

Representing Indian Children: What Judges and Attorneys Should Know About ICWA, Kinship, and Native Culture



Congress passed the Indian Child Welfare Act (ICWA) in 1978 to protect the best interests of Indian children* and promote the stability of families and Tribes by setting minimum standards for state child custody proceedings involving an Indian child. ICWA is grounded in Tribal sovereignty, the political status of Tribal nations, and was enacted in response to a long history of high rates of Indian children being removed from their families and placed in non-Native homes by public and private agencies.

In every ICWA case, all legal professionals are responsible for more than ensuring compliance. ICWA is not simply a procedural statute. ICWA is a civil rights law designed to protect Indian children's safety, family connections, identity, and relationships to their Tribe. It is a reparative statute that recognizes the essential relationships of Native people and that "...there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. §1901(3). Attorneys and judges in ICWA cases must ensure not only that the child is safe, but that the child remains connected to family, community, and culture, because those connections are central to the child's well-being.

ICWA recognizes that removal from family often also results in a separation from culture and community and harms children in ways that are cultural, emotional, and intergenerational. An Indian child's connection to their Tribe is not just about heritage – it is a political, legal, and identity-based relationship. Children who lose connection to their Tribal community are at risk of losing their cultural identity and belonging, access to extended family networks, language,

* This resource uses the terms "Indian," "Tribe," and "Tribal" consistent with the statutory language of the Indian Child Welfare Act (ICWA), and the term "Native" more broadly when describing culture. At the same time, we recognize that "Native," "Indigenous," and similar terms are widely used in contemporary discourse. As scholars have noted, terminology in this area reflects both legal constructs and evolving self-identification, and no single term captures the full diversity of Indigenous peoples. Accordingly, these terms are used here for legal precision while acknowledging broader and preferred usage in other contexts.

traditions, spiritual practices, other community-based protective factors, and ultimately a sense of who they are and where they come from.

ICWA Statutory Requirements

For judges and attorneys, protecting Tribal connections must be a key consideration when protecting an Indian child's best interests. The Indian Child Welfare Act is not self-executing. Without zealous advocacy, its protections can become about mere compliance – checking off a box – rather than promoting what is best for the child. Incumbent upon the court and the attorneys of record alike in ICWA cases is the responsibility to monitor:

- ▶ Whether the Tribe has been properly notified and involved under ICWA. 25 U.S.C. §1912(a).
- ▶ Whether **active efforts** – not just reasonable efforts – are being/have been made to prevent the breakup of a family before the agency seeks the removal of a child or termination of parental rights. 25 U.S.C. §1912(d).
- ▶ Whether placements comply with listed ICWA preferences. 25 U.S.C. §1915.
- ▶ Whether the child's cultural identity is being supported in daily life, including by maintaining connections with their family, Tribe, and community members.

Placement Preferences Under ICWA

ICWA prioritizes placement with extended family to keep children connected and ensure continuity of identity and belonging. ICWA articulates the following preferred order of foster care placement for an Indian child, in the absence of good cause to the contrary:

1. A member of the Indian child's extended family;
2. A foster home licensed, approved, or specified by the Indian child's Tribe;
3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
4. An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs. 25 U.S.C. §1915(b).

For adoptive placements of an Indian child under federal law, the statutory preferences are:

1. a member of the child's extended family,
2. other members of the Indian child's Tribe, or
3. other Indian families. 25 U.S.C. §1915(a).

Tribes may establish, by resolution, a different order of placement preference for foster care and adoptive placements than those set forth in ICWA and related above. If an Indian child's Tribe has established a different order of preference by resolution, that order must be followed. U.S.C. §1915(c).

It is important to note that Tribes generally define "kin" in an expansive manner – based on Tribal tradition, custom, resolution, or law – extending it far beyond immediate biological family to include extended family, clan members, and community members with emotional bonds. This Tribal view of kin prioritizes cultural and community connections. Kinship placements for Indian children can help preserve family history, clan or family roles within the community, cultural practices, and Tribal community ties, as well as both sibling and extended family relationships. For many Indian children, kin placements reduce the trauma of removal by enabling them to maintain a sense of "home" while in foster care.

