

Indian Child Welfare Act

Presentation by:
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Indian = Political Classification

- Application of ICWA is based upon the child's status as a member or eligible for membership in a federally recognized tribe.
- Application of ICWA is not based upon the child's race.

Demographics

- 550+ Federally Recognized Tribes
- Tribes in Nebraska
- Native Americans in Nebraska

History of Indian Child Welfare

- Federal Recognition of Tribes
- Boarding Schools
- Termination of Tribes
- Relocation of Nuclear Families
- Removal of Indian Children by public and private agencies

ICWA

- Federal – 1978
- Nebraska – 1985
- Iowa - 2003

CAUTIONS

- Definitions: some words/phrases have different legal meanings than the every day meaning
- When identifying a tribe, pay close attention to the tribal name. Many tribes have similar names.

INDIAN CUSTODIAN

- Indian person with legal custody of an Indian child under tribal law or custom or state law
- Indian person to whom temporary physical care, custody and control of an Indian child has been transferred by a parent of the child

Application Test

- Child unmarried and under the age of 18
- Child is a member OR eligible for membership and the biological child of a member
- “Child Custody Proceeding” as defined by ICWA

Child Custody Proceeding

- Foster care placement (includes guardianships and placement in institutions)
- Termination of parental rights
- Preadoptive placement
- Adoptive placement
- Status offenses

Child Custody Proceeding

DOES NOT INCLUDE:

- Placement based upon an act committed by the child that would be deemed a crime if committed by an adult
- An award, in a divorce proceeding, of custody to one of the parents

NOTICE

- Registered mail
- Federal Register – (approximate) annual listing of tribes (4/4/08)
- Federal Register – (approximate) annual listing of tribal agents for service (8/2/06)

SENT BY

- The party seeking the foster care placement of a child
- The party seeking the termination of parental rights of parents or Indian custodians to a child



TO WHOM

- Parents
- Indian custodians (if any)
- All tribes in which the child may be a member or eligible for membership
- Aberdeen Area Director of the Bureau of Indian Affairs (for proceedings in Nebraska if the identity or location of any of the above is unknown)
- Copies to Secretary of the Interior
- ***Make 2 additional copies of each notice sent (1 for the court, 1 for the NDHHS file).

CONTENT OF NOTICE

- Name and date and place of birth of child
- All names (birth, Indian, adoptive, married, and aliases), birth and death dates and places, and current and former addresses of all parents, grandparents, great grandparents
- Tribal affiliations of all with enrollment/registration numbers if any if known
- Other information that would assist a tribe in determining if a child/parent was a member or eligible for membership
- Copy of the Petition
- Rights of parents, Indian custodians and tribes

RIGHTS IN NOTICE (7)

- (1) A statement of the absolute right of the biological Indian parents, the child's Indian custodians and the child's tribe to intervene in the proceedings.
- (2) A statement that if the Indian parent(s) or Indian custodian(s) is (are) unable to afford counsel, and where a state court determines indigency, counsel will be appointed to represent the Indian parent or Indian custodian where authorized by state law.

RIGHTS IN NOTICE (CONT.)

- (3) A statement of the right of the Indian parents, Indian custodians and child's tribe to be granted, upon request, up to 20 additional days to prepare for the proceedings.
- (4) The **location, mailing address, and telephone number** of the **court and all parties** notified pursuant to this section.

RIGHTS IN NOTICE (CONT.)

- (5) A statement of the right of the Indian parents, Indian custodians and the child's tribe to petition the court for transfer of the proceeding to the child's tribal court pursuant to 25 U.S.C. 1911, absent objection by either parent: Provided, that such transfer shall be subject to declination by the tribal court of said tribe.
- (6) A statement of the potential legal consequences of the proceedings on the future custodial and parental rights **of the Indian parents or Indian custodians.**

RIGHTS IN NOTICE (CONT.)

- (7) A statement that, since child custody proceedings are conducted on a confidential basis, all parties notified shall keep confidential the information contained in the notice concerning the particular proceeding. The notices shall not be handled by anyone not needing the information contained in the notices in order to exercise the tribe's rights under the Act.

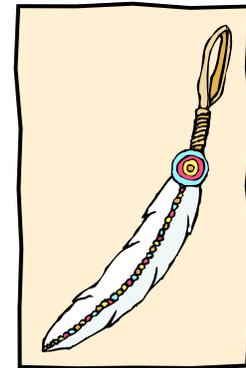
WHEN TO SEND NOTICE

- When the petition to place the child in foster care is filed
- When the petition to terminate parental rights is filed
- Notice must be received at least 10 days prior to any proceeding.



WHY

- Federal law
- State law
- Protect the rights of the child
- Protect the rights of parents/Indian custodians
- Protect the rights of tribes



HOW

- Notice to parents and Indian custodians must be sent by registered mail, return receipt requested (or served in person).
- Notice to tribes must be sent by registered mail, return receipt requested.
- Notice to Aberdeen Area Director must be sent by registered mail, return receipt requested.
- Copies of notice to Secretary of the Interior may be sent by regular first class mail.

Okay, now what do I do with the return receipts?

- The return receipts (green cards) must be filed with the court – stapled to a copy of the notice - along with a copy of the certificate of service.
- Keep copies of the notices and copies of the green cards (in the ICWA section of the NDHHS file for NDHHS staff).

