



## 16.24, Children of Indian Heritage

**Application:** All Department of Children's Services Employees

**Authority:** TCA 37-5-106, Indian Child Welfare Act of 1978 (Pub.L. 95-608, 92 Stat. 3069, 25 U.S.C. § 1901 *et seq.*); 25 CFR § 23; *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 FR 10146-02; Bureau of Indian Affairs *Quick Reference Sheet for State Agency Personnel in Involuntary Proceedings*.

**Standards:** COA CFS 3.06; 8.04; 12.01; 12.03; 27.06; 27.07; 28.02

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### Glossary:

#### ◆ **Adoptive Placement**

- See "Child Custody Proceeding" definition below.

#### ◆ **Child Custody Proceedings**

- For ICWA applicability:
  - i. "foster care placement" means any action removing an Indian child from his/her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
  - ii. "termination of parental rights" means any action resulting in termination of the parent-child relationship;
  - iii. "pre-adoptive placement" means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
  - iv. "adoptive placement" means the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. (25 U.S.C. § 1903(1))

♦ **Extended Family Member**

- For ICWA applicability, “extended family member” is defined by the law or custom of the child’s tribe. In the absence of such law or custom, extended family member refers to a person 18 years of age or older and the child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. (25 U.S.C. § 1903(2))

♦ **Foster Care Placement**

- See “Child Custody Proceeding” definition above.

♦ **Indian**

- As defined by ICWA, “Indian” refers to “any person who is a member of an Indian tribe, or who is Alaska Native, and a member of a Regional Corporation as defined in section 1606 of title 43”. (25 U.S.C. § 1903(3))

♦ **Indian Child Welfare Act of 1978 (ICWA)**

- Federal legislation aimed at protecting the best interests of American Indian and Alaskan Native children and promoting the stability and security of American Indian and Alaskan Native tribes and families. (25 U.S.C. § 1901-1923) (P.L. 95-608, Nov. 8, 1978)

♦ **Indian Child’s Tribe**

- As defined in ICWA, an Indian child’s tribe is the tribe in which the child is a member or is eligible for membership; or, in the case of child who is a member or eligible for membership in more than one tribe, the tribe with which the child has more significant contracts. (25 U.S.C. § 1903(5))

**Policy Statement:**

The Department of Children’s Services shall comply with all rules, regulations, and laws governing the Indian Child Welfare Act of 1978 (ICWA) and make a diligent effort to identify those children/youth and families subject to the Act.

**Purpose:**

To ensure that all DCS services affecting Indian children, as defined by ICWA, are conducted in compliance with ICWA. The goal of ICWA is to strengthen and preserve Indian families and culture.

**Procedures:**

**A. ICWA Overview**

1. ICWA sets minimum standards for child custody proceedings involving any “Indian child.”
  - a) Not all tribes are federally recognized and subject to ICWA.

2. ICWA applies to any “child custody proceeding” where the child is at risk of involuntary removal.
  - a) This may include Child Protective Services (CPS), Family Support Services (FSS)/Family Crisis Intervention Program (FCIP), adoption, guardianship, termination of parental rights, runaway/truancy, or voluntary placement.
3. ICWA makes a distinction between how cases are handled when the child resides on reservation land versus non- reservation land.
  - a) The case manager shall seek to immediately confirm the child’s residence address and Tribal affiliation in all types of cases (CPS, FSS, FCIP, etc.).
    - ◆ Certain notices, legal standards, placement preferences, and other actions must be met for ICWA cases.
4. Upon request, ICWA cases are subject to transfer to tribal courts, absent good cause or objection by either parent, the Indian custodian, or the tribe.
  - a) ICWA permits the tribe to intervene in state court proceedings at any time.
5. ICWA requires qualified expert witness testimony for adjudication of each child custody proceeding, including both removal or transfer of custody actions and all termination of parental rights actions.
  - a) See the [Protocol for Work with Children of Indian Heritage](#) for more information and responsibilities.
6. **All actions initiated in an ICWA case must be made in collaboration with and under the guidance of Regional Legal Counsel or Central Office Legal Counsel.**

## **B. Notice to Regional Legal Counsel**

1. The case manager will immediately notify Regional Legal Counsel upon identifying a child with suspected or confirmed Indian heritage or suspected or confirmed residence on reservation lands.

