

# The Indian Child Welfare Act

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The Indian Child Welfare Act<sup>1</sup> (ICWA) is a Federal statute that governs how courts must handle child custody (including child welfare) cases involving “Indian children.” Unlike other Federal statutes regarding child protection (e.g., the Adoption and Safe Families Act, the Child Abuse Prevention and Treatment Act), which establish funding schemes, the ICWA is *substantive law*. That is, the states must abide by each specific requirement of the ICWA when handling cases involving Indian children. Michigan has specifically adopted the provisions of the ICWA.<sup>2</sup>

While the ICWA is invoked in only a small number of cases, when it does apply it is of critical importance that its unique procedural requirements be followed. Failure to follow the requirements of the ICWA could result in the eventual disruption—perhaps years later—of the family court’s action by a higher court, and the disruption of carefully laid permanency plans for the children involved. For this reason, Michigan law requires that in every child protection case the court must determine whether the child has Indian heritage.<sup>3</sup>

If there is *any* hint that a child may have Indian heritage, you will need to follow the notice requirements of the ICWA.<sup>4</sup>

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<sup>1</sup> 25 USC 1901-1963.

<sup>2</sup> MCR 5.980; *see In re Morgan*, 140 Mich. App. 594, 603 (1985).

<sup>3</sup> MCR 5.965(B)(7).

<sup>4</sup> *See In re IEM*, 233 Mich. App. 438 (1999) (“Because the probate court has reason to believe I.E.M. had some unspecified Indian heritage, the FIA was required to send notice of the probate court proceedings and of the applicable tribe’s right of intervention . . . . It is not the responsibility of the respondent to establish the applicability of the ICWA.”).

## History and Purpose

Enactment of the ICWA in 1978 represented the culmination of a decade of advocacy by American Indian organizations aimed at addressing the historical removal of Indian children from their families and tribes by both state and private child welfare systems.<sup>5</sup> In passing the ICWA Congress noted:

**“that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal . . . agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes or institutions.” After a hundred years, the legacy of the boarding school was the needless separation of children from their families and the destruction of Native American culture.”**

It is this history of removal and interference with both family and tribe that led the Federal government to enact the ICWA, establishing minimum Federal standards “for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.”<sup>6</sup>

It is critical to understand that the ICWA is intended to protect the rights of both the individual Indian family and the Indian child’s tribe.<sup>7</sup> Thus, as we will see, many of the procedural protections set out in the ICWA are aimed at protecting and preserving the tribe’s interest in its children rather than just the interests of the biological parents. Moreover, to insure the utmost protection for Indian families and tribes, the Federal law requires that courts apply the more exacting of state and Federal standards to each stage of a case involving an Indian child.<sup>8</sup> Thus, for example, where Michigan law provides for termination of parental rights based upon

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<sup>5</sup> For an interesting and informative article on the history of the ICWA, see, Mary Roberts, *The Indian Child Welfare Act: Implications for Culturally Competent Service Providers*, 2 Michigan Child Welfare Law Journal 7-10 (Spring 1998).

<sup>6</sup> 25 USC 1902.

<sup>7</sup> See *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30 91989).

<sup>8</sup> 25 USC 1921.

clear and convincing evidence, when an Indian child is involved, termination of parental rights must be based upon a showing of beyond a reasonable doubt.

## **Definitions**

Before addressing the substance of the ICWA in detail, it will be helpful to define some of the basic terms used in the ICWA and to understand how these terms have been understood by courts.

### *Indian*

For purposes of the ICWA, an Indian is “A person who is a member of an Indian tribe, or who is an Alaska Native. . . .”<sup>9</sup>

### *Indian Child*

The ICWA defines an “Indian child” as any “unmarried person who is under eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”<sup>10</sup>

### *Indian Custodian*

As defined by ICWA, an Indian Custodian is “any Indian person who has legal custody of an Indian child under tribal law *or custom* or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.”<sup>11</sup> It is important to understand that if an Indian child is involved in the child protection system the agencies may be required to work with individuals who are not the child’s biological parents.

### *Parent*

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<sup>9</sup> 25 USC 1903(3).

<sup>10</sup> 25 USC 1903(4).

<sup>11</sup> 25 USC 1903(6)(emphasis added).

