

## Indian Child Welfare Act

### Introduction

Prior to the passage of the Indian Child Welfare Act (ICWA) in 1978, many states with Indian populations had disproportionate numbers of Indian children in foster care. The number of children removed and subsequently adopted by non-Native American families was particularly disturbing to Native American Tribal communities. Native American Tribes had child rearing practices which differed significantly from European practices, upon which most social services practices were based.

Tribal governments, Native American urban communities, and legislators responded to this National crisis by creating and supporting the passage of Public Law 95-608, the Federal Indian Child Welfare Act (ICWA). ICWA was passed to preserve the rights and cultural heritage of Native American children and their families. The law is precise and very specific regarding the treatment of Native American families when children are removed, or may be removed, from their families.

**"It is in the best interest of the child that the role of the tribal community in the child's life be protected."**

As a CASA or FCRB member, you may be involved in a case with an Indian child. Your role will not be any different regarding how you interact with the child. Regardless of a child's ethnicity, your purpose is to do what is in the best interest of that child. With an Indian child this may include being sure the child has opportunities to participate in Tribal events. But mostly it involves making sure the child's needs are being met and that there is a good permanency plan to help move the child out of dependency as soon as possible.

**"To protect the rights of an Indian child as an Indian, and the rights of the Indian Tribe and community in retaining the child in its society."**

Prior to the passage of the Indian Child Welfare Act, Indian children were being removed from their homes and placed in foster care at a rate high above the average. In some states they were put in out-of-home placement 20 times more often than Caucasian children.

During Senate investigations it was determined that Indian children were not treated well in the foster care system. The parents and Tribe were not always notified of court proceedings. But the most damaging effect was the children were separated from their culture. After aging out of the foster care systems, these young adults would be returned to their Tribes without knowing how to interact culturally or socially.

ICWA was written to try to correct these problems.

**ICWA established federal policy that an Indian child should remain in the Indian community.**

ICWA restated that federally recognized Indian Tribes are sovereign entities that have the right to self-govern. While Indian Tribes are subject to federal laws, they have exclusive jurisdiction over all Indian child custody cases except divorce and delinquency.

This does not prevent Indian Tribes from waiving jurisdiction and keeping the child in the state system. In fact, several Tribes do not have the resources available to give a dependent child the specialized services that may be required. Tribes may waive their jurisdiction if it is felt it will benefit the child's development. ICWA also gives the Tribe's preference over placement a higher priority than what the state system may

have laid out. This recognizes how the Indian culture has a broader sense of a family unit and a vested interest in making sure the child retains the cultural heritage. The tribal placement choice allows the Tribe to have direct input into how the Indian child will ultimately be raised and helps to maintain cultural identity.

The Indian Tribe's right to intervene in the state proceedings does not get waived. Even if the Tribe earlier passed jurisdiction to the state, they can later petition to have jurisdiction transferred back. ICWA gives them that option by going through the Bureau of Indian Affairs and using any agreements between the Tribe and the state.

Tribal intervention can be as little as being allowed to appear in court and listen. It can also include the right to discovery, calling witnesses, placing objections in state court, and can even include the right to veto a decision.

During the Senate hearings many cases came up where the parents or legal custodians were not informed of the hearings and procedures associated with their child's case. The guardians were also not always fully informed of their rights or the consequences of what they were agreeing to.

ICWA addresses these issues by granting the following rights to parents and custodians.

1. The right to a court-appointed lawyer.
2. The right to seek transfer of jurisdiction to the Tribal Court.
3. If the parent voluntarily terminated custody, they can rescind their decision and have the child returned to them immediately.

## **Concerns**

Two concerns regarding ICWA have been the delays caused by the notification requirement, and the difficulty in finding a placement the Indian Tribe will accept. Both of these concerns should not be considered problems. ICWA explains what options must be followed for the latter concern, and the former concern has an easy method to avoid long delays.

