

The Indian Child Welfare Act

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The Indian Child Welfare Act

- Indian Child Welfare Act of 1978
- Pub. L 95-608, 92 Stat. 3069
- 25 U.S.C. 1901 et seq.
- Bureau of Indian Affairs (BIA)
 - Guidelines 44 Fed. Reg. 67584 (1979)
 - Implementing regs 25 C.F.R. 23.1 et seq.

State Law and Policy

- Dependency
 - RCW 13.34.040, 070, 240, 245, 250
- Nonparental Custody
 - RCW 26.10.034
- Adoption
 - RCW 26.33.040
- Child In Need of Services
 - RCW 13.32A.152
- LICWAC
 - WAC 388-70
- Children's Administration ICW Manual
 - www1.dshs.wa.gov/ca/pubs/mnl_icw/chapter1.asp

Policy

- 25 U.S.C. 1902
- Protect the Best Interests of Indian children
- Promote stability/security of Indian tribes & families
- By establishing minimum standards for removal
- Placements that reflect unique values of Indian culture

When Does ICWA Apply?

- 25 U.S.C. 1903(1)
- “Child custody proceedings”
- Involving an “Indian child”

Who Is An Indian Child?

- 25 U.S.C. 1903(4)
- Under the age of 18
- Unmarried
- A MEMBER of a federally recognized tribe
 - See 25 U.S.C. 1903(8)

Or

Who Is An Indian Child?

- Under the age of 18
- Unmarried
- Eligible of MEMBERSHIP
- AND
- Biological (not adoptive) child of a MEMBER
- Paternity must be established or acknowledged
 - 25 U.S.C. 1903(9).

Who Is A Member?

- A political question, not racial
- Not always the same as ENROLLED
- Not always dependent upon “blood quantum”
- Decided solely by the tribe

Child Custody Proceedings

- “Foster Care Placement” 25 U.S.C. 1903(1)(i) and (iv).
 - Indian child removed from parent
 - Indian child removed from Indian custodian
 - Temporary placement
 - Child NOT returned upon parent’s demand
 - Parental rights NOT terminated
 - Placement NOT based on adult criminal act

Foster Care Placements

- Dependency - RCW 13.34.040(4)
- 3d Party Custody – RCW 26.10.034(1)(a)
- CHINS – RCW 13.32A.152(3)(a)-(b)
- Truancy – see 25 U.S.C. 1903(9)

Child Custody Proceeding

- Termination of parental rights. 25 U.S.C. 1903 (ii).
- Preadoptive placement. 25 U.S.C. 1903 (iii).
- Adoptive placement. 25 U.S.C. 1903 (iv).

Jurisdiction

- 25 U.S.C. 1911(a)-(b)
- Holyfield, 109 SCt 1597 (1989)
- Exclusive Tribal Jurisdiction
- Concurrent State and Tribal Jurisdiction

Exclusive Tribal Jurisdiction

- Child residing or domiciled on
- Reservation of federally recognized tribe
- In all non PL 280 states
- Tribes that retain/reassume jurisdiction in PL 280 states

(Washington is a PL 280 state)

- Once child becomes ward of tribe

Limited Exception

- Child residing or domiciled on reservation
 - Will be applied regardless
- Temporarily located off reservation
- Emergency state removal or placement
- Prevent imminent physical harm
- Time limited

Concurrent Jurisdiction

- State and child's tribe
- Child not residing/domiciled on reservation
- Tribes affected by PL 280

Transfer of Jurisdiction

- 25 U.S.C. 1911(b)
- Request by:
 - Parent
 - Indian custodian
 - Tribe
- Transfer Made In Absence of
 - Parental veto
 - Good cause
 - Advance stage of proceedings
 - Forum non conveniens (limited)

Notice

- 25 U.S.C. 1912(a) – Involuntary proceedings
- RCW 26.33.040(1)(d) – Adoption
- Parent
- Indian Custodian
- Child's Tribe – Designated Agent
- BIA
- Registered/Certified Mail Return Receipt

