



The Indian Child Welfare Act and Advocacy for Status Offenders

To learn more about representing juvenile status offenders generally, visit the American Bar Association's website at <http://new.abanet.org/child/Pages/rjso.aspx>

What is the Indian Child Welfare Act (ICWA)?

ICWA is a federal law that establishes minimum standards for the removal of Indian children from their families.¹ Congress set out protections for Indian children and their families after finding “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”² ICWA was intended to protect Indian children’s best interests by, among other things, ensuring that when an out of home placement was necessary it would be in a setting which would “reflect the unique values of Indian culture.”³

When does ICWA apply in status offense cases?

ICWA covers child custody proceedings, which by definition include proceedings involving foster care placements, termination of parental rights, and preadoptive or adoptive placements which involve an Indian child.⁴ The 1979 guidelines for ICWA issued by the Bureau of Indian Affairs specifically stated that ICWA applies to status offenses (offenses that would not be a crime if committed by an adult). Commentary in the guidelines says that “...status offenses are usually premised on the conclusion that the present custodian of the child is not providing adequate care and supervision.... For that reason status offenses are treated the same as dependency proceedings and are covered by the Act... ”⁵ ICWA is implicated whenever an alleged Indian child status offender is being placed outside of his home, whether or not that placement is a secure confinement. An Indian child is an unmarried person under age 18 who is a member of an Indian tribe or who is eligible for membership and is the biological child of a tribe member.⁶ ICWA does not apply to delinquency proceedings unless there is a termination of parental rights.⁷

What protections or rights does ICWA grant?

ICWA ensures numerous protections for Indian children, guardians and tribes in the context of different custody and parental rights contexts (e.g., foster care placements, adoptions, termination of parental rights). The overall aim of these protections is to preserve tribal and family connections and rights. The discussion below summarizes only the provisions of ICWA that are most relevant to advocating for an Indian child in a status offense case. For a summary of all of ICWA’s provisions, see the Native American Rights Fund’s *A Practical Guide to the Indian Child Welfare Act*, available at <http://www.narf.org/icwa>.

Jurisdiction⁸



The Indian Child Welfare Act and Advocacy for Status Offenders

ICWA gives Indian tribes exclusive jurisdiction over custody proceedings involving Indian children residing or domiciled within their reservation, and Indian children who are wards of the tribal court, even if they are not residing or domiciled on a reservation. For all other covered proceedings involving Indian children, upon request of a parent, the tribe, or the child's Indian custodian, the State should transfer jurisdiction to the tribe absent good cause or an objection from either parent. The objection of a child over age 12 is considered good cause not to transfer the proceedings. The tribe has the right to decline the transfer, however. Tribes also have the right to intervene at any point in covered proceedings.

Protections for Parents and Tribes⁹

An Indian child's parent or Indian custodian and the child's tribe must be notified of the proceedings and of their right to intervene by registered mail with return receipt requested. A foster care placement or termination of parental rights proceeding may not be held until at least 10 days after notice is received and the parent, custodian or tribe must be given an additional 20 days to prepare for the proceeding if they request it. Notice is a very common issue in ICWA appeals, so attorneys should consult the statute and related regulations to see if the notice to the tribe was properly given in each case.¹⁰

Indigent parents or custodians also have the right to court-appointed counsel for removal, placement or termination proceedings. ICWA also grants parents the right to examine certain reports and documents filed with the court and establishes standards for termination of parental rights orders. Some protections are also required for parents who voluntarily agree to placement or termination of parental rights.¹¹

Protections for or Concerning Indian Children¹²

ICWA provides that the court may appoint counsel for an Indian child if it finds that the appointment is in the child's best interest.

Perhaps one of the most powerful protections for status offenders under ICWA is that prior to a foster care placement or TPR, the agency must "satisfy the court that **active efforts have been made to provide remedial services and rehabilitative programs** designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

ICWA also prevents a foster care placement from being made unless the court determines that the child staying with their parent or custodian "**is likely to result in serious emotional or physical damage to the child.**" The standard for this determination is clear and convincing evidence and ICWA specifically states that this is to include expert witness testimony.