While placement with Native kin is preferred, there may be circumstances in which Indian children are placed with a non-kin foster family or are placed with kin who are non-Native. Additionally, kin who are Native may not have a previously existing connection to Native culture. Regardless of the Indian child's placement, all legal partners involved in the case must continue to ensure that all placements, both with kin and non-kin, are stable and culturally protective. A well-supported placement can reduce the trauma of removal and preserve kin and Tribal connections. Attorneys should explore the following key considerations when advocating for a culturally protective placement:

- ▶ Is the kin caregiver or foster parent ensuring that the child remains connected to the child's Tribe and culture? If so, how is that connection being maintained?
- ▶ Is the caregiver supported financially and with other resources to stabilize the placement?
- ▶ Does the caregiver support reunification efforts?
- ▶ Is the kin caregiver committed to providing a permanent home for the child if reunification is no longer possible?

Children fare better when their first placement is their only placement. Research shows that children who are placed with kin often experience less placement disruption. However, kin placements can fail without adequate support.

Benefits of Continued Tribal Connections

Not only does ICWA stress the importance of maintaining an Indian child's connection to their culture, but [research](#) also shows that [connection](#) to a child's Tribal community and culture is a protective factor that promotes resilience. Continuity of an Indian child's cultural connection helps the child develop a strong identity and self-esteem, cope with trauma, build a sense of belonging, access community support systems, and better understand their place within their

family and community history. In order to advocate for placement that is not only physically safe but also enhances an Indian child's cultural identity, attorneys should ask the following questions throughout a child's placement:

- ▶ What specific steps are being taken to ensure that the child remains connected to their Tribe, Native community, and cultural practices while in placement?
- ▶ Are cultural practices, language, and traditions part of the child's life?
- ▶ Does the caregiver affirm the child's Native identity and encourage practices that support this identification?

When a child is in foster care, continued connection to their Tribe is an integral part of achieving successful permanency. Permanency can include both relational and legal permanency:

- ▶ Relational permanency occurs when children in care form supporting, lasting connections with adults that will extend beyond their time in care.
- ▶ Legal permanency can fall into two legal categories: state-based and Tribal.
 - State-law legal permanency options may include reunification, adoption, legal guardianship, placement with a fit and willing relative, and Another Planned Permanency Living Arrangement ("APPLA").
 - Some Tribes offer permanency options that differ from the state-law models. For example, Tribes are often less inclined to permanently and legally terminate the parent/child relationship, instead looking at options like permanent guardianship or Tribal customary adoption. Tribal customary adoptions are a legal permanency option for Tribal children that allows adoption by kin or other community members and, unlike state-law adoption, does not require legally severing or terminating the biological parents' rights. Tribal customary adoption is a legal option that recognizes that while reunification may not always be successful, the spiritual connection between parent and child is perpetual. These culturally grounded approaches can preserve extended family and community relationships while still providing legal stability. Counsel should consult with the Tribe early to understand whether such options are available and appropriate in a given case.

All permanency decisions for an Indian child should be evaluated not just for safety, but for how they can preserve the child's relationship with their Native community and culture.

Finally, as with all cases, support for Indian children in ICWA cases should not end with case closure. Judges and attorneys should inquire about the availability of post-permanency support for the child and caregiver, including access to Tribal services, cultural resources,

and health care. Ensuring that the child remains connected to their Tribal community after court involvement ends is critical to the child's well-being and, in turn, the success and stability of their permanent home.

Conclusion

All legal partners in an ICWA case must appreciate that an Indian child's identity, community, and culture are legally recognized as essential to their well-being. Effective practice by legal professionals requires attention to the following for Indian children:

- ▶ **Safety**
- ▶ **Family Connection**
- ▶ **Tribal Connection**
- ▶ **Cultural Identity**
- ▶ **Legal and Relational Permanency**

When these elements are prioritized together, ICWA functions as intended – to protect Indian children and preserve both their culture and the Tribes to which they belong.

The Grandfamilies & Kinship Support Network: A National Technical Assistance Center (Network) helps government agencies and nonprofits in states, Tribes, and territories work across jurisdictional and systemic boundaries to improve supports and services for families in which grandparents, other relatives, or close family friends are raising children whose parents are unable to do so. For more information, please visit www.GKSNetwork.org.

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