The term “parent” as defined by the ICWA is much broader than it is for cases involving non-Indian children. Thus, a parent “means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law *or custom.*”<sup>12</sup>

#### *A Note on Tribal Membership*

The requirements of the ICWA are only the most basic requirements for tribal membership. It is essential to understand that *only* a tribe has the authority to define qualifications for and determine membership in the tribe.<sup>13</sup> Neither the court nor any other entity may define tribal membership. Thus, for example, the Grand Traverse Band of Ottawa and Chippewa Indians must define who is eligible for membership in the Band. Some tribes have a blood percentage requirement (i.e., ¼, say, or 1/16 before an individual is eligible) while others do not. Tribes may have other membership requirements.

#### *Indian Family*

A debate has persisted across the country and in Michigan for several years regarding whether the ICWA applies to cases where there is not an existing Indian family. That is, in situations where the family was not actively part of the Indian culture prior to the child protective proceeding being filed or where there is a request to terminate the parental rights of a non-Indian parent of an Indian child. A number of states have established a doctrine that permits trial courts to disregard the ICWA in these cases.

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<sup>12</sup> 25 USC 1903(9).

<sup>13</sup> See *In re Shawboose*, 175 Mich. App. 637 (1989).

Until recently, it was clear that Michigan had rejected the so-called “Indian family exception.”<sup>14</sup> If a child was an “Indian child” within the meaning of the ICWA, the court was required to apply its provisions to all child protective proceedings involving the child. However, in *In re Dougherty*<sup>15</sup> the Michigan Court of Appeals held that where the Indian family is not actually broken up by a child protection proceeding, the ICWA’s provisions do not apply.<sup>16</sup> In *Dougherty* the children were “Indian children” by virtue of their maternal heritage. The children had been sexually abused by their father, who was a not of Indian heritage. The mother immediately separated from the father and initiated divorce proceedings. The father was criminally charged, entered a guilty plea and was sentenced to prison. The FIA brought a petition to terminate his parental rights. The father asserted that no “active efforts” were made to preserve his family or to reunify him with the children. The Court of Appeals held that because termination would not result in the breakup of an “Indian family” ICWA’s “active efforts” requirement did not apply. Thus, the current status of the “Indian family exception” in Michigan is not clear.

A clear resolution of this matter is critical since improperly terminating the rights of a parent to an Indian child leaves the case open to a collateral attack at any time in “any court of competent jurisdiction.”<sup>17</sup> Collateral attacks may seriously impede efforts to achieve the permanent placement of children. For this reason, children will be best served if the ICWA’s provisions are always applied to cases involving “Indian children.”

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<sup>14</sup> *In re Elliott*, 218 Mich. App. 196 (1996)(rejecting “Indian family exception” and requiring all cases involving Indian child to be handled pursuant to the ICWA).

<sup>15</sup> 236 Mich. App. 240 (1999).

<sup>16</sup> For a more complete discussion of these two cases, see, James A Bransky, *Michigan Court of Appeals Rejects “Existing Indian Family” Exception to the Indian Child Welfare Act*, 2 Michigan Child Welfare Law Journal 12 (Spring 1998); James Keedy & Sean Reed, *Family Independence Agency v Dougherty—The Michigan Court of Appeals Turns a Deaf Ear to the Indian Child Welfare Act, its Own Precedent, and the Rule of Law*, 3 Michigan Child Welfare Law Journal 46 (Fall 1999).

<sup>17</sup> See 25 USC 1914.

## **Jurisdiction Over Child Protection Proceedings Involving an Indian Child**

In cases involving Indian children who reside on or are domiciled on a reservation, the tribal court has exclusive jurisdiction. In state court proceedings in which the ICWA applies, the tribal court may assert its jurisdiction over the child and remove the case to the tribal court, or the tribe may intervene in the state court proceedings.<sup>18</sup> As with the determination of tribal membership, tribes will take cases or intervene in state court proceedings for their own reasons.

