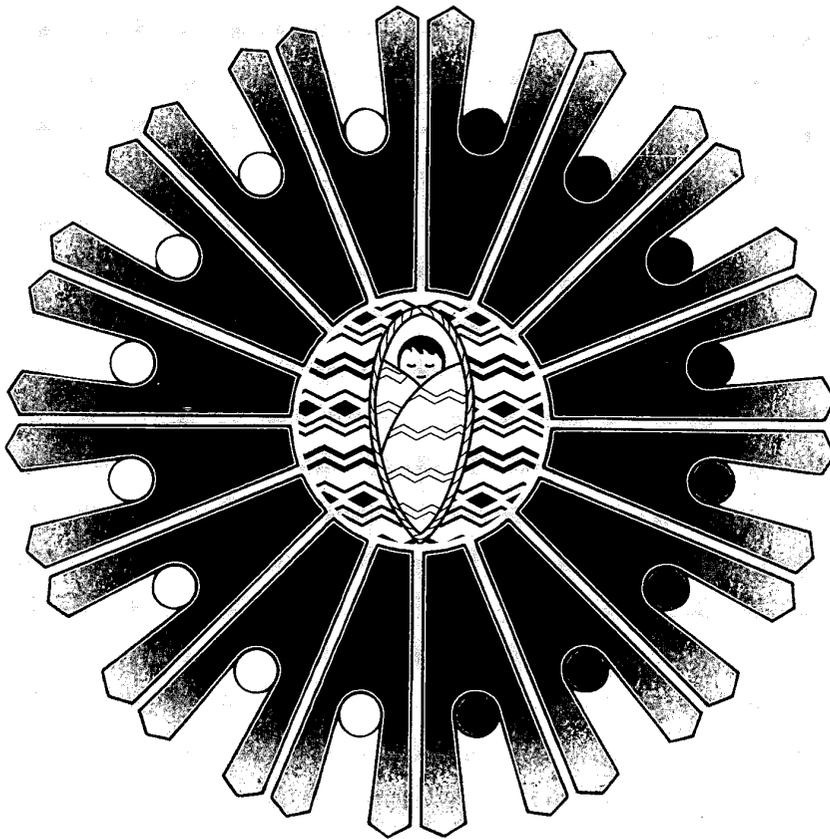




Access to Justice for Persons of Color:  
*Selected Guides and Programs for  
Improving Court Performance*

**The Indian Child Welfare Act:**  
*A Cultural and Legal Education Program*

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Access to Justice for Persons of Color:  
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Improving Court Performance*

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**The Indian Child Welfare Act:**  
*A Cultural and Legal Education Program*

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## *About the Cover*

The project logo, "Equal Justice," was designed by Seattle graphic artist Sekio Matsumoto. The original design on the cover of *Model Guide 1* depicts people of all races and ethnic backgrounds encircling "the scales of justice," with their arms raised in celebration. The shading and gradation of the colors represents a fusion of these diverse peoples into an indivisible whole, while still maintaining their individual identity. The balanced scales encircled by the people characterize one of the most fundamental principles of our society—*equal justice under law*.

The cover of this *Model Guide 4* illustrates a slight variation of the original logo design; an Indian child on a cradleboard is encircled by the people. Common to many American Indian cultures, the cradleboard has been a child-rearing aid for generations and is still used to transport, swaddle, and protect infants and toddlers. It is also the viewpoint from which many Indian children begin to learn about their cultures and traditions. Congress enacted the Indian Child Welfare Act to preserve Indian cultures and traditions, to prevent the unwarranted removal of Indian children from their homes, and to protect the parenting rights of Indian family networks, clans, and tribes. The cradleboard symbolizes the safekeeping that the Indian Child Welfare Act provides to Indian children and their tribes.

