

**705 INDIAN CHILD WELFARE ACT (ICWA)**

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## 705.1 Indian Child Welfare Act (ICWA) Description

### Philosophy

Native American children have a unique political status not afforded other children. As members of sovereign Tribal governments, this political status, as well as the history of biased treatment of Native American children and families under public and private child welfare systems, is the basis for the enactment of the Indian Child Welfare Act (ICWA) of 1978, Public Law No. 95-608, 92 Stat. 3069 codified at 25 U.S.C. §§1901-63. (To view the United States Code on ICWA, [click here](#).)

### Purpose Of The ICWA

The purpose of the ICWA is to preserve and strengthen Native American families and Native American culture. ICWA establishes “minimum Federal standards for the removal of Native American children from their families and placement in foster or adoptive homes which will reflect the unique values of Native American culture...” 25 U.S.C. §1902. It is through the children that the elders’ teachings, values, language, unique practices, and traditions are passed on and preserved. ICWA is a federal law; it supersedes state law where the two are in conflict.

The best interests of Native American children are inherently tied to the concept of belonging, which is key to the theme of temporary and permanency planning. Belonging can only be realized for Native American children by recognition and enhancement of the support networks that exist in the child’s extended family, clan, or Tribal systems. Permanency develops from identification with these systems through a sense of connectedness.

It is the principles of Child and Family Services to support these purposes through full compliance with and conscious adherence to the requirements of ICWA.

## 705.2 Determining When ICWA and Related Agreements Apply

### Major objectives:

Child and Family Services will make agreements with Native American Tribes to implement child welfare programs.

### **Applicable Law**

25 U.S.C. §1919

States and Native American Tribes are authorized to enter into agreements with each other respecting care and custody of Native American children and jurisdiction over child custody proceedings

### Practice Guidelines

- A. Agreements between states and American Indian/Alaska Native Tribes:
  - 1. The first step in applying the ICWA is to become familiar with the provisions of the Tribal-state agreements, state laws, or principles. The state of Utah presently has agreements with the Navajo Nation and the Ute Indian Tribe.

2. State law or Tribal agreements establish a higher standard of protection for Native American parents than ICWA, and that higher standard must be followed.
- B. Determine ICWA applicability:
1. ICWA applies to “child custody proceedings” in state courts. A “child custody proceeding” is defined as 25 U.S.C. §1903(1), to include: Foster care placements; termination of parental rights; pre-adoptive placements; and adoptive placements.
  2. Proceedings covered by ICWA:
    - a. Foster care placements, 25 U.S.C. §1913(a) and §1912(e);
    - b. Termination of parental rights, 25 U.S.C. §1903(1)(ii);
    - c. Pre-adoptive placements, 25 U.S.C. §1903(1)(iii);
    - d. Adoptive placements (includes conversion from foster care to adoptive placement), 25 U.S.C. §1903(1)(iv);
    - e. Both voluntary and involuntary placements;
    - f. Divorce proceedings in which neither parent will get custody;
    - g. Any transfers of placement;
    - h. Juvenile delinquency proceedings where parental rights may be terminated;
    - i. Status offenses (juvenile delinquency proceedings that involve an offense that would not be a crime if committed by an adult, e.g., drinking, runaway, truancy, etc.).
  3. Proceedings NOT Covered by ICWA:
    - a. Juvenile delinquency proceedings involving violations of criminal law;
    - b. Divorce proceedings where one parents is granted custody, 25 U.S.C. §1903(1).

## 705.3 Determination of an “Indian Child” (Native American Child)

### Major objectives:

Child and Family Services will make diligent efforts to identify every child who is subject to the ICWA.

### **Applicable Law**

25 U.S.C. §1903 defines an “Indian child” as: Any child unmarried and who is under 18 and is either a member of a Native American Tribe or is eligible for membership in a Native American Tribe and is the biological child of a member of a Native American Tribe, (4). As a sovereign nation, it is the Tribe that determines membership. A Tribe’s determination regarding membership or eligibility for membership is final, conclusive, and binding on the courts.

### Practice Guidelines

- A. Inquire at Intake in **ALL** cases whether the child/parents are American Indian/Alaska Natives (AI/AN). This is important because ICWA requires that “active efforts” be made to provide “remedial services and rehabilitative programs designed to prevent the

breakup of the Native American family...” 25 U.S.C. §1912(d). If AI/AN children are not properly identified early in a case, it is unlikely that the active efforts requirement will be met