### *Tribal Court Jurisdiction*

If the child lives on a reservation, or if the child is “domiciled” on the reservation, the tribal court has exclusive jurisdiction over the child’s case.<sup>19</sup> If the child is a member of a tribe, the tribal court may assert jurisdiction over the case even though the child lives off the reservation.<sup>20</sup> Once a tribal court asserts jurisdiction over a case, that jurisdiction is proper regardless of where the child lives. Domicile, recall, is the place where a person lives and has the intention of continuing to live. This is important to ICWA cases because the United States Supreme Court has ruled that an Indian child may be domiciled in a place where the child has never actually been. Thus, an Indian parent cannot defeat her tribe’s interest in the custody of her newborn by leaving the reservation to give birth and then placing the child for adoption.<sup>21</sup>

### *Transfer*

Generally, the state court must transfer the case to the tribal court if the parent, Indian custodian, or the tribe request such a transfer. There are two exceptions to this rule:

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<sup>18</sup> 25 USC 1911(b) and (c); MCR 5.980(A)(3).

<sup>19</sup> 25 USC 1911(a).

<sup>20</sup> 25 USC 1911(b).

<sup>21</sup> See *Holyfield*, *supra* note 7.

- 1) the court finds good cause not to transfer the case to the tribal court; or
- 2) either parent objects to the transfer.<sup>22</sup>

The mere fact that the State trial court thinks the tribal court is inadequate is not sufficient “good cause” to deny transfer.<sup>23</sup> You should note, too, that the tribal court has the right to reject transfer. The legal term for the tribe’s refusal to take a case is declination.<sup>24</sup>

### *Intervention*

An Indian child’s tribe has the right to intervene into the State court proceedings regarding that child at any point.<sup>25</sup> So, for example, where the case involves an Indian child the child’s tribe may decline to take the case to its tribal court at the time a temporary custody petition is filed, but then seek removal of the proceeding at a later date. Alternatively, the tribe may decide to wait until a permanent custody petition is filed before intervening in the State court proceeding. As is the case with accepting transfer of the case, the tribe may choose not to intervene in the proceedings.

### **Notice Requirements**

The Indian Child Welfare Act establishes numerous procedural protections for Indian families and Indian tribes. Among the most important of these requirements is the provision of legal notice.<sup>26</sup> The generally preferred method of legal notice in a child protection proceeding is personal service of a summons and a copy of the petition upon the individual (i.e., the parent).<sup>27</sup>

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<sup>22</sup> MCR 5.980(A)(3).

<sup>23</sup> MCR 5.980(A)(3).

<sup>24</sup> 25 USC 1911(b).

<sup>25</sup> 25 USC 1911(c).

<sup>26</sup> See *IEM*, *supra* note 4.

<sup>27</sup> MCR 5.920.

When notifying a tribe, however, the petitioner (usually FIA) must send the notice of the proceedings via registered mail, return receipt requested. The notice must state that the tribe has the right to intervene into the State proceedings.<sup>28</sup> NOTE: A PHONE CALL IS NEVER SUFFICIENT LEGAL NOTICE TO THE TRIBE OR THE SECRETARY OF THE INTERIOR. LIKEWISE, IT IS *NOT* SUFFICIENT LEGAL NOTICE TO CONTACT THE MICHIGAN INDIAN CHILD WELFARE AGENCY.<sup>29</sup>

#### *Tribal Affiliation Known*

If the parent or child is able to identify a specific tribe to which the child either belongs or is eligible for membership, all documents of notification must be sent to that particular tribe.

#### *Tribal Affiliation Unknown*

In some cases, it will not be clear that the child is a member of a particular tribe. The parent may not even be sure if the child is eligible for membership in a tribe. Again, if you have *any* inclination that a child *may* be of Indian heritage you should follow the ICWA's notice requirements. If the child's tribal affiliation is unknown, the petitioner *must* notify the Secretary of the Interior in Washington, D.C. This notification must be accomplished in the same way notice to the child's tribe would have been—i.e., registered mail, return receipt requested, with a copy of the petition and a statement that the tribe has the right to intervene into the state court proceedings.<sup>30</sup>

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<sup>28</sup> 25 USC 1912.

<sup>29</sup> See *IEM*, *supra* note 4.

<sup>30</sup> 25 USC 1912.

If the Secretary of the Interior is notified because the child's tribe cannot be readily identified, the Secretary has fifteen (15) days to provide the required notice to the appropriate tribe. The state court cannot hold any further hearings on the petition until ten (10) days after the parent and the tribe receive notification of the proceedings. Either the parent or the tribe may request and, if requested, must be given 20 additional days to prepare for the hearing.<sup>31</sup>

### *Filing and Finding*

Best practice requires that the petitioner file a copy of the notice documents that are sent to the tribe or Secretary of the Interior with the court. Similarly, copies of any documents that are received in response to the notice documents being sent should be filed with the court. If no response is received after proper notice and the elapse of the legally required time, the petitioner should file an affidavit with the court indicating that notice was made, how notice was made, the date on which notice was sent, and that no response has been received. Once notice has been effectuated and a response received (or affidavit of non-response is filed), the petitioner should request that the court make a finding on the record regarding the child's Indian status and the applicability of the ICWA.

