

INDIAN CHILD WELFARE ACT

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Sources

- David Simmons, Government Affairs Director, National Indian Child Welfare Association
- ICWA: 25 U.S.C. §§1901-63 (1978)
- ICWA Guidelines: 44 FR 67584 (November 28, 1979)
- Revised ICWA Guidelines: 80 FR 37 (February 25, 2015)
- Iowa ICWA: Iowa Code §§232B (2015)
- Federal Regulations issued 25 CFR 23 (June 14, 2016)

Why have ICWA?

- Sovereign Nations
- Historical Trauma
- Boarding Schools
- Adoptions out of Tribes
- Disproportionality



Historical Trauma

- As recent as the late 1960's, the government took Indian children away from their families and adopted them into white families
- Children lost their language, customs, and tribal family
- Trauma from over 100 years of maltreatment not yet addressed or corrected

Boarding Schools

- 1861-1970 Federal policy was to place children in Military style boarding schools



Adoptions

- Indian Adoption Project 1957-1968
 - Thought it was a good idea to end race matching in adoption
 - Effort to save Indian children from life on the reservation

Disproportionality

- Iowa ranks THIRD highest in the nation for having a disproportionately high number of Indian children in foster care
 - Indian children are overrepresented in foster care at a rate 4.5 times higher than their rate in general population
 - .3 % of the population but 1.6 % of foster care
- National average is 2.4 times higher

Elevator Speech

- ICWA is needed because:
 - Makes states consider tribal values
 - Allows the tribes to serve their child and families their way
 - Counterbalances actual biases in the system
 - Protects Indian children as tribal members

ICWA

- Federal Law enacted in 1978
- Recognizes Tribes as Sovereign Nations
- Congress finds that there is no resource more vital to the continued existence to Indian tribes than their children
- Tribes have the right to protect their children
- Tribes know what is best for their children
- We need to right past wrongs

Federal Guidelines updated in 2015

Federal Regulations updated in 2016

- Guidelines are not binding, but “best practice”
- Regulations are binding
 - NICWA hopes to make guidelines into regulations
 - They mostly did
- Updates necessary because
 - Guidelines had not been updated since their creation in 1979
 - States are still not following ICWA

Important Definitions

- **Active Efforts**

- Intended to maintain and reunite child with family or tribe
- More than reasonable efforts
- Defined in the Iowa Code §232B.5(19)
 - Vigorous and concerted level of casework beyond reasonable efforts
 - Efforts take into account prevailing social and cultural values of tribe
 - Consulted, utilized resources of extended family, tribe, Indian social services, and individual Indian caregivers
 - Requested the tribe for support, resolution, and services
 - Involvement of tribe ASAP
 - Frequent visitation in child's home and with extended family
 - Exhaustion of tribally appropriate family preservation alternatives
 - Actively assisted with housing, financial, and transportation services

Update to Federal Guidelines Examples

- Engage: child, parents, extended family, and custodians
- Keep siblings together
- Actively assist parents in obtaining services and overcoming barriers
- Identify, notify, and invite tribe to be involved
- Diligent search for extended family for assistance, placement, and consultation

Examples continued

- Consider the tribe's way of life
- Employ all culturally appropriate family preservation strategies
- Provide most natural settings for visitation
- Actively assist parents or extended family to access community resources, including, housing, financial, transportation, mental health, substance abuse, and peer support
- Consider alternative ways to address needs of parents and extended family

Important Definitions

- **Domicile**

- Regular legal definition
- Can also be defined by Tribal law or customs

- **Extended Family Members**

- Regular legal definition
- Can also be defined by Tribal law or customs
- Iowa Code §232B.3(7) lists 12 extended family members

- **Imminent physical damage or harm (IPDH)**

- Present or impending risk of serious bodily injury or death that will result in severe harm if safety intervention does not occur

- **Indian**

- Iowa Code §232B.3(5): a member or eligible for membership
- Federal Guidelines: member

- **Indian Child**

- Iowa Code §232B.3(6): unmarried and under 18 Indian OR under 18 and identified as a child of the Indian Community
- Federal Guidelines: member of tribe or eligible for membership AND biological child of a member of a tribe

• **Qualified Expert Witness (QEW)**

- Iowa Code §232B.10
 - Specific knowledge of tribe and tribe's culture and customs
 - Following characteristics in descending order
 - A member of child's tribe recognized as knowledgeable in family organization and childrearing practices of tribe
 - Member of another tribe, QEW by child's tribe knowledge of delivery of child and family services and child's tribe
 - Layperson recognized by child's tribe of having substantial experience and knowledge of both above
 - Professional with substantial education and experience in specialty who can demonstrate knowledge of prevailing social and cultural standards and childrearing practices of tribe

- **Parent**

- Iowa Code §232B.3(12)
 - Any biological parent or Indian person who has adopted child
 - Does not mean unwed father unless acknowledgment of paternity or DNA.