Not only has Mr. Matsumoto's design become a recognized symbol of efforts to promote equality and fairness in the justice system, it has received worldwide acceptance as an expression of diversity and inclusiveness. The design was originally conceived by Mr. Matsumoto in 1977 when he was asked by the American Baptist Churches, USA to demonstrate inclusiveness of a diverse racial, ethnic, and linguistic population in the national church membership. The Washington State Minority Justice Commission in 1994 asked Mr. Matsumoto if he could adapt his concept from a celebration of religion to a celebration of justice. The result was the "Equal Justice" version of the logo, which was virtually identical to its depiction on the cover of *Model Guide 1*. This adaptation was originally used for the *1994 Annual Report of the Washington State Minority and Justice Commission* and was later adapted again in 1995 by the *First National Conference on Eliminating Racial and Ethnic Bias in the Courts*. Most recently, the logo was adopted by the *National Consortium Monitor*, the newsletter of the *National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts*.

The copyright for the logo is held by the artist, who has given the National Center for State Courts permission for its use. The layout and design of the cover was done by graphic artist Hisako Sayers.

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## *Acknowledgments*

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The director appreciates the contributions made to this project by Windwalker Corporation of McLean, Virginia. Windwalker Corporation is a performance management and training consulting group specializing in the design, development, and evaluation of instructional materials and in program evaluation. For this project, Windwalker Corporation provided its curriculum design expertise to ensure an instructionally sound and user-friendly curriculum. Windwalker principals include Hallie L. Shilling, CEO; Barbara J. Waite, Executive Vice President; and Margaret H. Brooks, Associate.

## *Preface\**

Racial and ethnic bias have no place in the courts or anywhere in the justice system. Eliminating such bias and ensuring its absence is the keystone of equal justice. Eliminating bias involves not just dispensing with systems or procedures or letting go of individuals with a bad attitude, but including some affirmative steps and commitment of resources as well.

Eliminating bias from the courts and other aspects of the justice system is critical. This country and the rights and obligations of all who live here are defined by law—the Constitution and laws passed by Congress, states, and localities. If bias exists in the operation of this system for the enforcement and protection of rights, then a corruption exists that goes to the foundation of the nation. Therefore, this elimination of bias is not an exercise in political correctness; it is of fundamental and structural importance to the viability of our system of government.

Courts should undertake the exercise of self-examination to identify actual prejudice, discrimination, and those practices that appear discriminatory. This exercise is also salutary in and of itself. Effective outreach and a willingness to listen and self-examine bring people into the system and create a confidence in the interest, concern, and goodwill of the system. We must be ready to work together to redesign those aspects that have operated in a discriminatory, exclusionary, or otherwise unfair way. Equally important are the affirmative commitments of resources ranging from funds to time and energy, not just to eliminate the outcroppings of bias, but also to make justice equally available, fair, and impartial.

With so much of our effort to achieve a fair and just society, there is no ultimate right answer to the appropriateness of various initiatives under the Constitution or any philosophic or moral code. They are value choices for Americans to make. We, and those we represent in our local, state, and federal justice systems, must be energetic in devising ways to ensure that the individuals who comprise this pluralistic whole can effectively take advantage of the rights to which they are entitled. Those of us who in effect constitute our justice system, simply must have the judicial system, the most critical component of our democracy, respond to, and embrace the diversity of our country.

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\* This preface consists of excerpts from a luncheon address by Assistant Attorney General Eleanor D. Acheson entitled "The Importance of Eliminating Bias from Institutions of the Justice System in an Era of Challenges to Remedies for Inequality." Her address is published in the proceedings of *The First National Conference on Racial and Ethnic Bias in the Courts*, which are entitled *A New Paradigm for Fairness: The First National Conference on Eliminating Racial and Ethnic Bias in the Courts*. The proceedings were written by H. Clifton Grandy and were published in 1995 by the National Center for State Courts.

## *Foreword*

"Equal access" to justice is, in theory, a fundamental characteristic of the courts; however, in practice, "equal access" remains an aspiration for all court systems. The principle of equal access is much broader than the rights of litigants and defendants. Equal access includes access to employment opportunities as part of the court's staff or as a contract service provider to the court. Our nation's workforce is rapidly becoming more heterogeneous by race, ethnicity, gender, age, physical ability, religion, language, and educational background. State court judges and managers need to understand how this increasing diversity will present both opportunities and challenges to those who utilize the courts and those who are part of the judicial workforce.