- B. Inquire whether the child/parents are AI/AN at **ALL** stages of the case following Intake. This should include every court hearing and at every change or potential custody change.
  - 1. This will facilitate the proper management of ICWA cases at an earlier point in the permanency planning process.
  - 2. It will eliminate the sudden “surprise discovery” that there is a Native American child involved.
- C. If the child’s parents are unavailable or unable to provide a reliable answer regarding the Native American heritage of their child, the Child and Family Services caseworker will consider the following in determining the child’s Native American heritage:
  - 1. A thorough review of all documentation in the file, including contact with previous workers.
  - 2. Consultation with relatives/collaterals providing information that suggests the child/parent may be American Indian.
  - 3. Examination of any other information bearing on the determination of the child’s Native American heritage, such as communication from other sources including Native American Tribes and organizations.
- D. Upon receiving protective custody of an AI/AN child residing outside the boundaries of the reservation, the Child and Family Services caseworker will:
  - 1. Contact and staff the case with the state ICWA specialist.
  - 2. Inform the Assistant Attorney General that there is reason to believe that the child is a Native American child and subject to the requirements of the ICWA prior to initiating a petition. This will ensure that proper federal requirements of the ICWA and associated procedures are followed.
  - 3. Advise the Tribal/Nation’s ICWA representative through notice of taking protective custody of the AI/AN child.
    - a. A Child and Family Services caseworker should establish Tribal contact as early as possible in an ICWA case.
    - b. Child and Family Services caseworkers must work in partnership with Tribal social workers throughout the course of a child custody proceeding involving a Native American child. Having the Tribe’s social worker and Tribal attorney on board at the beginning of the case sets the stage for assistance, advice, positive conjoint efforts, Tribal intervention, possible transfer of the case, the sharing of critical, culturally relevant resources and information, and maximum input on placement decisions.
    - c. Child and Family Services caseworkers should continually maintain contact with Tribal social workers.

- E. Child and Family Services will gather the following information, if available, from the child or parent or Native American custodian and any other person with knowledge of the child or parent's Tribal affiliation. The information will assist in the confirmation or determination of Tribal membership:
1. The name of the Tribe or Tribes that the child and parent are a member of or eligible for membership in.
  2. The Tribal enrollment certification, identification numbers, or other documents that show the child and/or parent(s) are a member or eligible for membership in a Tribe.
  3. The birth mother's maiden name, and names of the maternal and paternal grandparents and biological and/or legal father(s).
  4. Birth dates and birthplaces of the child and parent(s).
  5. Social Security Numbers of the child and parent(s).
  6. Degree of Indian Blood and/or Certificate of Indian Blood (CIB) of child and parent(s).
  7. If either birth parent was adopted, obtain the name of his or her birth parents (if available).
  8. Other information about extended family members including dates of birth and addresses of grandparents, aunts, uncles, cousins, great grandparents, stepparents, and first and second cousins.
- F. When the child's Tribe has been identified and the above information gathered and documented in SAFE, the Child and Family Services caseworker will contact (by letter or phone) the Tribe's membership/enrollment office to ask them to make a determination whether the child is a member or eligible for membership in the Tribe. If the child is connected to more than one Tribe, all of the relevant Tribes must be contacted.
1. "Member" is defined by some Tribes as a descendent and does not equal enrollment.
  2. Formal notice to the Tribe regarding the court process is still required.
  3. The Tribal worker will work with the Child and Family Services caseworker once the Tribe is notified and throughout the case process.
- G. If the Tribe does not respond, call the Tribal enrollment officer or other Tribal employees or officials responsible for, or knowledgeable about, Tribal membership.
1. Several follow-up calls may be necessary as many of the Tribes are understaffed.
  2. Follow the call with a certified letter documenting the conversation.
- H. If the Tribe responds that the child is not an enrolled member, but is eligible for membership and the biological child of a member of a Native American Tribe, the Child and Family Services caseworker will:
1. Request (or assist the family in completing) Tribal membership application forms for the child.

2. Encourage the child's parents or Native American custodian to enroll the child in the Tribe to facilitate cultural ties and establish eligibility for potential Tribal benefits.
- I. Once a Tribe has determined that a child is not a member and not eligible for membership enrollment, ICWA does not apply. The Child and Family Services caseworker will:
  1. Document all steps taken to determine the child's Native American or Tribal ancestry.
  2. File the Tribe's written statement declaring that the child is neither a member of the Tribe nor eligible for membership (and the biological child of a member of a Native American Tribe).
  3. Incorporate in any court hearing the Tribe's written statement declaring that the child is neither a member of the Tribe nor eligible for membership (and the biological child of a member of a Native American Tribe).
- J. If the Tribe determines the child is a member or is eligible for membership and the biological child of a member of a federally recognized Tribe, ICWA APPLIES.
  1. Some Tribes define descendants as "members" for ICWA services. Child and Family Services caseworkers must follow ICWA whenever a Native American child is determined to be a "member" of a Tribe.
  2. If the child was determined to be covered by ICWA (or if eligibility is not yet determined) and there are past or pending custody proceedings, the case must be treated as an ICWA case and is subject to ICWA procedures until the child is determined to be non-Native American.
- K. The Child and Family Services caseworker should document in SAFE:
  1. All inquiries (oral or written) regarding the child's ethnicity.
- L. When the child was initially determined to be Native American, the Child and Family Services caseworker should also document:
  1. Family history chart.
  2. Tribal enrollment number.
  3. Tribal ID card.
  4. Certificate of Degree of Indian Blood (CIB).
  5. Other evidence such as a letter from the Tribe, Bureau of Indian Affairs.
  6. Documentation from the Indian Health Service, medical clinic or school, etc.

## 705.4 Emergency Removal of a Native American Child

### Major objectives:

When there is an emergency removal, the Child and Family Services caseworker will immediately cause an inquiry to be made as to the residence and domicile of the child.

## Applicable Law

### 25 U.S.C. §1915

If the child is believed to be Native American, the Child and Family Services caseworker must undertake diligent efforts to place the child during emergency care in a setting that complies with the placement preference set forth in §1915(b) or (c) of the ICWA (including cases involving emergency placements).

