. She reveres these moments more than any other because in the early 1970s her children were taken from her home, and she was forbidden by state officials from mothering them or taking any part in their paths. She deeply loved her children and ensured they were fed and educated. However, her love could not stop the physical and emotional abuse she endured from their father. Desperate for help, she called on the police. That phone call provided the basis for social services' involvement and the children's removal from their home, their people, and their culture. Social services did not provide the services which would have equipped the grandmother with the tools to stand against her abuser or correct that relationship. Social services also did not consider adoption placement with her many family members who were within the community and able to assume responsibility over the children. She and her children were revictimized by a system sworn to protect them. Eventually, as is often the case, after several years of unhealed wounds, they reunited and began to amend a connection through the ashes of their pain.

In 1978, Congress passed the Indian Child Welfare Act ("ICWA") recognizing that Indian children, like the children mentioned above, were being removed from their homes by public and private agencies at an alarmingly high rate. Congress determined that a federal law was necessary to "protect the best interest of Indian children and to promote the stability and security of Indian tribes and families."<sup>1</sup> Importantly, ICWA works not only to protect Indian children, but it protects families and tribes as well. Central to those provisions is the recognition by Congress that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."<sup>2</sup> Under ICWA an Indian child is protected by ICWA if the child is a member or eligible member of a federally recognized tribe and is under the age of 18 and unmarried.<sup>3</sup> ICWA applies to child welfare proceedings, adoption

proceedings, guardianships, limited juvenile delinquency proceedings, and third-party custody cases.<sup>4</sup>

There are 5.2 million American Indians and Alaska Natives that live in the United States—making up 1.7 percent of the total population.<sup>5</sup> With over 562 federally recognized tribes and Alaskan villages in the United States, each federally recognized tribe is a unique government recognized as a sovereign entity that determines its own membership and laws, many of which also have their own judicial system.<sup>6</sup>

Importantly, the ICWA legislation was deemed necessary to the survival of American Indian communities. Prior to ICWA, American Indian children were removed from their homes and communities for a multitude of mostly illegitimate reasons, often with no judicial process provided to families at all. Children could be removed for something as trivial as family size or because both parents worked. One story told of a child being picked up and taken to a farm never to return home again. In 1978, 25%-35% of all American Indian and Alaskan Native children were removed from their homes by state child welfare and private adoption agencies and 85% of those children removed were placed outside of their families and communities—even when fit and willing relatives were available, resulting in a loss of identity and a loss of culture.<sup>7</sup> Since ICWA's enactment, state and private agencies are required to not only inquire if a child is an Indian, but to also consider several factors when handling an ICWA case.

ICWA provides for the notification to key people and entities with an interest in the proceedings. A tribe and the child's parent or Indian custodian must be notified, in writing, about any involuntary child welfare proceeding in state courts involving a child subject to ICWA. The child's tribe has the right to intervene at any point during the proceeding, including cases in which a parent voluntarily relinquishes custody of an Indian child.<sup>8</sup>

ICWA requires that service providers make active efforts to reunify the

Indian family.<sup>9</sup> The active efforts of the social worker must include providing services to the family in an attempt to correct whatever abuse or neglect has occurred in the home.<sup>10</sup> The agency must include identifying and, if appropriate, accepting, placement preferences for the child that fit under those identified by ICWA.<sup>11</sup> Further, agencies must notify the child's tribe and the child's parents of the child protection proceedings and actively work to involve the child's tribe, parents, and extended family throughout the case.<sup>12</sup>

ICWA states:

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.<sup>13</sup>

The requirements or elements of active efforts, however, are not defined. Service providers may rely on 25 CFR 23.2 to define active efforts as the affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Active efforts are different from the "reasonable efforts" standard commonly used in comparable non-Indian state legislation because it strengthens the duty of state officials toward reunification. ICWA mandates the state to demonstrate active efforts in every ICWA case: providing services to the family to prevent removal of the Indian child from the parent or Indian custodian and reunifying an Indian child with the parent or Indian custodian after removal.<sup>14</sup> If a party seeks an involuntary foster care placement or involuntary termination of parental rights of an Indian child, the petitioner party must show active efforts by clear and convincing evidence as well as testimony of a qualified witness.<sup>15</sup>