RESPONSES BY TRIBES

- DOCUMENT EVERYTHING!
- If child is not eligible for membership, notify all parties of the information (NDHHS staff place this statement in the ICWA section of the NDHHS file.)
- If child is a member or eligible, notify all parties and ask court for a finding that ICWA applies to the proceedings

IF NO RESPONSE FROM TRIBE(S)

- DOCUMENT EVERYTHING – including messages left, no answers, etc.
- Call the tribal contact and ask if the child is a member or eligible
- Send a follow up letter

Jurisdiction

- Tribe has EXCLUSIVE jurisdiction over Indian children who reside or are domiciled on reservation or who are wards of the tribal court, regardless of residence or domicile
- Tribe and state have concurrent jurisdiction over other Indian children

Foster Care/Preadoptive Placement Preferences

- Least restrictive setting most like a family in which child's special needs, if any, met
- Within reasonable proximity to home
- Good cause exception
- Tribe may adopt different preferences

Foster Care/Preadoptive Placement Preferences

- Child's extended family
- Foster home licensed, approved or specified by child's tribe
- Indian foster home licensed or approved by authorized non-Indian licensing authority
- Institution for children approved by tribe or operated by Indian organization with program suitable to meet child's needs

Adoptive Placement Preferences

- Child's extended family
- Other members of child's tribe
- Other Indian families
- Tribe may adopt other preferences
- Good cause exception

Burden of Proof/Evidentiary Standards

- Continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child
- Placement in foster care: clear and convincing evidence
- Termination of Parental Rights: beyond a reasonable doubt
- Both require testimony of an expert witness

Active Efforts

Party seeking foster care placement or termination of parental rights MUST show active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful

Emergency Removals

- ICWA allows for emergency removal of children who are resident or domiciled on a reservation or are wards of a tribal court in an emergency to prevent imminent physical damage or harm to the child
- When emergency ends, state initiate child custody proceeding, transfer the child to the tribe, or return child to parent or Indian custodian

Non-emergency Removals

- State initiate child custody proceeding
- Burdens of proof/expert witness testimony prior to the child's removal

Tribal Intervention

- Child's tribe(s) may intervene in the proceedings
- Intervention simply means that tribe becomes a party and has the rights and responsibilities of any party to the case – call and cross examine witnesses, discovery, present evidence

Transfer of Case to Tribal Court

- Parent, Indian Custodian or Tribe may request transfer
- State court shall transfer in the absence of good cause to the contrary
- Parental objection prevents transfer

Full Faith and Credit

- U.S., States and Tribes must give full faith and credit to public acts, records, and judicial proceedings of Indian tribes that apply to ICWA proceedings to the same extent that full faith and credit is given to any other entity

Appointment of Counsel

- Parent of Indian child and Indian custodian, if any, entitled to appointment of counsel in any case in which the court determines indigency
- Court may appoint counsel for child
- Appointment of counsel for tribe is not required

Examination of reports or other documents

- Every party in foster care or termination of parental rights proceedings has a right to examine reports or other documents filed with the court upon which any decision may be based

Consent to voluntary placement or termination of parental rights

- MUST be in writing
- MUST be before a judge
- Judge MUST certify that terms and consequences of consent were fully explained in detail and fully understood
- MUST be in language that the parent understands
- MUST be after child is at least 10 days old

Withdrawal of Consent to Foster Care Placement

- Parent or Indian custodian may withdraw consent
- Child SHALL be returned upon withdrawal of consent

Removal from foster care home

New placement must comply with ICWA except when child is being return to parent or Indian custodian

Withdrawal of Consent to TPR or Adoption

- Consent may be withdrawn prior to entry of final decree of termination of parental rights or adoption
- Child **SHALL** be returned to parent

Collateral Attack

- Up to two years after final decree of adoption
- Parent withdraw consent if consent based upon fraud or duress
- If court finds fraud or duress, court must vacate the adoption and return the child
- Longer if state law allows

Petition to Invalidate

Child, Parent, Indian Custodian or Tribe may ask the court to invalidate prior proceeding(s) for certain ICWA violations:

Jurisdiction, Notice, Intervention, Transfer, Full faith and credit, Appointment of Counsel, Access to Documents in Court file, Active Efforts, Burdens of Proof, Expert Witness Testimony, Consent

Return of Custody

- If adoption vacated or adoptive parents consent to TPR, biological parent or former Indian custodian may petition for return of child
- Court SHALL grant return of child unless not in the best interests of the child

Record of Placement

- Maintained by the state
- Show efforts to comply with placement preferences
- Made available to Secretary or child's tribe upon request

Agreements between states and tribes

- Agreements, MOUs, MOAs may be entered into for the care and custody of Indian children and jurisdiction over Indian children
- No current agreements in Nebraska

Improper Removal

When a state court is aware that an Indian child has been improperly removed, the court **MUST** decline jurisdiction.

Higher standard applies

- If the federal ICWA contains the higher standard for protection, the federal ICWA standard is to be applied.
- If state law contains the higher standard for protection, the state law is to be applied.

Recordkeeping

- State court MUST provide copy of adoption decree and other information to Secretary
- Secretary MUST disclose information to specific individuals to protect the rights or benefits associated with the child's membership in the tribe.

THANK YOU

You have the power to make decisions and take action that will impact the lives of Indian children. Your decisions may be crucial to the self identity of Indian children, and vital to the survival of Indian cultures.