## Practice Guidelines

- A. After making a removal, the following conditions must be immediately considered unless circumstances do not permit such inquiry, and the Native American status of the child must be immediately determined:
  - 1. If the child is Native American, the name of the Tribe and/or band must be determined and the Tribe must be contacted.
    - a. If the identified tribe is Navajo Nation and you are unsure if the child is enrolled or needs to be enrolled, complete the following form and submit it to the Navajo Nation ICWA office (<https://powerdms.com/link/UTAHDHHS/document/?id=1288301>). Once completed, create an activity log and upload the form into Content Manager.
  - 2. It is determined by the Tribe that has jurisdiction over the child custody proceedings whether the child is domiciled on the reservation.
  - 3. It is determined that the child is in danger of imminent physical danger or harm.
  - 4. Determining the status of a Native American child:
    - a. A member of the Native American child's extended family;
    - b. A foster home licensed, approved, or specified by the Native American child's Tribe;
    - c. A Native American foster home licensed or approved by an authorized non-Native American licensing authority; or
    - d. An institution for children approved by a Native American Tribe or operated by a Native American organization that has a program suitable to meet the child's needs.
- B. The Native American child's Tribe has the right to establish a different order of placement preferences, and the state court is required to follow the order as long as it is the least restrictive setting appropriate to the particular needs of the child.
- C. Where appropriate in foster care placements, the preference of the Native American child or parent is to be considered.
- D. Where a consenting parent requests anonymity, the state court or state will give weight to the parent's request in applying the placement preferences (25 U.S.C. §1915(c)).
- E. Emergency custody is terminated when:



1. Removal is no longer necessary to prevent imminent physical damage or harm to the child.
  2. The appropriate Tribe exercises jurisdiction over the case.
- F. If termination of an emergency removal is not possible, a court order should be obtained authorizing continued protective custody.
- G. The Child and Family Services caseworker will obtain the following information for inclusion in the petition:
1. The name, age, Tribal affiliation, and last known address of the Native American child.
  2. The name and address of the child's parents, Native American custodian (if any), and the Tribe(s).
- H. If the name and location of the child's parents, Native American custodian (if any), or Tribe is unknown, the Child and Family Services caseworker should document the diligent efforts undertaken to obtain this information.
- I. If the name and location of the parent, Native American custodian, or Tribe is known, the Child and Family Services caseworker must obtain from the Tribe whether the residence or domicile of the parent, Native American custodian, or child is on or near a reservation, and identify the reservation.
- J. Develop a specific and detailed account of the circumstances that led to the conclusion that the child would suffer imminent physical damage or harm. These facts should be well documented.
- K. Set forth a specific plan of action describing the "active" reunification efforts that have been undertaken and which are planned to restore the child to his or her parents or Native American custodian.
- L. Develop a specific plan of action to physically transfer the child to the jurisdiction of the appropriate Native American Tribe pursuant to 25 U.S.C. §1911(b), in cooperation with the Tribal social worker.

## 705.5 Notice

### Major objectives:

Child and Family Services must send notice to the Tribe(s), the parents, and the Native American custodian whenever a child custody proceeding is initiated.

### **Applicable Law**

25 U.S.C. §1912(a)



Formal notice of custody proceedings is required by §1912(a) of the ICWA. Congress, in enacting ICWA, recognized that the Tribe has a direct interest in its children. The Tribe is entitled to notice as a party, because, from a Native American perspective, a child is a sacred and precious resource that belongs to the entire Tribe.

## Practice Guidelines

- A. No foster care placement or termination of parental rights proceeding may be held until the Tribe(s), parents, and Native American custodian have received proper notification and ICWA timelines have been followed.
- B. There are specific timelines set forth in §1912(a) of ICWA. This provision states that a custody proceeding cannot go forward until:
  - 1. At least 10 days after receipt of notice by the parents or Native American custodian, or after 30 days if 20 additional days are requested by the parents or custodian to prepare for the proceedings.
  - 2. At least 10 days after receipt of notice by the Tribe, or after 30 days if the Tribe requests an additional 20 days to prepare for the proceeding.
  - 3. At least 15 days after receipt of notice by the Secretary of the Interior (Bureau of Indian Affairs) if the identity or location of the parent or Native American custodian and the Tribe cannot be determined.
- C. Those to receive the ICWA notice of each proceeding are:
  - 1. Parents.
  - 2. Native American custodian, if any.
  - 3. Tribe.
  - 4. Additional Tribes (if the child is affiliated with or eligible for membership in more than one Tribe, all Tribes should receive notice).
  - 5. Bureau of Indian Affairs in Washington, D.C. as well as the appropriate Bureau of Indian Affairs area office if identified/location of parents or custodians cannot be determined.
- D. Notice is served by the following:
  - 1. Notice may be provided by registered mail, returned receipt requested.
  - 2. Notice must be filed with the court, along with any returned receipts or other proof of service.
  - 3. The case files must be properly documented regarding proof of service.
  - 4. Even if the Tribe does not respond, an official notice is sent of every future proceeding.
  - 5. Even if a Tribe replies that it does not wish to intervene in the proceeding, notices of every future proceeding are sent.
  - 6. Determination must be made that the parent was proficient in the English language.
  - 7. If there is a reason to believe that the parent or Native American custodian will not understand the notice because of possible limited English proficiency, a copy

of the notice must be sent to the Bureau of Indian Affairs Area Office nearest to the residence of that person, and a request must be made to the Bureau of Indian Affairs staff to arrange to have the notice explained to that person in the language that he or she best understands. The written request must be properly documented in the case file.