By filing the notice documents sent, any response that is received and asking the court to make a finding on the record regarding the child Indian heritage and the applicability of the ICWA, you will have a clear record in the event that the case is ever appealed.

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<sup>31</sup> *Id.*

## Temporary Emergency Removal

The ICWA distinguishes between Indian children who live on reservations and those that do not when determining the criteria for emergency removal.

### *Domiciled on Reservation*

If the child is domiciled on the reservation but is temporarily located off the reservation, the child cannot be removed from parental care unless the removal is necessary to prevent immediate physical harm to the child.<sup>32</sup> Note that the law does not permit removal if the damage that may be done is emotional or if the threat of physical harm is not immediate (e.g., in many neglect cases, the threat of harm is not immediate). Additionally, once the immediate physical risk to the child has passed, the child must be returned to the parent.<sup>33</sup>

### *Not Domiciled on the Reservation*

If the child is *not* domiciled on the reservation, the court may order the child placed in an out-of-home placement if “the child’s health, safety, or welfare is endangered.”<sup>34</sup> This standard appears to be lower than is required by Michigan law. Michigan law requires that there be a substantial risk to the child’s health or welfare and that no provision of services can maintain the child safely in the home. Thus, as discussed above, because Michigan’s removal standard is more exacting it must be applied to the decision to remove an Indian child.<sup>35</sup>

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<sup>32</sup> MCR 5.980; 25 USC 1922.

<sup>33</sup> 25 USC 1922.

<sup>34</sup> MCR 5.980(B).

<sup>35</sup> See MCR 5.965(C); 25 USC 1921.

## Placement Preferences

The ICWA establishes preferences for the placement of children in foster care, pre-adoptive and adoptive homes.<sup>36</sup> When placement of an Indian child outside the family home is necessary, the agencies and courts involved must place the child in accordance with these preferences.

### *Foster Care*

Indian children must be placed in the least restrictive setting that will meet the special needs of the child and must be within a reasonable geographic proximity of the parent's home. Unless the agency can show good cause for not doing so, an Indian child must be placed in accordance with the following descending order of preference:

- The first preference is to place with a member of the extended family. It is essential that you understand that "extended family" is defined first by tribal law or custom.<sup>37</sup> Thus, a child may need to be placed with a member of the "extended family" who is in fact not biologically related to the child. If tribal law or custom does not define "extended family" then you should try to place the child with a grandparent, aunt or uncle, brother or sister, brother-in-law, sister-in-law, niece or nephew, first or second cousin, or stepparent<sup>38</sup>;
- If a member of the biological or extended family is unavailable for placement, the child may be placed with a foster parent licensed, approved or specified by the child's tribe;

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<sup>36</sup> 25 USC 1915.

<sup>37</sup> 25 USC 1903(2).

<sup>38</sup> 25 USC 1903.

- The third option is an Indian foster home licensed or approved by a non-Indian licensing authority;
- As a last resort, an Indian child may be placed in an institution licensed or approved by an Indian tribe that is capable of meeting the child's needs.<sup>39</sup>

Notice that neither Federal nor Michigan law makes any provision for the placement of an Indian child in a non-Indian foster home or in a non-Indian adoptive home.<sup>40</sup>

NOTE: A TRIBE MAY ESTABLISH A DIFFERENT PREFERENCE FOR THE FIRST TWO OPTIONS. ADDITIONALLY, THE PREFERENCE OF THE PARENT OR INDIAN CHILD SHOULD USUALLY BE GIVEN CONSIDERATION.<sup>41</sup>

### **Remedial Services Must be Provided**

The ICWA seeks in the first instance to preserve the Indian family and to prevent the removal of children from parental care. Thus, absent an emergency as discussed earlier, before an Indian child may be placed out-of-home, the petitioner must present evidence by which the court can find that “active efforts” were made to preserve the Indian family. Likewise, before terminating parental rights, the court must find that “active efforts” have been made to rehabilitate the parent(s).