While minorities are overrepresented in the justice system as defendants in criminal cases and as inmates in jails and prisons, they are underrepresented as judges, judicial appointees, and employees. This underrepresentation has been well documented by the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts and individual state commissions tasked with identifying and documenting racial and ethnic bias in the judicial branch. The commissions of Arizona, the District of Columbia, Florida, Massachusetts, Minnesota, New York, New Jersey, Oregon, and Washington State have addressed the underrepresentation of minorities in the work force. For example, the New York commission found that minority underrepresentation in the courts fueled the perceptions of minority communities that the judicial branch is biased.

In March 1994, the American Bar Association in cooperation with the National Bar Association, the Native American Bar Association, the National Asian Pacific American Bar Association, and the Hispanic National Bar Association convened a meeting to explore racial and ethnic bias in the American justice system, the *Summit on Racial and Ethnic Bias in the Justice System*. Thus, the need for the State Justice Institute-funded *First National Conference on Eliminating Racial and Ethnic Bias in the Courts* ("Conference"), which was held in March of 1995 in Albuquerque, New Mexico. For the first time in the history of the state courts, more than 425 justices, judges, court administrators, judicial educators, attorneys, and court users gathered to focus on strategies to eliminate racial and ethnic bias in the courts.

Finally, the *Conference* provided an opportunity for participants to network and exchange invaluable information to assist them in addressing racial and ethnic bias in their state's court system. Several major themes that can be addressed through diversity training emerged from the *Conference*. These themes included staying vigilant against bias through continuous self-examination of court operations, as well as reassessment of mechanisms for addressing the perception of and the existence of biased behaviors on the part of judicial and nonjudicial staff; managing court interpretation problems, which equates to fairness and equal access to justice for non-English speakers; protecting the rights of American Indians as sovereign nations and culturally distinct peoples who are guaranteed unique parental rights under the Indian Child Welfare Act; and mentoring persons of color to judicial service on the bench.

As the series title indicates, "Access to Justice for Persons of Color: *Selected Guides and Programs for Improving Court Performance*," the *Model Guides* are designed to address the above issues through the various programs contained under the following titles:

MODEL GUIDE 1

**A Total Approach to Diversity: *An Assessment and Curriculum Guide for State Courts***

MODEL GUIDE 2

**Bias in the Court! *Focusing on the Behavior of Judges, Lawyers, and Court Staff in Court Interactions***

MODEL GUIDE 3

**Managing Language Problems: *A Court Interpreting Education Program for Judges, Lawyers, and Court Managers***

MODEL GUIDE 4

**The Indian Child Welfare Act: *A Cultural and Legal Education Program***

MODEL GUIDE 5

**Judicial Mentoring: *Starting, Organizing, and Sustaining a Program for Mentoring Persons of Color to the Bench***



NANCY E. GIST

*Director*

*Bureau of Justice Assistance*

## *The Need for a Cultural and Legal Education Program on the Indian Child Welfare Act*

American Indians may share some social disadvantages with other minority groups, but their status in this country is unique in comparison to any other people.<sup>1</sup> While other minority groups generally pursue greater participation in mainstream America and its legal system, certain Native American people pursue goals of “self-governance, separate and apart from both the federal and state government, including the courts.”<sup>2</sup> Many tribes are sovereign nations that are formally recognized by state and federal governments. Their people and lands may have their own laws, jurisdictions, and judicial systems that are also recognized by federal and state courts.

It is important for judges, attorneys, and relevant social service agency personnel to understand that misconceptions about Indian culture, jurisdiction, and sovereignty could not only undermine their right to fair and equitable treatment in state courts, but may also violate the unique rights that are guaranteed American Indians by the Indian Child Welfare Act (ICWA).<sup>3</sup> In 1978, Congress enacted ICWA to stop the unwarranted removal of Indian children from their homes and to preserve the child-rearing rights and cultural traditions of tribes and their extended family networks. Congressional studies and hearings revealed that failure to recognize tribal sovereignty, ignorance of Indian culture and child-rearing traditions, and the cultural biases of state court judges, attorneys, and social service personnel were directly responsible for the high removal rates of Indian children from their families and tribes. For Native Americans, the fate of their continued existence as discrete cultures is inextricably intertwined with the future of their children and the viability of their extended family, clan, and tribal networks.<sup>4</sup> Before Congress enacted ICWA, some tribes faced certain extinction because non-Indian judges, attorneys, and social service personnel did not understand—and in many cases refused to recognize or give legal standing to—traditional Indian child-rearing roles and practices.