- **Reason to believe Indian child**

- Iowa Code §232B.5(3)
 - any party to proceeding or interested person, including the child, tribe, or agency says is or may be
 - Residence or domicile is in a predominately Indian community
- Information suggesting that the child is one
- An employee of DHS or officer of the court knows
- Only the tribe can say for sure.

Application (Federal Guidelines)

- Applies in all state child custody proceedings where the Indian parent cannot have the child returned upon demand
 - Exception: If child has committed an act which would be a crime if committed by an adult
- Agencies and State Courts must ask whether the child is or could be an Indian child and conduct an investigation, **EVEN** when the child is not removed
 - Agency opens an investigation
 - Family engages in services to keep child home
 - Diversion, differential response (family assessment), or other program

Federal Guidelines Continued

- If there is REASON TO BELIEVE
 - Must treat as an Indian child until it is determined the child is not a member or not eligible
 - Notice requirements
 - Active Efforts

Application (Iowa Code)

- 232B.3(3) and (4): applies to voluntary or involuntary proceeding that MAY result in placement or termination, child cannot be returned upon demand
 - CINA, Mental Health and Substance Abuse Committals
 - Not delinquencies (would be a crime if committed by adult)
- 232B.4(4) determination of Indian status should be made as soon as practicable
- Should follow verification and notice processes, so tribe can intervene as soon as possible

Get the Information

RE: _____ (Family Name) JVJV# _____

ICWA (Indian Child Welfare Act) QUESTIONNAIRE

1. Do you have Indian Ancestry? (Includes Native Alaskan Indians) YES NO
 - a. If Yes, what do you know about your Indian ancestry? _____
2. Does your child have Indian Ancestry? (Includes Native Alaskan Indians) YES NO
 - a. If Yes, how does your child have Indian ancestry? _____
3. Are you or your child eligible for membership in a tribe? YES NO
4. Are you or your child an enrolled member of an Indian Tribe? YES NO
5. Are you considered by an Indian tribe to be a part of the tribe's community? YES NO

• If you answered to "No" to the above questions, please sign and date below.

• If you answered "Yes" to any above questions, please fill in ALL lines below.

1. What is the EXACT name of the tribe and geographic location of tribe if known? For example, you cannot just say "Cherokee or Sioux." _____

2. Full names of Child(ren), Date of Birth, and City of Birth: _____

3. Fill in ALL lines below for relatives who have Native American bloodlines. Please include full names (including maiden names/aliases):
 - o Biological Mother's Full Name _____ DOB _____
Current Address: _____
City of Birth _____ City of Death _____
Tribal Name and membership # _____
 - o Biological Father's Full Name _____ DOB _____
Current Address: _____
City of Birth _____ City of Death _____
Tribal Name and membership # _____
 - o Children's Maternal Grandmother _____ DOB _____
Current Address: _____
City of Birth _____ City of Death _____
Tribal Name and membership # _____

- o Children's Maternal Grandfather _____ DOB _____
Current Address: _____
City of Birth _____ City of Death _____
Tribal Name and membership # _____
- o Children's Paternal Grandmother _____ DOB _____
Current Address: _____
City of Birth _____ City of Death _____
Tribal Name and membership # _____
- o Children's Paternal Grandfather _____ DOB _____
Current Address: _____
City of Birth _____ City of Death _____
Tribal Name and membership # _____
- o Children's Maternal Great-Grandmother _____ DOB _____
Current Address: _____
City of Birth _____ City of Death _____
Tribal Name and membership # _____
- o Children's Maternal Great-Grandfather _____ DOB _____
Current Address: _____
City of Birth _____ City of Death _____
Tribal Name and membership # _____
- o Children's Paternal Great-Grandmother _____ DOB _____
Current Address: _____
City of Birth _____ City of Death _____
Tribal Name and membership # _____
- o Children's Paternal Great-Grandfather _____ DOB _____
Current Address: _____
City of Birth _____ City of Death _____
Tribal Name and membership # _____

1. This form was completed by:

Name _____ Date _____

Relationship to child(ren) _____

ATTENTION: Please return this form to your DHS worker or to the Court within 10 days of the child coming under the jurisdiction of Juvenile Court. Failure to complete this form fully will result in a violation of the Federal and State Indian Child Welfare Act requirements.