While ICWA itself does not specifically define active efforts, the state



implementation of ICWA may define them. For example, the Michigan Indian Family Preservation Act includes in the definition of active efforts, MCL 712B.1-41, "Engaging the Indian child, child's parents, tribe, extended family members, and individual Indian caregivers through the utilization of culturally appropriate services and in collaboration with the parent or child's Indian tribes and Indian social services agencies." The state of Minnesota defines active efforts under the Minnesota Indian Family Preservation Act 260.755 as:

. . . rigorous and concerted level of effort that is ongoing throughout the involvement of the local social services agency to continuously involve the Indian child's tribe and that uses the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe to preserve the Indian child's family and prevent placement of an Indian child and, if placement occurs, to return the Indian child to the child's family at the earliest possible time.

ICWA requires that a court may not order foster care placement or terminate parental rights "in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."<sup>16</sup> However, the definition of what or who constitutes a qualified expert witness is undefined by the language of ICWA. Federal regulations have defined a qualified expert witness as an expert who has knowledge about the tribe's culture and child-rearing practices.<sup>17</sup> The qualified expert witness does not include state social workers regularly assigned to work with the Indian children.<sup>18</sup> It is important to remember that a tribe may already have established specific criteria for a qualified expert witness through its experience handling previous ICWA

cases.<sup>19</sup> The tribe may also assist the petitioner to locate a qualified expert witness even if it has not created such criteria.<sup>20</sup>

Another important aspect of ICWA is the placement preferences. After a court has determined by clear and convincing evidence that continued custody by the parent is likely to result in serious damage to the child, the child shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met, whether it is placement in foster care or a pre-adoptive placement.<sup>21</sup> The child shall also be placed within reasonable proximity to his or her home.<sup>22</sup> If a foster care or pre-adoptive placement is being considered by the court:

. . . a preference shall be given, in the absence of good cause to the contrary, to a placement with—

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.<sup>23</sup>

Also under ICWA, the Indian child's tribe may determine an alternative order of preference for placement of the Indian child.<sup>24</sup> The alternative preference to ICWA created by the tribe must be passed by resolution by the tribe. The court shall follow such resolution so long as the placement is the least restrictive setting appropriate to the particular needs of the child.<sup>25</sup> The court must also take into consideration the parent's preference to placement of the Indian child.<sup>26</sup>

Furthermore, under ICWA, the Indian child's parent or Indian custodian has a right to court appointed counsel if they cannot afford it.<sup>27</sup>

Finally, ICWA also governs voluntary child protection proceedings including adoptions, foster care placement, and termination of parental rights.

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.<sup>28</sup>

Prior to any consent to voluntary foster care or termination of parental rights, this section requires the court to explain the terms and consequences to the parent's consent and to ensure the parent fully understands the parent's rights. The requirements under 25 U.S.C. § 1913 further protect the rights of the parent or Indian custodian, as under ICWA a parent or Indian guardian may withdraw their consent before the final decree of any voluntary adoption or termination proceeding.<sup>29</sup> This portion of ICWA also applies to voluntary consent of foster care placement, allowing the parent or Indian custodian to withdraw at any time.<sup>30</sup>

Despite common misconceptions, ICWA is not based on race. ICWA only applies to children who are citizens (or "members") of a federally recognized tribe.<sup>31</sup> ICWA, like other federal Indian legislation, is based on the "unique political status of tribes and Indian people, not race and this status, established by Congress, the Constitution, statutes, and treaties, has been affirmed and reaffirmed by U.S. Supreme Court decisions for 200 years."<sup>32</sup> ICWA does not attempt



to identify how an Indian child can become a citizen of a tribe, but it does require enrollment or enrollment eligibility.