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<sup>1</sup> Many people believe the term “American Indians” is a pejorative, or is somewhat “politically incorrect.” This is untrue as many Native Americans prefer the cultural distinction that the term affords them. As part of the preliminary research for this project, I asked an American Indian colleague to share her personal insight with me regarding the “American Indian” versus “Native American” dialectic. She replied by asking me, “Where were you born?” “Brownsville, Texas” I replied. “Well,” she said, “You’re Native American.” I understood her perspective. I may refer to myself as “Native American” because of my place of birth, but I am not an “American Indian.” For her, the term “Native American” does not convey any distinction between an individual who was born in this country and another individual, such as her, who was also born here, but has been socialized according to the norms, values, and traditions of one of the more than 500 American Indian tribes and their unique cultures. Needless to say, I now prefer the term “American Indians” as a general term when referring to the original people of this land; however, I have an even greater preference for using tribal names such as Lakota, Sioux, Pomo, Nez Perce, or Navajo whenever appropriate. Despite my personal preference, there are other descriptive terms that are accepted by American Indians, including “Native Americans.” Therefore, the terms “Native Americans,” “American Indians,” “tribes,” “tribal members,” and “tribal people” are used in a variety of contexts in this *Guide* to refer to the indigenous people who have resided in this country for generations. The terms are mainly used for descriptive purposes and do not convey the fullness and diversity of indigenous people, culture, and identity.

<sup>2</sup> “Report of the New York State Judicial Commission on Minorities,” *Fordham Urban Law Journal*, vol. 19 (1992), p. 245.

<sup>3</sup> The acronym “ICWA” is commonly pronounced (ick-wa).

<sup>4</sup> B. J. Jones, *The Indian Child Welfare Act Handbook*, American Bar Association, 1995.

Unfortunately, ICWA generally is still not understood or is disregarded by juvenile and domestic judges, attorneys, and social service professionals. For example, Minnesota's task force on racial and ethnic bias in the courts lamented, "[D]espite the shift in philosophy ICWA helped engender, Minnesota's Native American children are being removed from their homes today at a rate 10 times greater than the rate at which white children are removed from their homes."<sup>5</sup> New York's commission noted similar problems, reporting that its judges were not following the procedures set forth in ICWA, including certain explicit requirements.

In 1992, Minnesota instituted its own proactive measures by adopting the federal regulations aimed at eliminating procedures and guidelines, "which clearly resulted in the disproportionate placement of Native American children outside their homes. . . . Minnesota incorporated the federal mandate by adopting the Minnesota Indian Family Preservation Act and enhanced the protection of the federal act by requiring earlier notification of tribal authorities and tribal social services when a Native American child is involved in juvenile court proceedings."<sup>6</sup> New York's commission pursued a different approach by requesting that the chief judge enjoin all state court judges to abide by all the provisions of ICWA and recommending the establishment of a system for monitoring proceedings involving Native American children to ensure full compliance with ICWA.

This *Model Guide* represents a renewed effort to promote education about the cultural and legal aspects of ICWA. This *Model Guide* will help raise the awareness of state court judges, attorneys, and relevant social service agency personnel about the legal consequences of ignorance of and biases against Native Americans and their child-rearing practices, as well as engender a sense of equity and fairness concerning their judicial needs.



**ROGER K. WARREN**

*President*

*The National Center for State Courts*

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<sup>5</sup> *Minnesota Supreme Court Task Force on Racial Bias in the Judicial System: Final Report*, 1993, p. 79.

<sup>6</sup> *Ibid.*, p. 80.



