



THE INDIAN CHILD WELFARE ACT

CONTROVERSY



MISSISSIPPI CHOCTAW INDIANS V. HOLYFIELD, 490 U.S. 30 (1989)

Mother and putative father both residents of tribal land. Mother pregnant with twins.

Mother left with intention of giving birth outside of tribal lands. Surrender resulted in adoption.

2 months after the adoption was finalized, the tribe objected that ICWA gives tribal courts exclusive j/d when child is domiciled on tribal lands. Trial court and MS Supreme Court disagreed.

U.S. Supreme Court reversed.

Protests, tears as girl in tribal custody battle removed from foster home

By [Sara Sidner](#), Traci Tamura and [Amanda Watts](#), CNN

🕒 Updated 8:10 AM ET, Wed March 23, 2016



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Indian Child Welfare Act Under Fire: Federal Judge Strikes Down 40-Year-Old Law, Appeals Could Lead to Supreme Court

🕒 October 7, 2018 👤 John Kelly

Federal Law Protecting Indian Children and Families Will Stand

🕒 August 9, 2019 👤 Christie Renick



THE ACT



RATIONALE - 1978

A 1976 Study by the Association on American Indian Affairs found that **25-35% of all Indian children** were being placed in out-of-home care.

Most of those children (**85%**) were placed in non-Indian homes or institutions, and few ever returned.

Steven Unger, ed., *The Destruction of American Indian Families*. New York: Association on American Indian Affairs, 1977.

RATIONALE - 2019

Today, American Indian children are **4x more likely** to be removed by state child welfare systems than non-Native children, *even when their families have similar presenting problems.*

56% of adopted American Indian Children are adopted outside their families and communities.

(Nat'l Indian Child Welfare Association, 2018)

POLITICAL STATUS - NOT RACE

Indian children have a unique **political status** as members of sovereign tribal governments. Congress, through the Constitution, statutes, and treaties, is charged with responsibility for the protection and preservation of Indian tribes and their resources, including Indian children.

POLITICAL STATUS - NOT RACE

ICWA applicability is “based on the child’s political ties to a federally recognized Indian Tribe, either by virtue of the child’s own citizenship in the Tribe, or through a biological parent’s citizenship and the child’s eligibility for citizenship.

“ICWA doesn’t apply simply based on a child or parent’s Indian ancestry. Instead, there must be a political relationship to the tribe.” (ICWA guidelines, 2016)

The Indian Child Welfare Act of 1978 (ICWA)
25 U.S.C. §§1901-1963

Guidelines for Implementing ICWA
www.bia.gov
December 2016

WHO IS AN “INDIAN CHILD”?

Any unmarried person under the age of 18 who is either a **member** of an Indian tribe or **eligible for membership** in an Indian tribe; **and**

Is the **biological child of a member** of an Indian tribe.

WHAT IS AN “INDIAN TRIBE”?

ICWA applies **only** to the 588 federally-recognized tribes.

www.bia.gov/tribal-leaders-directory

Tribes have the exclusive right to determine membership, and such membership determinations are conclusive.

A child who does not meet the definition of “Indian Child” when the case starts may later become an Indian Child for ICWA purposes.

In determining whether a child is an Indian Child, the following **may not be considered**:

1. Participation of the parents or the child in tribal activities.
2. The relationship between the child and the parents — **unless** the parent has never exercised any custody over the child (*Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013)).
3. The child's quantum of Indian blood.

Don't get distracted from the only issues that matter:

Is a biological parent a member of a federally-recognized tribe?

Is a biological parent eligible for membership?

Which tribe?



APPLICABILITY



TO WHAT KINDS OF CASES DOES ICWA APPLY?

Foster Care Placements - voluntary and involuntary

Terminations of Parental Rights

Adoptive and Pre-Adoptive Placements (including conversions from foster care to adoptive placement).

Changes of Placement

Status Offenses

WHEN DOES ICWA APPLICATION BEGIN?

As soon as it is **known**, or there is **reason to know** that
the child is an Indian Child.

WHEN DOES ICWA APPLICATION BEGIN?

“State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child.

“The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct parties to inform the court if they subsequently receive information that provides reason to know that the child is an Indian child.” *BIA Guidelines*

WHEN DOES ICWA APPLICATION BEGIN?

A court has “reason to know” if any participant:

- informs the court that the child is an Indian child;
- informs the court that it has discovered information indicating that the child is an Indian child.

WHEN DOES ICWA APPLICATION BEGIN?

What if the court has “reason to know”, but doesn’t have enough evidence to determine conclusively whether the child is an Indian child?

The court must receive evidence that the agency has used due diligence to identify the tribe; and

Treat the child as an Indian child until there’s sufficient evidence for the court to determine on the record that the child is or is not an Indian child.

PRACTICE



WHICH TRIBE?

As soon as the court knows or has reason to know that the child is an Indian child, the agency must provide written notice to the tribe of the specific proceedings pending and of the right to intervene.

Notice must be sent by registered mail with return receipt.

WHICH TRIBE?

If a tribe is named by the person giving the information, then the agency must check with that tribe to determine eligibility/membership.