### **Higher Burdens of Proof**

The family court may generally exercise its authority over a child based on a preponderance of the evidence that the child was abused or neglected in the parental home.<sup>42</sup> To

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<sup>39</sup> 25 USC 1915(a) and (b).

<sup>40</sup> 25 USC 1903; MCR 5.980(C)(2).

terminate parental rights, the court must find clear and convincing evidence that there is a basis to terminate and that termination is in the child's best interest.<sup>43</sup> It is important to note that the standards of evidence applicable at these two stages are higher in cases involving an Indian child.<sup>44</sup> These more exacting standards of evidence do not violate equal protection.<sup>45</sup>

### *Temporary Custody*

The court may take jurisdiction of an Indian child only if it is presented with clear and convincing evidence that “the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to child.”<sup>46</sup> Note that the ICWA specifically requires that expert witnesses be called to support the court's assertion of jurisdiction.<sup>47</sup> That is, the court cannot simply conclude that the child's physical or emotional health would be at serious risk. The petitioner must present the testimony of expert witnesses to demonstrate that this is true. Finally, the petitioner must demonstrate the “active efforts” requirement has been met.

### *Permanent Custody*

Before the court may take permanent custody of an Indian child, the court must find that there is evidence 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.”<sup>48</sup> Additionally, Michigan's appellate courts have held that the family court may terminate the

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<sup>41</sup> 25 USC 1915(c).

<sup>42</sup> MCR 5.972(C)(1).

<sup>43</sup> MCR 5.974(F)(3)(note that this rule specifically excepts cases to which the ICWA applies).

<sup>44</sup> MCR 5.980 (C)(D); 25 USC 1912(e)(f).

<sup>45</sup> *In re Miller*, 182 Mich. App 70 (1989).

<sup>46</sup> 25 USC 1912(e).

<sup>47</sup> *Id.*

rights of a parent in an Indian child only if the court finds that one or more statutory ground for termination exists.<sup>49</sup> Thus, when seeking to terminate parental rights of an Indian child's parent, the petitioner must prove the following:

- 1) That there is clear and convincing evidence that there is one or more statutory grounds to terminate parental rights; and
- 2) That there is evidence beyond a reasonable doubt "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." Note that this finding can only be made if "active efforts" to preserve or reunify the family have been made and were unsuccessful; and
- 3) That there is evidence beyond a reasonable doubt that termination of parental rights is in the child's best interest.

### **Conclusion**

Child welfare practice under the ICWA can be tricky because it is applied so rarely. In relevant cases, it is essential that it be carefully applied. Its numerous procedural requirements are intended to protect both Indian families and Indian tribes. Failure to appropriately apply the ICWA's provisions may result in disrupted permanency, possibly years after a case has been closed.

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<sup>48</sup> 25 USC 1912(f).

<sup>49</sup> *In re Shawboose*, *supra* note 13.

**Michigan Tribal Courts:**

Bay Mills Indian Community Tribal Court, 12140 W. Lakeshore Dr., Brimley, MI 49715. Phone: (906) 248-3241; Fax: (906) 248-3283.

Grand Traverse Band of Ottawa and Chippewa Indians, 2605 N. West Bayshore Dr., Suttons Bay, MI 49682. Phone: (231) 271-3538.

Hannahville Indian Community, N14911 Hannahville B-1 Road, Wilson, MI 49896. Phone: (906) 466-7363 Ext. 120; Fax: (906) 466-7377.

Keweenaw Bay Indian Community, 107 Beartown Rd., Baraga, MI 49908. Phone: (906) 353-6623.

Lac Vieux Desert Band of Lake Superior Chippewa Indians, P.O. Box 249, Watersmeet, MI 49969. Phone: (906) 258-4577.

Little Traverse Bay Bands of Odawa Indians, 1150 Bayview Rd., P.O. Box 246, Petosky, MI 49770-0246. Phone: (616) 439-3828; Fax: (616) 439-3885.

Saginaw Chippewa Indian Tribe, Tribal Court, 6954 E. Broadway, Mt. Pleasant, MI 48858. Phone: (517) 775-4800.

Sault Ste. Marie Tribe of Chippewa Indians, 2428 Shunk, Sault Ste. Marie, MI 49783. Phone: (906) 635-4963.

**Another helpful resource:**

Michigan Indian Legal Services (616) 947-0122.