## **C. Referral to the International, Immigration, and Cultural Affairs Division**

1. When a case involves a child with suspected or confirmed Indian heritage, the case manager will immediately make a referral using [CS-4275, Indian Child Welfare Act \(ICWA\) Referral to Cultural Affairs Team](#) to the International, Immigration, and Cultural Affairs Division (IICA) within three (3) business days.
  - a) IICA may be contacted via email at [ei\\_dcs\\_culturalaffairs@tn.gov](mailto:ei_dcs_culturalaffairs@tn.gov).

2. An IICA Specialist will be assigned to the case, will be a required participant at all Child and Family Team meetings, and will serve as the primary contact for any involved Tribal representatives.
  - a) Case managers will refer all communication with Tribal representatives to the assigned Specialist.
3. See the [Protocol for Work with Children of Indian Heritage](#) for more information about IICA referrals and responsibilities.

#### **D. “Active Efforts” and Diligent Search Required**

1. ICWA requires DCS to make “active efforts” to prevent the breakup of the Indian family in any foster care or termination of parental rights proceeding involving an Indian child.
  - a) Prior to adjudicating involuntary foster care removal or termination of parental rights, the Court must conclude that active efforts have been made and that those efforts have been unsuccessful.
2. “Active efforts” requires more than “reasonable efforts.”
  - a) Active efforts involve assisting the parents or Indian custodian to complete permanency plan responsibilities and assessing and developing resources necessary to satisfy those responsibilities.
  - b) Guidance from the Bureau of Indian Affairs (BIA) states that active efforts “shall take into account the prevailing social and cultural conditions and the way of life of the Indian child’s tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social services agencies, and individual Indian caregivers.” Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584, 67, 592 (Bureau of Indian Affairs Nov. 26, 1979, guidelines for State courts)
3. To the maximum extent possible, the case manager will ensure that active efforts are provided in a manner consistent with the social and cultural conditions of the child’s tribe.
4. The case manager will document all active efforts in case recordings, affidavits of active efforts, and affidavits of diligent search submitted in court proceedings.
5. The case manager will make diligent efforts to identify ICWA cases, to locate extended family for an Indian child, and to ensure ICWA placement preferences are met.
  - a) These efforts will be documented in the applicable child welfare information applications and case recordings.

**E. Placement Preferences**

1. For any foster care or pre-adoptive placement of an Indian child:
  - a) The child must be placed in the least restrictive setting which:
    - ◆ Most approximates a family;
    - ◆ Meets the child's special needs; and
    - ◆ Is in reasonable proximity to the child's home.
  - b) Preference must be given in the following order, absent good cause to the contrary, to placement with:
    - ◆ A member of the child's extended family;
    - ◆ A foster home, licensed, approved, or specified by the tribe, whether on or off reservation lands;
    - ◆ An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
    - ◆ An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.
2. The tribe may establish a different order of preference by resolution, and that order of preference shall be followed as long as the criteria above are met. In any adoptive placement of an Indian child under State law, preference must be given (in the order listed below) to placement of the child with:
  - a) A Member of the child's extended family;
  - b) Other members of the child's tribe; or
  - c) Other Indian families, including families of single parents.
  - d) The tribe may establish a different order of preference by resolution, and that order of preference must be followed so long as the placement is the least restrictive setting appropriate to the child's needs.
  - e) Unless a consenting parent voices a desire for anonymity, the Court or agency shall notify the child's extended family and the tribe that their members will be given preference in the adoption decision.
3. If an Indian child is adopted from DCS custody in State court, the case manager shall immediately notify IICA.

**F. Required Court Findings and Standards of Proof**

1. The court may adjudicate and order foster care placement or terminate parental rights only if there is:
  - ♦ Clear and convincing evidence (for foster care placement) or evidence beyond a reasonable doubt (termination of parental rights), including the testimony of a qualified expert witness(es), that the child's continued custody by the child's parent or Indian custodian is likely to result in "serious emotional or physical damage" to the child.

**G. Maintenance of ICWA Case Records**

1. DCS shall establish a single location where all records of every foster care, pre-adoptive placement, and adoptive placement of Indian children by the Courts will be available within seven (7) days of a request by a child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

**Forms:**

[CS-4277, ICWA Notice and Confirmation Request](#)

[CS-4276, Request for Determination of Tribal Affiliation](#)

[CS-4278, Confidential ICWA Adoption Notice](#)

**Collateral Documents:**

[Bureau of Indian Affairs: Guidelines for State Courts; Indian Child Custody Proceedings](#)

[List of ICWA Tribal Agents](#)

[Protocol for Work with Children of Indian Heritage](#)