Remedies¹³

An Indian child or her parent, guardian or tribe can petition the court to invalidate any placement decision or TPR if it violated the standards set out above.

Placement¹⁴

Any Indian child placed in foster care must be placed in "the **least restrictive setting** which most approximates a family and in which his special needs, if any, may be met." The child should be placed reasonably close to his home and preference (in the following order) must be given to:



The Indian Child Welfare Act and Advocacy for Status Offenders

“(i) a member of the Indian child's extended family;
(ii) a foster home licensed, approved, or specified by the Indian child's tribe;
(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(iv) 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.”¹⁵

The court must comply if the tribe asks for a different order of preference. A request of the child (if he is of sufficient age) or parent is considered good cause not to follow the preference order. The court must apply the social and cultural standards of the relevant Indian community to meet the preference requirements.

How can ICWA be used to advocate for status offenders?

Ask all clients and their parents about Indian heritage, and share any reports of Indian heritage with the court. Any state court that has reason to believe a child involved in a custody proceeding is an Indian child must verify the child's status with the child's tribe or the Bureau of Indian Affairs.¹⁶ The court must wait until the tribe determines whether the child is eligible for membership before making a finding that ICWA does or does not apply to the case, since the tribal decision is a determining factor. For any case involving an Indian child, use ICWA to further your advocacy by doing the following:

- Determine whether you are most likely to obtain a successful outcome for the child through the tribal court system or the state court, and make appropriate objections or requests for transfer. Also consider the possibility of asking the tribe to intervene in any state court case where their presence will further your advocacy.
- As soon as you are assigned to the case, determine what services have been offered to your client and his family. If sufficient services have not been offered (or been given enough time to succeed), argue to the agency, and then to the court if necessary, that placement cannot even be considered because ICWA's requirements to prevent the breakup of the family have not been met. Similarly, if a residential placement is being considered for a status offender, ensure that the agency meets its burden of showing (through expert witnesses and by a clear and convincing standard), that failure to place the child in a residential setting would seriously damage the child.
- Status offense cases may involve family conflicts that may make the parent and child more adversarial than in other families, including those involved in typical dependency proceedings. Indian children may also be exhibiting status offense behaviors due to feelings of cultural or community isolation. In these cases, ICWA's emphasis on the importance of the extended family and tribal connections may be helpful. Work with the child and/or tribal child welfare contacts to identify and propose a family-like setting the child can live in until her problems at home can be resolved.
- Status offenders may be more likely to be placed in a group home or secure confinement than abused or neglected youth. If such a placement is being considered, argue that such settings are unlikely to meet ICWA's requirement for the least restrictive and most family-like setting.



The Indian Child Welfare Act and Advocacy for Status Offenders

- Some states offer protections to Indian children and families that go beyond ICWA’s requirements. Consult your state’s laws to determine what may be available.

¹ 25 U.S.C.A. § 1902.

² 25 U.S.C.A. § 1901.

³ 25 U.S.C.A. § 1902.

⁴ 25 U.S.C.A. § 1903.

⁵ 44 Fed. Reg. 67584 at 67587.

⁶ 25 U.S.C.A. § 1903.

⁷ 44 Fed. Reg. 67584 at 67587.

⁸ 25 U.S.C.A. § 1911. Note that there is an exception to exclusive jurisdiction “where such jurisdiction is otherwise vested in the State by existing Federal law.”

⁹ 25 U.S.C.A. § 1912.

¹⁰ See 25 CFR § 23.11(d)(1-4) and e (1-7) for federal notice requirements, and consult state law and court rules for additional requirements.

¹¹ 25 U.S.C. § 1913.

¹² 25 U.S.C. §§ 1912 –1915; 44 Fed. Reg. 67584.

¹³ 25 U.S.C. § 1914.

¹⁴ 25 U.S.C. § 1915.

¹⁵ *Ibid.*

¹⁶ 44 Fed. Reg. 67584.