

Questions and Answers: Indian Child Welfare Act

What is the Indian Child Welfare Act?

The Indian Child Welfare Act is a federal law passed by Congress in 1978 to protect Indian families from the loss of their children. The Act was passed because Congress found that many children were being taken from their families by courts and welfare departments and placed in non-Indian homes and institutions. The Act requires state courts and welfare departments to respect the need for Indian children to grow up within their culture.

When does the Act apply?

If an Indian child is involved, then the Act applies to the following situations:

- 1.) Whenever the welfare department or some other person starts a court case which might result in Indian children being removed from their home. Usually this is called a dependency or neglect case.
- 2.) Whenever the welfare department, or some other person, starts a court case to take away parents' rights to their children.
- 3.) Whenever an Indian child is charged in Juvenile Court with doing something wrong which would not be considered criminal if an adult did it; for example, skipping school and running away.
- 4.) Whenever an Indian child is moved from one foster home or institution to another foster home or institution.
- 5.) Whenever an Indian child is placed for adoption.
- 6.) Whenever Indian parents or custodians want to voluntarily place their children in foster care or give up their parental rights.

Who is protected by the Act?

The Act protects Indian children, parents of Indian children, people who have custody and are taking care of an Indian child, and the child's tribe.

An "Indian Child" is defined as any unmarried person under the age of eighteen who is either a member of an Indian tribe or is eligible for tribal membership.

How does the Act work?

When a court case falls under the law, the Act requires the court to notify the Indian Child's parents, the tribe and/or the people who are taking care of the child. The tribe can then ask the court to transfer the child's case to tribal court, if the parent's don't object, or the tribe can take part in the state court case. The state court must consider the arguments of the tribe.

What is required before a child can be taken from an Indian home?

The police can only remove children from their home if it can be shown that the children are in physical danger; this removal may continue only as long as is necessary to prevent immediate harm to the child. The child will be returned home as soon as it is safe. If it is not an emergency, the court must be shown that:

- 1.) The welfare department has tried to help the family but there's been no change;
- 2.) It is clear that the child will suffer if the child remains with the parents (an expert in Indian life must be one of the people to give the court information).

Can the courts permanently take Indian children away from their parents?

Yes.

When children are placed outside their home, must preference be given to Indian families?

Yes. The court and welfare departments must try to place the child accordingly:

- 1.) first with family;
- 2.) second, with a family approved by the child's tribe;
- 3.) if that's not possible, then with an Indian foster home which is state approved;
- 4.) when no Indian foster home is available the child can be placed in an Indian operated institution;
- 5.) and last, if there is no other choice, the child can be placed in a non-Indian home or institution.

Do the same standards apply when children are placed for adoption?

Yes. The court and welfare department must try to place the child;

- 1.) first with family;
- 2.) if that's not possible, then other Indian families have priority;
- 3.) and last, if there is no Indian family the child can be placed in a non-Indian home.

How does the Act apply when parents voluntarily consent to adoption?

If the child is placed for adoption, parents can change their minds and get the child back at any time before a court ordered their rights to be ended, or before the child is adopted.

If an Indian child was adopted in the past, can the Indian parents challenge the adoption?

In some cases, yes. The Act says that when a voluntary adoption has occurred less than two years ago, the parents can have the adoption set aside -- if the parent shows that fraud, trickery, or undue pressure was used to obtain the parent's consent to the adoption.

What can be done if a state court or welfare department does not follow the Act?

In that case, an Indian child, parent, custodian, or tribe may bring legal action to change a state court decision, or the actions of the welfare department. If you think your children have been taken from you unfairly, or if someone is threatening to take your children, contact your local tribe, Indian center, legal services office or public defender's office.

Does the Act help Indian families before they end up in court?

Yes. Many Indian centers and most tribes already have programs to assist Indian families, including those going to court.

What is required under the Act before a child can be permanently removed from an Indian home?

Except for emergencies, a child may not be taken away from his/her parents without a showing supported by clear and convincing evidence including expert witnesses who qualify as being knowledgeable in Indian customs and social relations, that the child will suffer emotional or physical damage if the child remains with the parents. If parental rights are to be "terminated" that is, the rights to the child permanently lost, the court must find beyond a reasonable doubt that the child will be physically or emotionally damaged by staying with the parents.

What standards must the court consider in placing the child?

In making its decision regarding placement, the state court must consider only the Indian community standards of a suitable home and not the standards of the non-Indian community. This is to prevent the state from finding that an Indian home is inadequate because it isn't similar to a white middle-class home.

What additional information should an Indian Child Welfare worker know?

In situations involving involuntary placement proceedings of an Indian child or a child which the court has reason to believe is Indian, the Act requires the state court to notify the Indian child's parents, custodian, and tribe. If the tribe is not known, the court must notify the regional office of the Bureau of Indian Affairs in order to determine the child's tribal membership. The notice must be in writing, indicating the tribe's right to intervene and it must allow at least ten (10) days after delivery for the tribe to respond. The tribe may have an additional twenty (20) days to respond if it is so requested.

Once the tribe is notified, the tribe may "transfer jurisdiction", take control of the case itself if the parents don't object, or "intervene". If the tribe intervenes the state court can proceed with the case, but the tribe's arguments and desires must be considered by the state court, and the state court must follow strict guidelines to ensure that whatever action is taken, primary consideration is given to maintaining the child's Indian cultural environment.

All parties are entitled to see any reports which the state court may use in making its decision. Additionally, the state court is required to notify the parent, and Indian guardian of their right to an attorney, and that the court will appoint an attorney free of charge if they cannot afford to pay for one.

When WON'T the Indian Child Welfare Act apply?

The Act does not apply in cases where the child is charged with criminal wrongdoing and in child custody disputes between parents in a divorce action.

" The Act requires state courts and welfare departments to respect the need for Indian children to grow up within their culture."

This information is provided to the community by the Tribal Family Action Program (TFAP) of the Confederated Tribes of Grand Ronde. For additional information and assistance, please contact one of three Family and Children's Services ICW Caseworkers at 1-800-775-0095.

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