Content of Notice

- Nature of proceeding
- Right to intervene
- Name, birthdate, birthplace of Indian child
- Name of tribe – member, or may be eligible
- Copy of petition

Content of Notice

- Name, current and former addresses of
 - Biological parents
 - Maternal & paternal grandparents
 - Maternal & paternal great-grandparents
 - Indian custodians

Content of Notice

- Right to court appointed counsel
- Right to 20 day continuance
- Location, mailing address & phone of court
- Location, mailing address & phone of parties
- Right to seek transfer of jurisdiction
- Potential legal consequence of proceeding

Before Removal of an Indian Child

- 25 U.S.C. 1912(d)
- Active Efforts
- Remedial Services
- Rehabilitative Programs
- Designed to prevent the break up of the Indian family
- Efforts unsuccessful

What Are Active Efforts?

- Active Efforts v. Reasonable Efforts
- Dependency v. 3d Party Custody
- BIA Guidelines
- Children's Administration ICW Manual
- Case Law

What Are Active Efforts?

- Considerations
 - Problems that pose risk to child
 - Type of service appropriate to problem
 - Is nature of service culturally relevant
 - Culturally competent service delivery

Before Removal

- Clear and convincing evidence.
- Child will **LIKELY** suffer **SERIOUS** physical or emotional damage.
- Evidence must include testimony of a qualified expert witness.

Qualified Expert Witness

- Professional
- Recognized & approved by Tribe and DSHS
- Substantial education & experience in specialty
- Extensive knowledge of:
 - prevailing social and cultural standards
 - family organization
 - child rearing practices within Indian community relevant to the Indian child.

Qualified Expert Witness

- Person recognized & approved by Tribe and DSHS
- Substantial experience in delivery of child and family services to Indians
- Extensive knowledge of:
 - Prevailing social and cultural standards
 - Family organization
 - Child-rearing practices within the Indian community relevant to the Indian child.

Qualified Expert Witness

- A member of child's Indian community
- Recognized within community as expert in tribal customs and practices pertaining to family organization and child-rearing.

Termination of Parental Rights

- 25 U.S.C. 1912(d)
 - Active Efforts
- 25 U.S.C. 1912(f)
- Beyond a reasonable .
- Child will **LIKELY** suffer **SERIOUS** physical or emotional damage.
- Evidence must include testimony of a qualified expert witness.

Consent to Placement/Termination

- In writing
- Recorded before judge
- Judge certifies terms/consequences
 - Fully explained
 - In detail
 - Fully understood
 - In language understood by parent/Indian custodian

Consent to Placement/Termination

- NOT VALID if
- Given prior to child's birth
- Given within 10 days of child's birth

Adoptive Placement Preferences

- “In the absence of good cause”
- Member of child’s extended family
 - Indian or non-Indian
- Member of child’s tribe
- Indian family

Foster Care/Preadoptive

- Least restrictive setting
- Most approximates a family
- Where special needs can be met
- Within reasonable proximity of child's home
 - Considering any special needs

- In the absence of good cause
- Member of child's extended family;
- Foster home licensed, approved, or specified by tribe;
- Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- Institution for children approved by an Indian tribe or operated by an Indian organization having a program that meets the child's needs.

Other Placement Issues

- Child's Tribe can by resolution establish different order of preference
 - Must meet least restrictive requirement
- Court shall, where appropriate, consider child's or parent's preference
- If by consent, request for anonymity considered in applying preferences

Why Do It Right?

- 25 U.S.C. 1914
- The Indian Child, parent, Indian custodian, or the child's Tribe
- May petition ANY court of competent jurisdiction
- Invalidate a court's order if

Petition to Invalidate For

- Violation of 25 U.S.C. 1911
 - Jurisdiction, intervention, full faith & credit
- Violation of 25 U.S.C. 1912
 - Notice, time of proceedings, appointment of counsel, access of evidence, active efforts, burden of proof, qualified expert witness
- Violation of 25 U.S.C. 1913
 - Consent, withdrawal of consent