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**The Indian Child Welfare Act:**  
*A Cultural and Legal Education Program*

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# The Indian Child Welfare Act: A Cultural and Legal Education Program

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# The Indian Child Welfare Act: A Cultural and Legal Education Program

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## Instructor Preparation

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### Program at a Glance

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The purpose of *The Indian Child Welfare Act: A Cultural and Legal Education Program* is to:

- Increase awareness of the cultural and political issues that led to the enactment of the Indian Child Welfare Act (ICWA), and
- Improve understanding of the legal requirements of ICWA.

**Note to instructor:** Because policymaking regarding adoption, in general, and ICWA, in particular, is currently being reviewed, and in some instances debated, at both the state and federal level, it is critical that you research both current legislative developments and judicial decisions in your jurisdiction, state, and the Congress. This is essential for you to ensure that your information as it pertains to this *Guide* is current, accurate, and applicable to your state or jurisdiction.

**This Guide contains three modules.**

Module 1 addresses the circumstances and issues that led to the enactment of ICWA.

In Module 2 participants study the legal requirements of ICWA.

Module 3 contains information about recent legislative developments and judicial decisions that may affect ICWA.

The program timing is flexible. Module 2 is the longest module and will probably take two hours to present, including a fifteen-minute break. The amount of time for Module 1 and Module 3 depends on the depth of your discussions.

## **Objectives of the Program**

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Specifically, this program will enable participants to:

1. Explain the historical and political context of ICWA.
2. Describe the impact on Indian tribes and children of removing Indian children from their culture.
3. Identify differences between Indian and non-Indian child-rearing practices.
4. Apply ICWA's legal requirements.
5. Discuss recent changes and challenges to ICWA.

## **Preparation Activities**

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### **Things to Do**

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- Review this Faculty Guide.

The Faculty Guide leads you step-by-step through each module of the workshop. You may follow the script in the right column, or use the call-out notes in the left column. The script provides word-for-word guidance. The call-out notes provide cues.

Notes to the instructor appear in **bold font**. These notes give you information about the text and provide instructions about actions you should take (e.g., posting responses on the flip chart).

- Refer to the opening section of each module for additional preparation activities.



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# *Module 1*

## *The Indian Child Welfare Act: A Cultural Education Program*





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# Module 1. The Indian Child Welfare Act: A Cultural Education Program

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## Module at a Glance

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- Introduction
  - Icebreaker
- Historical, political, and cultural context of ICWA
- American Legal Culture vs. American Indian Culture
  - Video: *In the Best Interest of the Child*
  - Discussion: Contrasting child-rearing practices
- Module Conclusion

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## Objectives

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At the end of Module 1, participants will be able to:

1. Explain the historical, political, and cultural context of the Indian Child Welfare Act (ICWA).
2. Describe the impact on Indian tribes of removing Indian children.
3. Describe the impact on Indian children of removing them from their culture.
4. Identify and understand critical differences between Indian and non-Indian child-rearing practices.

## Preparation

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### Things You Need

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- Equipment**
- Flip chart (FC), markers, and masking tape
  - VCR and monitor
  - Overhead projector
  - Screen

- Instructor material**
- Faculty Guide, pp. 1-1 through 1-21.
  - Overheads (OHs) 1-1 through 1-4, located in Appendix A
  - Video: *In the Best Interest of the Child*

- Participant material**
- Handout (HO) 1-1: *Introduction*, located in Appendix B.
  - HO1-2: *The Worker and the Court*, located in Appendix C.

### Things to Do

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- Review pp. 1-1 through 1-21 of this Faculty Guide. Review the corresponding overheads located in Appendix A of this Faculty Guide.
- Read HO1-1: *Introduction*, located in Appendix B of this Faculty Guide.
- Read HO1-2: *The Worker and the Court*, located in Appendix C of this Faculty Guide.
- View the video: *In the Best Interest of the Child*
- Prepare FC1-1: Objectives (refer to page 1-5).
- Post warm-up questions on FC pages for the icebreaker (refer to pp. 1-5 and 1-6).

- Copy the overheads onto transparency paper. Camera-ready copies of the overheads are located in Appendix A of this Faculty Guide.
- Make copies of HO1-1: *Introduction*. This handout is located in Appendix B of this Faculty Guide.
- Make copies of HO1-2: *The Worker and the Court*. This handout is located in Appendix C of this Faculty Guide.