8. If a person is assigned to explain the notice to the parent or Native American custodian in the language that is best understood, the details of the assistance rendered must be documented in the case file.

## 705.6 American Indian/Alaska Native Parent or Indian Custodian Rights to Legal Counsel

### Major objectives:

The Child and Family Services caseworker will, at the earliest point in the case, advise the parents or Native American custodian of their right to court-appointed legal counsel.

### **Applicable Law**

25 U.S.C. §1912(b)

Pursuant to §1912(b) of ICWA, the court is mandated to appoint legal counsel for an indigent parent or Native American custodian in any removal, placement, or termination proceeding

### Practice Guidelines

- A. Inform the AI/AN parents or Native American custodian of the procedures that must be followed to have legal counsel appointed.
- B. The right to counsel applies in proceedings initiated by the state and those initiated by private parties, such as stepparent adoption proceedings and intrafamily disputes.
- C. The right to counsel also extends to pre-adoptive and adoptive placement preferences.

## 705.7 Jurisdiction

### Major objectives:

- A. In every case involving a Native American child, the Child and Family Services caseworker must routinely ask the child's Tribe whether the child is a ward of the Tribal court under any prior Tribal court proceedings.
- B. Once it is determined that a case is a child custody proceeding under ICWA and that the child is Native American, it must then be determined which court has jurisdiction.

### **Applicable Law**

25 U.S.C. §1911(a) and (d)

- A. Exclusive jurisdiction is vested with the Tribal court over any child custody proceeding involving a Native American child who:
  - 1. Resides or is domiciled within the reservation or is a ward of the Tribal court, regardless of the child's domicile.
  - 2. If an order establishing Tribal court wardship is currently in force, the state court must accord full faith and credit to any Tribal court orders, records, and judicial proceedings.

## Practice Guidelines

- A. Concurrent jurisdiction lies with the Tribal and state court when a child resides or is domiciled off the reservation and the child is not a ward of the Tribal court.
- B. A foster care placement or termination of parental rights proceeding may be transferred to Tribal court under §1911(b) of ICWA absent:
  - 1. The Tribal court's declination of the case.
  - 2. "Good cause" to the contrary.
  - 3. Objection by a parent.
- C. Some Tribes might decline jurisdiction due to limited resources (e.g., no Tribal court, or limited medical or mental health services). If a Tribe declines jurisdiction, Child and Family Services will still give notice to the Tribe.
- D. In every case involving an AI/AN child, the Child and Family Services caseworker will:
  - 1. Work closely with the Assistant Attorney General and Tribal Attorney to clarify initial jurisdiction.
  - 2. Ask the Tribal social worker early in the case whether the Tribe would like the jurisdiction to be transferred to their Tribal court.
  - 3. Work closely with the Tribal social worker, if the Tribe accepts transfer of the case, to coordinate appropriate legal documents required by the state court to effectuate the transfer and to make arrangements for the physical transfer and delivery of the child.
  - 4. Continue to involve the Tribal social worker, even when a Tribe declines transfer of a case. The Tribal social worker can play a significant role in the concurrent planning process for the long-term well-being of the child.

## **705.7.1 Transfer of Jurisdiction to an Indian Tribe with a Title IV-E Agreement**

### Major objectives:

It is important to provide essential documents and information to the Tribe that are necessary to continue an Indian child's eligibility under Title IV-E and Medicaid programs under Title XIX and provide for continuity of care when the child's case is transferred to Tribal jurisdiction where Title IV-E benefits can continue.

## Practice Guidelines

- A. In order to provide for the continuation of coverage, the Child and Family Services caseworker will work with the eligibility worker and the health care nurse to provide a packet with the following information to the Tribe:
1. The court order from the shelter hearing showing that continuation in the home from which the child was removed would be contrary to the welfare of the child or that reasonable efforts to prevent the removal of the child have been made.
  2. All documents related to the child's Title IV-E eligibility under sections 472 and 473 of the Social Security Act:
    - a. Relevant court orders.
    - b. Title IV-E/Medicaid application.
    - c. Determination forms.
    - d. Support documentation.
    - e. Birth certificate or other verification of citizenship.
    - f. Review documents.
    - g. Placement licensing information.
    - h. Federal benefits (SSA/SSI) information.
  3. All documents that the state has that relates to the child's IV-E eligibility or potential eligibility for other federal benefits such as death benefits, WIC, HeadStart and others.
  4. A copy of the current Child and Family Services Plan developed with the Child and Family Team, a list of the members of the Child and Family Team with contact information, and minutes from the Child and Family Team Meeting used to develop that plan.
  5. The Health Report from SAFE that includes all health care information about the child recorded by Child and Family Services.
  6. Any educational records of the child, including school enrollment information.
  7. Information on all placements that the child has had in the current out-of-home care episode including the most recent provider's contact information and a copy of their foster care license including the expiration date of the license.
- B. Once the packet is complete, the caseworker will contact the Tribal worker at the Tribe and notify him or her that the packet will be sent and confirm address information for the Tribal worker. The packet will then be sent to the Tribal worker.

## 705.8 Tribes' Right to Intervene

### Major objectives:

If the Tribe declines jurisdiction, the Tribe still will have the right to participate as an interested party or to intervene at any point in the proceeding.