Determining Indian Status

- Iowa Code §232B.4
 - Party seeking placement, termination, or adoption shall contact:
 - Any tribe in which the child may be a member or eligible
 - The child's parent/custodian
 - Any other person reasonably expected to know (Department of Interior, Bureau of Indian Affairs)
 - Writing or testimony from tribe is conclusive
 - No answer from tribe, court determines
- Federal Guidelines
 - Contact should include:
 - Genograms or ancestry charts for both parents, grandparents, great grandparents, including all known names, addresses, birthdates, places of birth, death, tribes, reservations for all

Notice

- Iowa Code §232B.5(4): Any involuntary proceeding
- Iowa Code §232B.5(8): Voluntary proceeding
 - No hearing until at least 10 days after notice is received
 - They can ask for additional 20 days
 - Send notice by registered mail, return receipt requested
 - Send notice to:
 - Parents/Indian Custodians
 - Any tribe child may be a member or eligible
 - If you don't know the above, then Secretary of the Interior

- Iowa Code §232B.5(9): notice shall be clear, understandable language, including:
 - Name of child and tribe
 - Petition
 - Rights of parents, tribe, Indian family, including:
 - Intervention
 - Transfer
 - Request additional 20 days before hearing and further delays
 - Extended family intervene and considered for placement (notice tribe)
 - Consequences of adjudication on future custodial rights of parents
 - Counsel will be appointed for parents and child
 - Confidential information statement
 - Tribe may provide notice, documents to extended family

NOTICE

IN THE JUVENILE COURT FOR POTTAWATTAMIE COUNTY, IOWA

IN THE INTEREST OF:	JUVENILE
INDIAN CHILD DOB: 10/23/2014	NO. JVJV
MINOR CHILDREN	CHILDREN IN NEED OF ASSISTANCE

IT IS ORDERED that the following shall be served with a copy of the Child In Need of Assistance Petition and Order setting the matter for hearing before the Pottawattamie County, Iowa Juvenile Court. The following shall also be served with Notice of their rights under the Indian Child Welfare Act, upon proof that the Indian Child Welfare Act applies to the above named children. Service shall be personally or by registered mail with return receipt requested, not less than ten days prior to the date of the hearing.

MOM.
DAD.
Blackfeet Tribe, PO Box 588, Browning, MT 59417.
Cheyenne River Sioux Tribe, Attn: Diane Garreau, PO Box 590, Eagle Butte, SD 57625.
Crow Creek Sioux Tribe, ICWA Director, PO Box 247, Fort Thompson, SD 57339.
Flandreau Santee Sioux Tribal Council, Attn: Celeste Honomichl, PO Box 283, Flandreau, SD 57028.
Lower Brule Sioux Tribal Council, Attn: Greg Miller, 187 Oyate Cir., Lower Brule, SD 57548.
Lower Sioux Indian Community of Minnesota, Attn: Thomas Williams, 39527 Reservation Highway 1, Morton, MN 56270.
Oglala Sioux Tribal Council, Attn: Juanita Sherick, PO Box 2080, Pine Ridge, SD 57752.
Prairie Island Indian Community, Attn: Nancy Anderson, 5636 Sturgeon Lake Road, Welch, MN 55089.
Rosebud Sioux Tribe, Attn: Shirley Badwound, Indian Child Welfare Act Program, PO Box 609, Mission, SD 57555.
Santee Sioux Tribal Council, Attn: Clarissa LaPlante, Dakota Tiwahe Social Services Program, Route 2, Box 5191, Niobrara, NE 68760.
Shakopee Mdewakanton Sioux Tribe, Attn: Karen Ross, 2330 Sioux Trail NW, Prior Lake, MN, 55372.
Sisseton-Wahpeton Sioux Tribe, ICWA Director, PO Box 509, Agency Village, SD 57262.
Spirit Lake Sioux Tribal Council, ICWA Director, PO Box 509, Agency Village, ND 58335.

YOU are hereby notified that there has been filed in the Pottawattamie County, Iowa Juvenile Court a Child In Need of Assistance Petition and Order setting the matter for hearing, alleging that the above named children are Children In Need of Assistance and alleging that they are within the jurisdiction of the Court.

YOU are further notified that, upon proof to the Pottawattamie County, Iowa Juvenile Court that the above named children are members of or eligible for membership in the above named tribe and the biological children of an enrolled member, thus invoking the Indian Child Welfare Act, you have the following rights:

1. No foster care placement or termination of parental rights proceeding involving the above named children shall take place until at least ten (10) days after receipt of this notice.
2. You have the right to intervene and be made a party in this proceeding.
3. Where the Court determines indigency, the parent or Indian custodian will have the right to have counsel appointed to represent them. The Court may, in its discretion, appoint an attorney to represent the above named children.
4. You have the right, upon request, to be granted up to twenty (20) additional days to prepare for this proceeding.
5. You have the right to examine all reports or other documents filed with the Court upon which any decision with respect to such action may be based.
6. You have the right to petition the court to transfer this proceeding to the courts of the tribe. In the absence of good cause to the contrary, the petition shall be granted, absent objection by either parent.

