

# Indian Child Welfare Act

## A Court Reference Guide for Tennessee Child and Parent Attorneys, Multidisciplinary Professionals and Court Staff

In 2023, the U.S. Supreme Court upheld the Indian Child Welfare Act of 1978 (ICWA). ICWA is a federal law that governs the removal and out-of-home placement of Indian children in foster care or for adoption.

### THE PURPOSE

The purpose of ICWA is to protect the best interests of Indian children and promote the stability and security of federally recognized Indian tribes and families by establishing minimum federal standards for the removal of Indian children from their homes for placement in foster care or for adoption.

### THE LAW

Indian Child Welfare Act, 25 USC §§ 1901-1963. Federal Final Rule, 25 CFR Part 23, effective for all proceedings initiated on after Dec. 12, 2016. Bureau of Indian Affairs Guidelines for Implementing the Indian Child Welfare Act, issued 2016.

### DCS Administrative Policies & Procedures: 16.24

DCS Policy describes the responsibilities of the family service worker to determine and confirm tribal affiliation, relevant time limits, considerations for emergency removal and placement under ICWA.

### Child Custody/Foster Care Placement Proceedings

**Active Efforts:** The Court must find that DCS has provided active efforts to implement support designed to prevent disruption or support reunification of the Indian family. 25 U.S.C. § 1912(d), 25 C.F.R. § 23.120. The active efforts standard requires more than the reasonable efforts standard and must be documented.

**Burden of proof:** Requires proof by clear and convincing evidence that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, including testimony from a Qualified Expert Witness (usually someone familiar with tribal culture). 25 U.S.C. §1912(e).

### Termination of Parental Rights

**Burden of proof:** Requires proof beyond a reasonable doubt that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, including testimony from a Qualified Expert Witness. 25 U.S.C. §1912(e).

### Surrender of Parental Rights

Consent must be in writing, before a judge, and given after child is at least 10 days old; may be revoked at any time prior to finalization of adoption.

### ICWA Foster Care Placement Preferences

Placement preference for a child who is a member of a federally recognized tribe, or who is eligible for membership, should be prioritized in the following order:

1. With extended family.
  2. In an Indian foster home approved by the child's tribe.
  3. In another Indian foster home.
- \* If not placed in one of these settings, has "good cause" (defined by statute) to deviate from these preferences been demonstrated?

### WHEN DOES ICWA APPLY?

- ICWA applies to emergency, voluntary or involuntary "child custody proceedings" in which the Court knows or has reason to know that an "Indian child" is involved, including DCS and private party actions that may result in foster care, guardianship, termination of parental rights, or adoption. ICWA requirements apply to an action that may result in one of these outcomes, *even if it ultimately does not*. 25 C.F.R. § 23.2(2).
- ICWA applies to status offenses but *not* to delinquency cases, unless the reason for out-of-home placement is based on the fitness of the parents.
- ICWA does *not* apply to divorce proceedings or custody fights between parents.

### Who is an "Indian child"?

ICWA defines an "Indian child" as an unmarried person, under the age of 18, who is either a member of a federally recognized tribe (or Alaskan Native village) or the biological child of such a tribal member and eligible for membership.

### The ICWA Inquiry

- The Court must make an *ICWA inquiry* into whether each participant knows or has reason to know that the child is an Indian child. This inquiry must be made at the commencement of the proceeding and all responses should be on the record. 25 C.F.R. § 23.107(a).
- If there is no reason to know the child is an Indian child, the Court must instruct parties to inform the Court if they subsequently receive information that provides reason to know the child is an Indian child.

### Attorney Practice Tip:

An attorney's independent investigation can include an inquiry into Indian heritage. Making an ICWA determination early in the case will ensure the correct standards apply and minimize the potential for insufficient findings, delays or disrupted placements. A list of federally recognized tribes is available online. Many tribes have their own websites with contact information.

### NOTICE AND RIGHTS

ICWA establishes information that must be provided in the notice and specific timelines to ensure all have an opportunity for effective participation.

- Notice must be provided to the parents, Indian custodian (if any) and the child's tribe (if known) with a copy to the Bureau of Indian Affairs. If the tribe is unknown, notice goes to the Secretary of Interior.
- The matter cannot be heard sooner than 10 days after receipt of the tribal notice, and the matter can be continued up to an additional 20 days upon request. 25 U.S.C. § 1912(a), 25 C.F.R. § 23.112.
- Counsel must be appointed for the child's parents and Indian custodian (if any) if found indigent.
- The child's tribe may intervene at any time or request transfer of jurisdiction to tribal court.

**For questions or assistance, email DCS Cultural Affairs Division at [ei\\_dcs\\_culturalaffairs@tn.gov](mailto:ei_dcs_culturalaffairs@tn.gov).**