The delays due to notification are meant to protect the Indian Tribe by assuring that they will be informed of any Indian child severance case. But this should not be a stumbling block to a case. ICWA gives very specific time lines to be followed during notification. All notification is to be done with return-receipt mail. This gives proof that there was an attempt to notify interested parties AND the notification was received. ICWA also allows the state to notify the Tribe if a parent or guardian cannot be found. ICWA goes further by allowing notification to be mailed to the Bureau of Indian Affairs if the Tribe cannot be located. The case can resume ten days after any of the notifications are received. The only exception is if the parent, custodian, or Tribe request extra time to prepare for the case. ICWA allows them an additional 20 days. So the longest a case can be delayed by ICWA would be one month at the very beginning of the proceedings.

The second complaint addresses an issue created for the benefit of Indian Tribes. The Indian Tribe has a say in where the child will be placed. This is a very important option because it allows the Tribe to attempt to place the child in a home that will help the child learn and develop within the Indian culture.

Indian culture relies on strong family ties. As a result, foster care placement is allowed only when evidence is clear and convincing that placement at home will cause serious emotional or physical damage to the child. The evidence must also include expert testimony stating such damage will occur. An expert can be any of the following (in order of preference):

1. Tribal member knowledgeable in family organization and child rearing practices.
2. Lay expert with experience in Indian child and family services and knowledge of the social and cultural standards of the Tribe.
3. Professional person with substantial education and experience working with Indian families and familiar with Indian cultural standards, particularly those of the child's Tribe.
4. A professional person.

If foster care is required, the choices for placement are to be used in the following order:

1. A member of the extended family.
2. A Tribally-approved and licensed foster home.
3. A state licensed Indian foster home.
4. Other Tribally-approved placement.

### **Role Summary**

The primary role of a Court Appointed Special Advocate or Foster Care Review Board member does not change just because they are working with an Indian child. The advocate should still consider what is best for the child. Children in the court system need someone to watch out for them and be sure they are getting the proper treatment and support. The CASA and FCRB advocates will need to keep in mind one of the supports that Indian children may need is to be culturally involved with their nation.

The advocate will also need to consider that an Indian Tribe may not be inclined to lose their child to the state system. The Tribe can be very resistant to allowing complete severance. This means that long-term foster care can be a preferred option instead of adoption to the Tribe. This may not be the best option for CASA or FCRB, but the Tribe's wishes must be respected because ultimately the Indian child is a citizen of the Tribal nation.

As far as CASA and FCRB are concerned, an Indian child is still a child traversing the dependency process. Be aware of the cultural differences that may be involved with the case. A CASA and FCRB member's role is to help the child and learn what is best for the child. ICWA only insures that the volunteers understand the wishes of the child's nation and why those wishes are important.

### **Resources**

To read the ICWA click on the reference link below:

[References: Indian Child Welfare Arc, US. Code Title 25 Chapter 21.](#)

[http://www.law.cornell.edu/uscode/html/uscode25/usc\\_sup\\_01\\_25\\_10\\_21.html](http://www.law.cornell.edu/uscode/html/uscode25/usc_sup_01_25_10_21.html)

The following list contains the names of 21 current federally recognized Indian tribes in Arizona from information provided by the United States Bureau of Indian Affairs. The links will provide you with history of the tribes, contact information, government and council members and events.

Ref: Arizona Tribes - <http://www.itcaonline.com/index.html>

- [Ak-Chin Indian Community](#)
- [Cocopah Tribe](#)
- [Colorado River Indian Tribes](#)
- [Fort McDowell Yavapai Nation](#)
- [Fort Mojave Tribe](#)
- [Gila River Indian Community](#)
- [Havasupai Tribe](#)
- [Hopi Tribe](#)
- [Hualapai Tribe](#)
- [Kaibab-Paiute Tribe](#)
- [Navajo Nation](#)
- [Pascua Yaqui Tribe](#)
- [Quechan Tribe](#)
- [Salt River Pima-Maricopa Indian Community](#)
- [San Carlos Apache Tribe](#)
- [San Juan Southern Paiute](#)
- [Tohono O'odham Nation](#)

- [Tonto Apache Tribe](#)
- [White Mountain Apache Tribe](#)
- [Yavapai-Apache Nation](#)

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