A decision in this matter may affect the future custodial rights of the tribe, the parents, and the Indian custodian of the above named children and may result in the temporary or permanent removal of the children from their home, the termination of parental rights to the children and the permanent placement or adoption of the children.

Notice Continued

The information contained in this notice and the attached Petition and Order is confidential and should not be disclosed or revealed to any person or agency which is not necessary for proper notification of the parents, Indian custodian or the tribe and which is not necessary for the exercise of their rights under the Indian Child Welfare Act.

Pottawattamie County, Iowa Juvenile Court is located at the Pottawattamie County Courthouse, 227 S. 6th St., Council Bluffs, IA 51501. The telephone number of the Court is 712-328-5861.

All filings in this matter should be directed to the Pottawattamie County, Iowa Clerk of Court, Juvenile Division, 227 S. 6th St., Council Bluffs, IA 51501.

The next scheduled hearing in this matter is set before the Pottawattamie County, Iowa Juvenile Court on the 15th day of January, 2015 at 10:30 a.m.

Restricted certified service will be attempted on Mom and Dad. This notice will be sent to the other persons and entities indicated by registered mail, return receipt requested.



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Removal

- Iowa Code §232B.6(1): Allowed only as necessary to prevent IPDH
 - Present or impending risk of serious bodily injury or death that will result in severe harm if safety intervention does not occur

- Iowa Code §232B.6: Agency and Court must:
 - Conduct Active Efforts to prevent the break up of family, if possible before removal
 - Immediately take and document all practical steps to confirm Indian status and tribal affiliation
 - Immediately (3 days per Iowa Code §232B.6(2)) notify parents and tribe of removal and hearings
 - Maintain records that detail the steps taken to provide notice

Ex-Parte Application and Order Protective Custody Order

- Iowa Code §232B.6(3): order must be accompanied by an affidavit containing the following
 - Name, age, last known address of Indian Child
 - Name, last known address of parents
 - If parents are unknown, detailed explanation of efforts to find them
 - Facts necessary to determine the residence and domicile of child
 - Name of reservation if applicable
 - Tribal affiliation of child and parents
 - Specific and detailed account of circumstances leading to removal
 - Efforts made to transfer case to tribe with exclusive jurisdiction
 - Active efforts to assist parents to get child back
 - IPDH expected and evidence that it continues to exist

Post Removal

- As short as possible (Iowa Code §232B.6(4) 15 days maximum)
 - Unless a hearing with proper notice and clear and convincing evidence that custody by the parent is likely to result in IPDH to get 30 additional days
 - Extraordinary circumstances exist
- End as soon as IPDH no longer exists
- Foster care placement only with the testimony of at least one QEW that serious emotional or physical damage is likely if returned home
- Each Agency or court involved must:
 - Diligently investigate and document removal is proper and continues to be necessary to prevent IPDH
 - Whenever new information is received or assertions are made that emergency situation has ended, promptly hold a hearing with evidence and evaluation
 - Immediately terminate the removal with sufficient evidence that emergency has ended

Improper Removal

- Any time, any party asserts or the court has reason to believe improper removal or retention the court must stay the proceeding until a determination is made
- Iowa Code §232B.14(3): if removal was improper the court must terminate the proceeding and immediately return child to parents unless IPDH would result

Involuntary Foster Care Termination of Parental Rights

- Iowa Code §232B.5(19)
 - Party seeking involuntary foster care or TPR shall produce evidence of unsuccessful but attempted active efforts to provide remedial services and rehabilitative programs designed to prevent the break up of the Indian family
 - Court shall not order placement or TPR unless evidence shows
 - Vigorous and concerted level of casework beyond reasonable efforts
 - Efforts took into account prevailing social and cultural values of tribe
 - Consulted, utilized resources of extended family, tribe, individual Indian
 - Requested the tribe for support, resolution, and services
 - Involvement of tribe ASAP
 - Frequent visitation in child's home and with extended family
 - Exhaustion of tribally appropriate family preservation alternatives
 - Actively assisted with housing, financial, and transportation services