### **Applicable Law**

25 U.S.C. §1911(c)

ICWA grants the Tribe the authority to intervene in any state court foster care placement or termination of parental rights proceeding "at any point in the proceedings."

## Practice Guidelines

- A. The Tribes should be encouraged to intervene early in the child custody proceeding.
- B. The right to intervene extends to voluntary as well as involuntary proceedings.
- C. If the Tribe intervenes, it is a party to the proceeding and has the same rights to notice of all hearings and assert its interest, the right of access to court records, the right to retain counsel if it chooses, the right to appeal, the right to present witnesses, to cross-examine witnesses, and to present other relevant evidence at the hearing.
- D. Tribal recommendations should be documented in the case file and court reports.

## **705.9      Transfer to Tribal Court**

### Major objectives:

Child and Family Services will advise parents or Native American custodian that ICWA allows the parent or Native American custodian or Native American Tribe to transfer the proceeding to Tribal court.

## **Applicable Law**

25 U.S.C. §1911(a) and (d)

- A. Exclusive jurisdiction is vested with the Tribal court over any child custody proceeding involving a Native American child who:
  - 1. Resides or is domiciled within the reservation or is a ward of the Tribal court, regardless of the child's domicile.
  - 2. If an order establishing Tribal court wardship is currently in force, the state court must accord full faith and credit to any Tribal court orders, records, and judicial proceedings.

## Practice Guidelines

- A. The state court must transfer, unless the Tribal court declines jurisdiction, either parent objects to such transfer, or if the court determines that good cause exists to deny the transfer.
- B. If the parent or Native American custodian requests, either orally or in writing, workers should recommend such a transfer. If not, the grounds on which the worker would oppose a transfer petition must be documented.
- C. If the Tribe requests, either orally or in writing, workers should recommend such a transfer. If not, the grounds on which the worker would oppose a transfer petition must be documented.

- D. If any party believes that good cause exists not to transfer the proceeding, they must document in writing their reasons for such belief in the case record and court file.
- E. Written statements must be distributed to all parties so that everybody has the opportunity to provide the court with their views.

## 705.10 Active Efforts Required to Prevent Family Breakup

### Major objectives:

- A. Child and Family Services will undertake active efforts to provide remedial services to the Native American family subsequent to an investigation and before a decision is made to place the child out of the home.
- B. The rehabilitative effort should take into account the prevailing social and cultural conditions and the way of life of the child's Tribe. These requirements are meant to assure that both evaluation of the problem and development of the treatment plan are culturally appropriate and not tainted by cultural bias.

### **Applicable Law**

Utah Code Ann. [§80-2-301](#). Division responsibilities.

### Practice Guidelines

- A. The Child and Family Services caseworker will offer the provisions of services of a remedial nature designed to rehabilitate and prevent the breakup of Native American families to the same extent that are available to non-Native American families when eligible.
- B. Prior to initiating a petition before a state court for foster care placement or termination of parental rights, the Child and Family Services caseworker will undertake active efforts to provide remedial services and rehabilitative programs to the family designed to prevent its breakup.
- C. In determining the type of remedial services that are appropriate, consider the following:
  - 1. Are the Native American child's or Native American parent's cultural values, beliefs, and religious practices tied to the child's Tribe?
  - 2. Does the Native American child or parent or Native American custodian maintain cultural ties to a Tribe?
  - 3. Is the Native American child or parent or Native American custodian willing to accept services provided by the Tribe or an organization such as an AI/AN cultural and/or service center?
  - 4. Is there an organization such as an AI/AN cultural and/or service center that can offer culturally appropriate services to Native American children and their families in close proximity to the Native American child, parent, or Native

- American custodian? Are these services designed to prevent removal or reunify Native American families?
5. Is the Native American child's Tribe able and willing to provide services that eliminate the risk factors that prevent the child from living safely at home?
  6. Is there a contract provider who has access to culturally American Indian programs and/or resources?
- D. To reduce the potential for cultural bias when evaluating home and family conditions and making decisions affecting Native American children and families, the Child and Family Services caseworker should involve the Tribe and Native American organizations at the earliest possible point of intervention.
- E. Services in the community specifically designed for Native American families are to be used where available, including resources of the extended family, the Tribe, urban Native American organizations, Tribal family service programs and individual Native American caregivers, e.g., medicine men or women, and other individual Tribal members who may have developed special skills that can be used to help the child's family succeed.
- F. In order to demonstrate that "active efforts" have been made, the Child and Family Services caseworker must assure that due consideration has been given to the cultural needs and values of the family and that resources have been diligently sought to provide family services.

## 705.11 Active Efforts Versus Reasonable Efforts

### Major objectives:

The Child and Family Services caseworker will extend to the American Indian/Alaska Native families an intense level of services to be sure to satisfy ICWA.

### **Applicable Law**

Utah Code Ann. [§80-2-301](#). Division responsibilities.

### Practice Guidelines

Definition of Active Efforts – Active efforts mean not just an identification of the problems or solutions, but efforts showing an active attempt to assist in bridging the gap.

- A. Do caseworkers consider cultural conditions and way of life of the child's Tribe and/or Native American community in making judgments about the family?
- B. Do caseworkers intervene only when supported by relevant, prevailing Native American social and cultural standards regarding intervention in familial relationships by non-family?