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## Instructor Notes

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The purpose of this module is to give participants a contextual understanding of the ICWA. This module will provide insight into Indian child-rearing practices, and will increase participants' awareness of the effects of removing Indian children from their cultures.

This module includes lectures, interactive discussions, and a video. The Faculty Guide provides step-by-step instructions for facilitating the module. To make this module as interactive as possible, encourage participants to share their insights and experiences throughout the discussion portions of the program.

**Note to instructor:** Because policymaking regarding adoption, in general, and ICWA, in particular, is currently being reviewed, and in some instances debated, at both the state and federal level, it is critical that you research both current legislative developments and judicial decisions in your jurisdiction, state, and the Congress. This is essential for you to ensure that your information as it pertains to this *Guide* is current, accurate, and applicable to your state or jurisdiction.

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## Introduction

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**Note to instructor:** **Begin the workshop by welcoming the participants. Introduce yourself by providing information about your background and experience.**

**State program purpose** The purpose of this program is to increase understanding of the ICWA, the historical, political, and cultural background which led to its enactment. We will also discuss the legal requirements of the Act and recent policymaking developments which may change these legal requirements. The program consists of three modules. In this module, we will focus on the issues that led to the Act. In Module 2, we will discuss the legal requirements of ICWA, and in Module 3 we will investigate recent challenges to ICWA.

**State that Module 1 discusses American Indian culture** In this module, you will learn about traditional American Indian family relationships. We will also discuss how misunderstanding of American Indian culture created the circumstances that led to the enactment of the ICWA.

**Explain why culture is important** It is important for judges, lawyers, social service personnel, and court staff to gain an understanding of Indian culture; their tribal, clan, and extended family relationships; and child-rearing practices. Without this understanding, court officers, legal advocates, and social service providers cannot weigh evidence, evaluate testimony, or render fully informed decisions in legal proceedings involving Indian children.

**Note to instructor:** Prepare FC1-1 before the workshop by posting the objectives shown below on a piece of flip chart paper. Tape the piece of paper to the wall so that during the program you can refer to it and point out when each objective has been met.

**Show FC1-1: Objectives**  
**State objectives**

Specifically, at the end of this module, you will be able to:

1. Explain the historical, political, and cultural context of the ICWA.
2. Describe the impact on Indian tribes of removing Indian children.
3. Describe the impact on Indian children of removing them from their culture.
4. Identify and understand critical differences between Indian and non-Indian child-rearing practices.

**Note to instructor:** There are more than 500 Indian tribes and bands in the United States. The generalizations of Indian people that are set forth in this *Guide* are for descriptive purposes and are meant to bring attention to the common plight of Indian tribes regarding the continued loss of their children. Although there are characteristics that some Indian tribes may share, each is distinct in cultural identity, traditional practices, or observance of kinship ties. You will state this caution to participants later in this module.

**Introduce warm-up questions**

Let's begin by talking briefly about your experience with the effect of cultural differences on legal proceedings.

## Icebreaker

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**Note to instructor:** Step-by-step instructions for conducting the icebreaker are listed below. Post the questions on separate pieces of flip chart paper before the program.

**Do not discuss the participants' answers. Just make a list of the issues they identify.**

**For each question, probe for responses from a representative sample of your audience (e.g., judges, attorneys, social service personnel, and court staff).**

**Ask Question 1** Based on your knowledge of American Indian culture, how do child-rearing practices differ from non-Indian child-rearing practices?

**Note to instructor:** Pause to allow participants to consider the question and respond. Record responses.

**If no one has any answers, mention the following:**

- Parenting
- Family orientation
- Accountability
- Correction

**State that we will discuss these differences in child-rearing practices later in this module.**

**Ask Question 2** What issues are likely to surface when people from different cultures come into the court system? If you have experience working with American Indian tribes, answer with respect to those cultures.

**Note to instructor:** **Pause to allow participants to consider the question and respond. Record responses.**

**Thank participants for input** Thank you all for your input. You have made some very good points and raised some important issues in response to these questions.