If a tribal group is named, check with each tribe in that group. BIA Regional Offices are good resources to ensure that you've checked with all potential tribes.

WHICH TRIBE?

If the identity of the parent or tribe can't be determined, the agency is required to notify the U.S. Secretary of the Interior, Bureau of Indian Affairs, which has 15 days to provide the requisite notice.

This is the notice that would have been sent to the tribe, and the notice must be given in the same way: registered mail, return receipt requested.

RIGHT TO INTERVENE

Every notice to the tribe of every hearing must notify the tribe of its right to intervene.

The right to intervene applies at any point in the life of the case.

PRESUMPTION OF TRANSFER

State courts are required to transfer any ICWA case to the jurisdiction of the child's tribe upon oral or written petition by the parent or tribe.

Exceptions:

1. A parent objects;
2. The tribe declines jurisdiction; or
3. Good cause is shown

PRESUMPTION OF TRANSFER

“Good cause” is in the discretion of the court, provided a sufficient record is made. The following **may not** be considered in evaluating good cause:

1. Whether the proceeding is at an advanced stage if the Indian parent or tribe didn't receive notice until an advanced stage.
2. Whether there have been prior proceedings involving the same child with no transfer petition.
3. Whether the transfer would cause a change in placement.
4. Lack of connection with the tribe or reservations.
5. Any consideration of the socio-economic conditions, perceptions of services or of tribal judicial systems, compared to those outside the tribe.

Even if a tribe declines to accept jurisdiction & transfer, and even if a tribe declines to intervene or to be involved in the case in any way, ICWA still applies for the life of the case, and notice of each hearing and of each change of placement must be provided to the tribe.

EVIDENTIARY STANDARDS - EMERGENCY REMOVAL

Must be made to prevent **imminent physical damage** to the child.

May last no longer than necessary to prevent imminent physical damage. At any court hearing during the emergency proceeding the court must determine whether continued removal is necessary to prevent imminent physical damage.

The emergency proceeding ends when:

- a) an ICWA-compliant petition is filed,
- b) the case is transferred to the Tribe, or
- c) the child is returned to the parent.

EVIDENTIARY STANDARDS - EMERGENCY REMOVAL

A voluntary placement under threat of removal, and in which the parent cannot retrieve the child on demand, is a removal.

EVIDENTIARY STANDARDS - FOSTER CARE PLACEMENTS

Must be supported by a finding, using the **clear & convincing evidence standard**, supported by the testimony of one or more **Qualified Expert Witnesses (QEW)** that continued custody by the parent is likely to result in **serious emotional or physical damage to the child.**

This applies to the Preliminary Protective Hearing.

EVIDENTIARY STANDARDS - TPR

Must be supported by a finding **beyond a reasonable doubt**, supported by the testimony of one or more **Qualified Expert Witnesses (QEW)** that continued custody by the parent is likely to result in **serious emotional or physical damage to the child**.

This applies to the Preliminary Protective Hearing.

WHAT'S A QEW?

[In order of availability]

A member of the child's tribe recognized by the tribal community as knowledgeable in tribal customs related to family organization and child-rearing practices.

A lay person having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the child's tribe.

A professional having substantial education in his or her area of speciality along with a substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community.

The purpose of the QEW is to testify whether continued custody with the Indian parent is likely to result in serious emotional or physical damage to the child.

The Guidelines point out that if the facts surrounding the question of serious emotional or physical damage are clearly irrelevant to tribal conditions, state courts may use a QEW who doesn't meet the requirements.

The child's agency case manager may not serve as the QEW, despite any qualifications.

The failure to use a QEW deprives the court of the ability to find that the standard of “serious physical or emotional damage to the child” has been met, and so deprives the court of authority to continue a removal.

ACTIVE EFFORTS

A showing of **active efforts** is required at every stage at which a showing of reasonable efforts would be required in non-Indian foster care cases.

Active efforts isn't defined, beyond a statement that they must be **affirmative, active, thorough, and timely and intended primarily to maintain or reunite an Indian child with his or her family.**

ACTIVE EFFORTS

BIA Guidelines provide 15 illustrative examples of active efforts. Some are:

Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services.

Including the tribe in identifying and providing services.

Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or are not available.

PLACEMENT PREFERENCES

In any **foster or preadoptive placement**, preference must be given, in the absence of good cause, in this order:

1. Extended family
2. Foster home licensed, approved, or specified by the tribe;
3. An Indian foster home licensed or approved by any other licensing authority;
4. An institution for children approved by or operated by the tribe.

PLACEMENT PREFERENCES

In any **adoptive placement**, preference must be given, in the absence of good cause, in this order:

1. Extended family
2. Members of the child's tribe
3. Other Indian families

These preferences come into play at the initial placement and at any change of placement.

PLACEMENT PREFERENCES

Good cause to place outside the preferences includes:

1. Objections by parents or child;
2. Extraordinary physical or emotional needs of the child;
3. Unavailability of a preferred placement.

PLACEMENT PREFERENCES

ICPC doesn't apply to placements on tribal lands or to transfers to tribal jurisdiction, no matter where the tribal lands are located.

ICPC does apply to placements in another state outside tribal lands, even when those are preferred placements.

QUESTIONS?



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