- C. Do caseworkers develop a case plan with assistance of parent/custodian that involves use of Tribal Native American community resources?
- D. Do caseworkers encourage maintenance of the child in his or her family except where physical or emotional harm may result?
- E. Do caseworkers involve the child, if of sufficient age, in the design and implementation of case plan?
- F. Do caseworkers provide time and resources to prevent family breakup in at least equal measure to time and resources provided to other families?
- G. Do caseworkers assist parents or custodian and child to maintain an ongoing familial relationship?

## 705.12 Termination of Parental Rights

### Major objectives:

Child and Family Services will recognize the unique nature of termination proceedings when AI/AN child is involved. Child and Family Services as petitioner must show the court by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Native American custodian is likely to result in serious emotional or physical damage to the child.

### **Applicable Law**

25 U.S.C. §1912(f)

The termination of parental rights standard set forth in 25 U.S.C. §1912(f) of ICWA requires evidence beyond a reasonable doubt.

### Practice Guidelines

- A. Only where the standard can be satisfied that serious emotional or physical damage is likely to result to the child would termination of parental rights be appropriate and adoption a potentially appropriate plan for the Native American child.
- B. The testimony of qualified expert witnesses is required by the ICWA.
- C. When the ICWA termination standard cannot be met, the permanency plan will need to provide for a different option (e.g., a long-term guardianship, a relative placement, or continued efforts at reunification).
- D. Where a parent is making progress toward reunification by the time of the 12-month hearing, it may be appropriate to continue reunification as the permanency goal.

- E. Any permanency plan developed for a Native American child that provides for out-of-home placement, including an adoptive placement, must comply with the placement preferences outlined in 25 U.S.C. §1915.
1. The child must be placed in a manner consistent with the foster/pre-adoptive placement preferences established by ICWA, which are:
    - a. Member of the child's extended family;
    - b. Foster home licensed, approved, or specified by the Native American child's Tribe;
    - c. Native American foster home licensed or approved by an authorized non-Native American; or
    - d. An institution for children approved by a Native American Tribe or operated by a Native American organization that has a program suitable to meet the child needs.
  2. In any adoptive placement, preference will be given, in absence of good cause to the contrary, to a placement with:
    - a. A member of the child's extended family;
    - b. Other members of the Native American child's Tribe; or
    - c. Other Native American families.

## 705.13 Qualified Native American Expert Witness

### Major objectives:

The Child and Family Services caseworker will enlist a qualified Native American expert witness who is experienced and knowledgeable about Indian culture, childrearing practices, and traditions to render an opinion as to whether a Native American child is suffering from some form of physical or emotional harm because of the behavior of the family.

### **Applicable Law**

25 U.S.C. §1912(e) and (f)

The testimony of qualified Native American expert witnesses is required by ICWA before a foster care placement or a termination of parental rights may be ordered.

### Practice Guidelines

- A. Child and Family Services caseworkers will:
1. Enlist the state ICWA specialist to serve as an expert witness or contact to help locate a qualified expert witness.
  2. Enlist the assistance of the Native American child's Tribe in locating persons qualified to serve as expert witnesses.
  3. Enlist the assistance of the closest Bureau of Indian Affairs area office in locating persons qualified to serve as expert witnesses.
  4. Contact official reservation Tribal organizations or urban Native American programs that serve children and families to locate potential expert witnesses.

- B. “Qualified expert witnesses” who are routinely relied on in ICWA hearings include:
1. A member of the Native American child’s Tribe who is recognized by the Tribal community as knowledgeable in Tribal customs as they pertain to family organization and child-rearing practices.
    - a. Medicine men;
    - b. Medicine women;
    - c. Tribal leaders;
    - d. Tribal ICWA specialist.
  2. A lay person having substantial education and experience in the area of his or her specialty along with substantial knowledge of prevailing social and cultural standards and childrearing practices within the Native American child’s Tribe.
    - a. Native American child welfare workers;
    - b. Day care workers;
    - c. Bureau of Indian Affairs resource: knowledge of customs and culture of Tribes they serve;
    - d. Tribal ICWA specialist;
    - e. State ICWA specialist.
  3. A professional person having substantial education and experience in the area of his or her specialty along with substantial knowledge of prevailing social and cultural standards and childbearing practices within the community.
    - a. Psychologists;
    - b. Psychiatrists;
    - c. Social workers;
    - d. State ICWA specialist.

## 705.14 Recognition of Tribal Licensing or Approval of Standards for Foster Homes

### Major objectives:

Child and Family Services will recognize full faith and credit of an Indian Tribe’s licensure of a Tribal foster home located on state lands and within Indian country.

### **Applicable Law**

Utah Code Ann. [§26B-2-129](#). Licensure of tribal foster homes.

25 U.S.C. §1901-1963

The ICWA provides that Tribes may develop and implement Tribal foster home standards. The office will continue to license Tribal foster homes according to standards developed and approved by the Tribe or the Tribe may develop their own Tribal licensing standards.

### Practice Guidelines

- A. If the Tribe has not developed their own licensing standards, the office will license Tribal foster homes pursuant to this chapter.

- B. Utah Foster Care currently recruits and trains Native American foster families and coordinates with Utah Tribes to increase recruitment efforts.

## 705.15 Higher Standards of Proof

### Major objectives:

Child and Family Services will recognize these higher standards and will seek to meet the standards when taking custody of an AI/AN child.

### **Applicable Law**

25 U.S.C. §1901-1963

ICWA mandates higher standards of proof in child custody proceedings involving AI/AN children than the state's requirements in those cases involving non-Native American children.