ICWA has paved the way toward restoring the ability of sovereign tribes to utilize its government and culture to aid those families facing abuse or neglect. ICWA, unfortunately, is not always followed or even known by practitioners outside of those who practice Indian law.<sup>33</sup> When practitioners do not follow ICWA, Indian children and families will continue to suffer. They will continue to be removed at alarming rates and will continue to be placed in risky and culturally disconnected adoptions. If violations do occur, the Indian family and the Indian child's tribe may invalidate certain actions under 25 U.S.C. § 1914. Actions that can be invalidated are foster care placement or termination of parental rights. Invalidation of the action can be brought by the parent or Indian custodian—whose custody was removed—or by the Indian child's tribe upon a showing to a court of competent jurisdiction that the action by the state court violated any provisions of section 1911, 1912, or 1913.<sup>34</sup> Section 1914 of ICWA creates another layer of protection for Indian families and tribes when a court violates the provisions of ICWA.<sup>35</sup>

Common noncompliance of the key provisions of this federal law can be prevented. For example, a commitment to the early identification of ICWA-eligible children is necessary to comply with ICWA. Someone should ask if the child is a member of an Indian tribe or lives on an Indian

reservation. Practitioners can also improve compliance by ensuring notice of all the key parties, including noticing the other parent, the child's tribe, and the Bureau of Indian Affairs when the tribe is unknown. Another way to ensure the Indian family remains intact is to follow placement guidelines, striving to place children with family members, and in the least restrictive placements when possible. Above all, though, ICWA compliance inherently demands the respect of state officials. After notice and participation is followed, social services, courts, and attorneys must be willing to listen to those tribes who become involved and articulate its cultural norms, practices, difficulties, and mechanisms of healing that are often in contravention to those understood in a non-Indian society. The ICWA and tribes across the country are working diligently to protect future generations. Through compliance of ICWA, vulnerable Indian families can be preserved for generations to come.

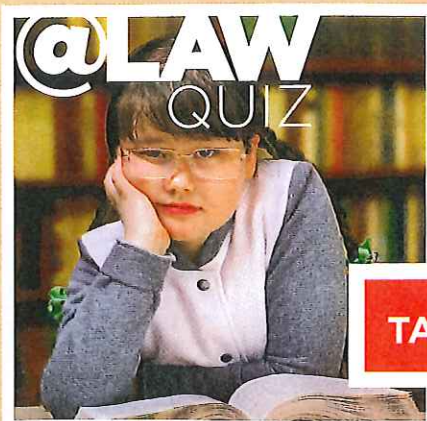


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## Endnotes

1. 25 U.S.C. § 1902.
2. 25 U.S.C. § 1902 (3).
3. 25 U.S.C. § 1903 (a)(b).
4. 25 U.S.C. § 1903(1).
5. 2010 Census.
6. <https://www.bia.gov/WhoWeAre/BIA/index.htm>.
7. [http://www.nicwa.org/government/documents/Setting-Record-Straight-About-ICWA\\_Sep2015.pdf](http://www.nicwa.org/government/documents/Setting-Record-Straight-About-ICWA_Sep2015.pdf).
8. 25 U.S.C. § 1912 (b).
9. 25 U.S.C. § 1912 (d).
10. *Id.*
11. 25 U.S.C. § 1915 (b).
12. 25 U.S.C. § 1912 (d).
13. 25 U.S.C. § 1912 (d)(emphasis supplied).
14. 25 U.S.C. § 1912 (d).
15. *Id.*
16. 25 U.S.C. § 1912(e)-(f).
17. 25 CFR § 23.122.
18. 25 CFR § 23.122 (c).
19. 25 CFR § 23.122 (b).
20. *Final Rule, 81 Fed Reg at 38873.*
21. 25 U.S.C. § 1915 (b).
22. *Id.*
23. *Id.*
24. 25 U.S.C. § 1915 (c).
25. *Id.*
26. *Id.*
27. 25 U.S.C. § 1912 (b).
28. 25 U.S.C. § 1913 (a).
29. *Id.*
30. *Id.*
31. 25 U.S.C. § 1903 (4).
32. [http://www.nicwa.org/Indian\\_Child\\_Welfare\\_Act/documents/Top%2010%20ICWA%20Myths.pdf](http://www.nicwa.org/Indian_Child_Welfare_Act/documents/Top%2010%20ICWA%20Myths.pdf)
33. [http://www.nicwa.org/government/documents/Setting-Record-Straight-About-ICWA\\_Sep2015.pdf](http://www.nicwa.org/government/documents/Setting-Record-Straight-About-ICWA_Sep2015.pdf).
34. 25 U.S.C. § 1914.
35. *Id.*



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