- Iowa Code §232B.6(5) and (6)
 - Before foster care
 - Clear and Convincing evidence, including testimony of QEW, that staying with parents is likely to result in serious emotional or physical damage
 - Federal Guidelines defines clear and convincing: shows a causal relationship between conditions in the home and serious emotional or physical damage
 - Not evidence of poverty, isolation, single parent, bad housing, or substance abuse by itself
 - Before Termination
 - Evidence beyond a reasonable doubt, including testimony of QEW, that staying with parents is likely to result in serious emotional or physical damage

Voluntary Foster Care and Termination of Parental Rights

- Iowa Code §232B.7
 - Consent must be in writing, recorded before a judge, certified by judge that terms and consequences were fully explained and understood in English or interpreted
 - Not valid if given before or within 10 days after birth
 - Foster care can be withdrawn at any time = return
 - TPR or adoption withdrawn any time before final decree = return
 - After final decree of adoption, can withdraw if consent was by fraud or duress
 - Court shall vacate decree if above shown and less than 2 years since adoption
 - Return to parent unless shown not in best interest of child
 - Federal Guidelines: failure to comply with ICWA

Permanent Placement Preferences

- Iowa Code §232B.9(1) preferences for any adoptive or permanent placement (tribe can change)
- Child or parent preference considered if below is harmful
 - 1. Family member
 - 2. Other tribe member
 - 3. Another Indian family
 - 4. Non-Indian family approved by tribe
 - 5. Non-Indian family committed to extended family visitation and cultural and ceremonial events of tribe
 - Must be supported by clear and convincing evidence, QEW, best interests of the child
 - Judged by social, cultural standards of tribe

Nonpermanent Preferences

- Iowa Code §232B.9(2) emergency removal, foster care, pre-adoptive
 - Least restrictive setting that most approximates a family, meets special needs, that's close to home, and in best interests of child
 - Foster care or pre-adoptive preferences (tribe can change)
 - 1. Extended family
 - 2. Foster licensed, approved, or specified by tribe
 - 3. Indian foster licensed or approved by an authorized non-Indian licensing authority
 - 4. Foster agency approved by tribe or operated by Indian organization which meets child's needs
 - 5. Non-Indian foster agency approved by tribe
 - 6. Non-Indian family committed to extended family visitation and cultural and ceremonial events of tribe

Intervention

- Iowa Code §232B.5(14)
 - Tribe and custodian have right to at any point in CINA or TPR
 - Tribe also can at any point in adoption proceeding
 - Family member in adoption for adoptive placement

Transfer of Jurisdiction

- Iowa Code §232B.5(10)-(13)
 - Motion made by:
 - Parent
 - Indian Custodian
 - Tribe
 - Prevented by:
 - Either parent
 - The tribal court
 - Good cause

Good Cause

- What it is according to Iowa Code § 232B.5(10)-(13)
 - Lack of subject matter jurisdiction under tribal or federal laws
 - Undue hardship, for parties or witnesses, in presenting evidence to decided the case in tribal court, that can't be mitigated by remote communication or moving court
- What it is not according to Federal Guidelines
 - The case is at an advanced stage
 - Change of placement for the child
 - Child's contact with tribe (lack thereof)
 - Any perceived inadequacy of tribe (judicial or social services)

How to Transfer Jurisdiction

- Parent or Tribe may petition the court for it at any time
 - Court must promptly notify the tribal court in writing and request a response with at least 20 days to decide
 - Tribal court shall respond within time frame provided or ask for more time with explanation
 - Promptly provide tribal court with all court records

When it Goes Wrong

- Iowa Code §232B.14 Compliance
 - Court of competent jurisdiction shall vacate order and remand the case for appropriate disposition for violations:
 - Failure to notify parent, custodian, tribe
 - Failure to recognize jurisdiction of tribe
 - Failure to transfer without cause as specified by code
 - Failure to give full faith, credit to records, acts of tribe
 - Failure to allow intervention of tribe or extended family
 - Failure to return child when IPDH is gone
 - Failure to provide testimony of QEW
 - Any other violation of ICWA that is not harmless error
 - Improper removal or retention of custody court shall decline jurisdiction and immediately return child unless substantial and immediate danger or threat of such danger

Petition to Invalidate an Action

- Federal Guidelines
 - Foster care or termination actions
 - Filed by:
 - Child subject
 - Parent or custodian from whose custody the child was removed
 - Tribe
 - No need for their rights to be violated, just violation in implementing act
 - Parent can say tribe's rights were violated or vice versa
 - Act is designed to protect tribes, parents, and children

Questions or Comments

- NICWA
 - www.nicwa.org
 - Sign up for weekly emails
- Bureau of Indian Affairs
 - www.bia.gov
- Eric Strovers
 - eric.strovers@pottcounty-ia.gov