### Practice Guidelines

Through ICWA, Congress declared that a Native American child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or because it would be “in the best interests of the child” for him or her to live with someone else. Nor can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are “unfit parents.” It must be that it is dangerous for the child to remain in his or her present conditions.

## 705.16 Out-Of-Home Placement of Native American Children

### Major objectives:

Child and Family Services caseworkers will give preference to the foster and pre-adoptive placements, unless the Native American child's Tribe has established a different order of placement. The caseworker should also contact the Tribe to discuss Tribal placement preferences as early as possible in case development.

### **Applicable Law**

25 U.S.C. §1915(d)

The preferences and standards recognized are the prevailing social and cultural standards of the Native American community in which the parent or extended family resides or with which the parent or extended family maintains social and cultural ties.

NOTE: The significance of Native American community standards cannot be overemphasized. In enacting this provision Congress realized that even where a Native American child's bond to the parents or custodian is severed, state courts must make every effort to recognize and preserve the tie between the Native American child and the child's Tribe in order to protect the future and sustainability of the Tribe itself.

## Practice Guidelines - Documentation

Documentation in the case file should relate indications of the likelihood of serious emotional or physical damage to particular conditions in the home, showing a causal relationship between the conditions and the serious damage that is likely to result to the child.

- A. For example, it is not adequate to show that the parent abuses alcohol. It is necessary to show, because of alcohol abuse, the parent may cause emotional or physical damage to the child.
- B. In cases of placement, document the active efforts that were unsuccessful.
- C. The case record must document that before initiating court proceedings to remove a child, that:
  - a. The conduct or condition of the parent will result in serious physical or emotional harm to the child.
  - b. Efforts were made to counsel and change the parents' behavior, but they did not work.

## Practice Guidelines - Foster Care/Kinship And Adoptive Placements

- A. ICWA requires:
  - 1. The child must be placed in the least restrictive setting available, 25 U.S.C. §1915(b).
  - 2. The child must be placed in reasonable proximity to the child's permanent home, 25 U.S.C. §1915(b).
  - 3. Inquiry must be made of the child's Tribe regarding the Tribe's customary definition of extended family, 25 U.S.C. §1903(2).
- B. The child must be placed within the foster/pre-adoptive placement preferences established by ICWA, which are:
  - 1. Member of the child's extended family.
  - 2. Foster home licensed, approved, or specified by the Native American child's Tribe.
  - 3. Native American foster home licensed or approved by an authorized non- Native American.
  - 4. An institution for children approved by a Native American Tribe or operated by a Native American organization that has a program suitable to meet the child's needs.
- C. In any adoptive placement, preference will be given, in absence of good cause to the contrary, to a placement with:
  - 1. A member of the child's extended family.
  - 2. Other members of the Native American child's Tribe.
  - 3. Other Native American families.

- D. The Child and Family Services caseworker should:
1. Contact the Tribe to ask if they have a different placement preference than those set forth in ICWA.
  2. Ask the Tribal social worker about concurrent planning options early in the case.
  3. File appropriate documents to show that a diligent search was undertaken to follow ICWA's placement preference.
  4. Contact the Tribe's social service office for input.
  5. Establish contact with the child's extended family.
  6. Conduct a search of state and county lists of available Native American homes.
  7. Contact other Tribes and Native American organizations with available placement resources.
- E. Documentation that must be in the record.
1. If the placement is outside the preferences established by ICWA, the record must document the reason.
  2. If any party believes that good cause exists to place the child outside the placement preferences, the reasons for that belief must be documented in the record
  3. If there is a finding(s) in a court order of good cause to place a child outside the placement preferences of ICWA, the reasons must be documented in the record

## Practice Guidelines - Voluntary Placements and Adoptions

- A. ICWA applies to voluntary placements involving public and private agencies. For valid consent to be given, the following conditions must be met:
1. The child is over 10 days old.
  2. The consent is in writing and recorded before a judge.
  3. The consent is accompanied by the judge's certification that the terms and consequences of the consent were fully explained in detail and fully understood by the Native American parents or Native American custodian.
- B. §1913(b) of the ICWA grants a parent or Native American custodian the right to withdraw consent to the termination of parental rights prior to the entry of the final order of termination.
- C. Consent should be obtained from both parents. If not, the non-consenting parent's rights must be terminated involuntarily in accordance with ICWA.
- D. If the case involved an unwed father and the father sought to acknowledge or establish paternity, the state should acknowledge that paternity.
- E. The consent signed by the Native American parents or custodians should contain:
1. Name and birth date of child.
  2. Name of child's Tribe.
  3. Child's enrollment number or other indication of membership in the Tribe.

4. Name and address of consenting parents of Native American custodian.
5. Name and address of prospective parents, if known, for substitute care placements.
6. Name and address of person or agency through which placement was arranged, if any, for adoptive placements.
7. Parents' right to withdraw consent from termination and regain custody of child before entry of official order.
8. Parents'/Native American custodian's right to be notified if the adoption is set aside or vacated or otherwise unsuccessful and the right to petition court for custody.
9. A statement of the parents' right for parental consent to be signed in closed court.

## 705.17 Change of Placements

### Major objectives:

The Child and Family Services caseworker will notify the parent and/or Native American custodian and the child's Tribe in writing prior to a change in placement or before the foster family moves.