**Conclude icebreaker** Throughout the workshop today, we're going to come back to these questions and examine some of the points you've raised. I am going to post these flip chart pages on the wall so we can easily refer to them throughout the day.

**Note to instructor:** **Tape the pages FC to the wall so that you may return to and comment on the responses during the presentation. You may wish to mention some of the specific responses that you will be discussing in the workshop.**

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## **Historical, Political, and Cultural Context of ICWA**

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**Explain why context is important**

Studying the historical, political, and cultural context behind ICWA helps explain the reasons for and the importance of the Act. It also helps us to appreciate the difficulties that Indian families and tribes may encounter when they interact with the U.S. court system.

**State political relationship of tribes to the U.S. government**

Many Indian tribes have a unique relationship with the U.S. government. These tribes are recognized by state and federal governments as sovereign nations. This recognition is based primarily on treaty agreements between the various tribes and our government.

Tribes that have this relationship with the U.S. government may have their own laws, jurisdictions, and courts, all of which are recognized by state and federal judicial systems.

**Discuss history of U.S. policies**

Despite this relationship between tribes and the U.S. government, the government has adopted various policies to try to assimilate American Indians with the non-Indian world.

Assimilation policies have included:

- Land policies—where communal land ownership was ended and individual Indians were allotted land.
- Moral assimilation policies—where Indian children were removed from their homes and placed in boarding schools. These children were often denied the right to speak their native languages, practice their religion, or maintain contact with their families.

**Describe later state practices of removal of children**

After the expiration of this moral assimilation policy, Indian families still dealt with the unwarranted removal of their children from their homes at an alarming rate. In the majority of these cases, Indian children were removed from their families without a modicum of due process. Congress documented that many state social service workers pressured Indian families to sign away custody of their children under threat of losing welfare benefits.

Many Indian families lost their children in court proceedings where they were not represented by counsel. Still others who could not speak or understand English—only their tribal languages—lost their children in proceedings where no court interpreter was present to bridge the communication gap between them and the court. In these and other similar circumstances, state courts based their decisions on the recommendations of social service personnel who sought the removal of the children.

Unfortunately, most of these social workers were non-Indians who also held strong biases against Indian child-rearing practices.

In some states, by the time ICWA was enacted, from 25 percent to 35 percent of all Indian children had been placed in foster care, usually in non-Indian homes. Another 1969 survey of sixteen states reported that 85 percent of Native American children living in foster homes were cared for by non-Indian parents.<sup>1</sup>

**Discuss “neglect” as cause  
for removal**

According to Congress, an overwhelming majority of these decisions cited neglect as the reason for the removal of an Indian child. Often, the use of the term neglect had more to do with the application of non-Indian standards to Indian families, and a lack of understanding of the cultural differences in Indian child-rearing practices. The basis for these decisions is actually a form of bias referred to as “cultural relativism”—considering one’s own cultural norms and values as superior to another group’s.

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<sup>1</sup> B. J. Jones, *The Indian Child Welfare Act Handbook*, 1995, ABA.

**Discuss the result of the removal of Indian children**

As a result of years of removal of many Indian children from their homes, there was an important break in the transmission of cultural identity from Indian families to their children.

Parents were unable to instill traditional values and customs into their children. This created a threat to survival of many tribes, some of whom faced the possible extinction of their cultures and traditions.

**Cite the role of state courts and institutions in removals**

Congress found that state courts and social service institutions played a substantial role in the unwarranted removal of Indian children because of ignorance of cultural mores. ICWA is an attempt to return the role of raising Indian children to Indian families.

**Transition**

Next, we will take a look at the type of conflicts that arise between American Indian cultures and the American legal culture.

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**American Legal Culture vs. American Indian Culture**

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**Describe American legal system as culture**

We can characterize the American judicial system as a particular culture. The norms, values, customs, ideals, and rules that serve as the foundation of our legal system also govern the behavior of judges, attorneys, social service personnel, and court staff.

One fundamental principle of our legal culture is that all people receive equal justice, regardless of racial, ethnic, or gender identity. Public trust and confidence in this principle is crucial to the survival of our legal system. The American legal system survives because of this trust, and the confidence that this principle is upheld in both the letter and practice of the law.