### **Applicable Law**

Utah Code Ann. [§80-2-301](#). Division responsibilities.

### Practice Guidelines

If an AI/AN child in a foster or pre-adoptive placement is to be moved from one placement setting to another or if the foster family moves (requiring a change in placement) the placement preferences will be followed, unless the child is returned to the parent or Native American custodian from whose custody the child was originally removed.

## 705.18 Records of Placement

### Major objectives:

Child and Family Services will maintain a written record of each placement of each Native American child and of the efforts to comply with the placement preferences established by ICWA.

### **Applicable Law**

Utah Code Ann. [§80-2-301](#). Division responsibilities.

### Practice Guidelines

- A. Written record of placement. This record will be maintained in SAFE, separate from the court report, and will contain, at a minimum, the petition or complaint, all substantive orders entered during the proceeding, and the complete record of the placement determination.



- B. Where the placement does not meet the preference priorities, the efforts to find suitable placement within those priorities will be recorded and documented in detail. Documentation will also be provided showing that the placement chosen is in the least restrictive setting possible, meets the child's special needs, and as much as possible, in cases of foster care placement, is close to the child's own home.
- C. At any time, upon the request of the Native American child's Tribe or the Department of the Interior, Child and Family Services will make available records of every foster care, pre-adoptive, and adoptive placement of each Native American child maintained by Child and Family Services.

## 705.19 Involuntary Adoptive Placements

### Major objectives:

Child and Family Services will observe the adoption preferences as indicated in ICWA.

### **Applicable Law**

25 U.S.C. §1915(a)

§1915(a) of the ICWA outlines the adoptive placement preferences:

1. A member of the child's extended family.
2. Other members of the Native American child's Tribe.
3. Other Native American families.

### Practice Guidelines

- A. The Tribe has the authority under §1915(c) to establish, by resolution, a different order of preference.
- B. The county/state or court effectuating the placement must follow the Tribe's alternate preference order as long as it is the least restrictive setting appropriate to the particular needs of the child.
- C. Where appropriate, the Native American child's preference or parents' preferences will be considered.
- D. Where a consenting parent requests anonymity, the court or state agency will give weight to the parent's request in applying the preferences.
- E. The Child and Family Services caseworker should contact the Tribe very early to ask if they have a different placement preference than those set forth in the ICWA.
- F. Documentation that must be in the record:
  1. If any party believes that good cause exists to place the child outside the placement preferences, the reasons for that belief must be documented in the record.

2. If there is a finding(s) in a court order of good cause to place a child outside the placement preferences of ICWA, the reasons must be documented in the record.

## 705.20 Disrupted Adoptive Placements

### Major objectives:

Child and Family Services will notify the Tribal authorities in the event of an adoption disruption.

### **Applicable Law**

25 U.S.C. §1912

The notice should include a statement of their right to return of their child and such petition should be supported by Child and Family Services unless it can be demonstrated that it is not in the child's best interest as defined by 25 U.S.C. §1912.

### Practice Guidelines

#### Documentation:

- A. Written records are to be maintained on each Native American child, separate from the court record, of all placements and efforts exerted to comply with required placement preferences provisions of ICWA.
- B. The record should contain:
  1. The petitions or complaint;
  2. All substantive orders entered;
  3. Complete record of placement determination.
- C. 25 U.S.C §1915(b) Upon request, the placement records will be made available to the Native American child's Tribe or the Secretary of the Interior.
- D. Where required placement preferences have not been followed, make sure efforts to find suitable placements within those priorities are documented in detail.

## 705.21 Confidentiality

### Major objectives:

Child and Family Services will make routinely available to the AI/AN parent or Native American custodian all reports or other documents that are filed with the court.

### **Applicable Law**

Utah Code Ann. [§80-2-301](#). Division responsibilities.

## Practice Guidelines

- A. The Child and Family Services caseworker should openly consult with the Tribal social worker to develop case planning.
- B. Child and Family Services will make available all relevant records to the Indian child's Tribe or Secretary of the Interior.
- C. Confidentiality and protection of children and adults should be considered and addressed when providing documents.

## **705.22 Full Faith and Credit for Public Acts, Records, and Judicial Proceedings of Tribes**

### Major objectives:

Child and Family Services will recognize its responsibility to give full faith and credit to the public acts, records, and judicial proceedings of any Native American Tribe with regard to Native American custody proceedings.

### **Applicable Law**

25 U.S.C. §1911(D)

The United States, every state, every territory or possession of the United States, and every Native American Tribe will give full faith and credit to the public acts, records, and judicial proceedings of any Native American Tribe applicable to Native American child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

## **705.23 ICWA Training**

### Major objectives:

Regions, contractors, and individual workers will receive on a regular and ongoing basis training regarding the intent and application of the ICWA. Child and Family Services will encourage other regular participants in the system to obtain or to participate in such training.

### **Applicable Law**

Utah Code Ann. [§80-2-301](#). Division responsibilities.

## Practice Guidelines

- A. The state ICWA specialist will set forth a format for training to improve the understanding of ICWA, which will provide a solid working knowledge of ICWA.
- B. The state ICWA specialist will coordinate with the state training coordinator to integrate/ICWA into existing and ongoing training for state employees.

- C. The state ICWA specialist will coordinate joint training and dialogue with state and Tribal child welfare agencies and court personnel to strengthen existing working relationships.