**Describe ICWA as a cultural contradiction**

ICWA seems to contradict this most fundamental principle of the legal culture because it requires state court judges to apply different standards and guidelines to proceedings that involve Indian children.

To some, ICWA seems to provide a greater level of protection and rights to Indian parents and tribes than non-Indians in child custody proceedings. However, ICWA is not a race-based law. It is based on the unique treaty relationships that exist between Indian tribes and the U.S. government.

It is important for judges, attorneys, social service personnel, and court staff to understand that this cultural contradiction is the law. To properly apply ICWA, we must increase our awareness of Indian cultures, traditions, and kinship ties.

**Transition to video**

Next we are going to watch a video that dramatizes the impact of removing Indian children from their tribes and families.

**Video: *In the Best Interest of the Child***

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**Provide background** The video we are going to watch is entitled *In the Best Interest of the Child*. It was produced by Shenandoah Film Productions of Arcata, California, which is an Indian-owned enterprise.

**Overview video content** In the video, a state court decision leads to an Indian child's removal from his home. He is placed in a middle class, non-Indian environment. Excerpts from interviews with individuals whose lives were affected by similar decisions add to the authenticity of the film.

**Note to instructor:** **Post the bulleted issues, below, on a piece of flip chart paper.**

**Give viewing tips** As you watch the video, think about the following issues:

- Potential impact on Indian children of removing them from their culture.
- Impact on the tribes and on the cultures of removing children.
- Differences in Indian and non-Indian child-rearing practices.

**Announce video** I am going to start the video now. We will have time for comment and discussion afterwards about these issues.

**Note to instructor:** **Start the video. It is 20 minutes long.**

**Note to instructor:** **After the video, use the discussion questions below to encourage comments and feedback. Keep participants focused on the substance of the video rather than the acting, directing, or editing.**

**The video provides information about some of the legal requirements of ICWA. Tell participants that we will discuss the legal aspects in detail in the next module.**

**Debrief the video**

What did you learn about the necessity for ICWA from the video?

- What are some of the effects of removing Indian children from their culture?

Possible answers:

- Children who are separated from their heritage may experience feelings of alienation, loss of personal and cultural identity, and low self-esteem during adolescence, which they are likely to carry into adulthood.
  - Children do not learn about their cultures, so they cannot pass these traditions on to their children.
  - When they return to their tribes, they have difficulty adjusting.
  - One interviewee stated that he felt like a second-rate citizen in a foreign home.
  - Children lose family support and structure.
- What are the impacts on tribes and Indian cultures of removing their children?

Possible answers:

- Removing children causes a break in the transmission of cultural identity, which may lead to the extinction of some Indian customs and values.

- Tribes lose their greatest resource: their children.
- What cultural differences did the video portray?
  - Grandparents play a more active role in raising children.
  - Importance of extended family.

**Ask for questions or comments** Are there any further questions or comments about the video?

**Note to instructor:** **If participants have additional insights, allow discussion to continue for two or three minutes. Do not allow the conversation to drift offtrack.**

**Transition** Now we're going to examine some specific cultural differences between Indian child-rearing practices and non-Indian practices. This is important for evaluating the testimony of social service personnel and qualified expert witnesses.

### **Contrasting Child-rearing Practices**

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**Introduce discussion** There are more than 500 Indian tribes and bands in the U.S. It would be impossible to generalize about the customs and child-rearing techniques of all of these tribes, just as it would be impossible to generalize about non-Indian communities; however, there are certain traditional practices that seem to be common among many tribes.

**List practices that you  
will discuss**

The practices that we are going to discuss are:

- Parenting
- Family orientation
- Accountability
- Correction

**Show OH1-1: Parenting  
Discuss differences in parental  
roles**

In the non-Indian community, parents assume the primary responsibility for raising their children, unless they are physically or emotionally unable to do so.

In many Indian communities, however, parents do not take primary responsibility for raising their children. Parents are merely part of a child's extended family. All members of the extended family share responsibility for raising the children.

Many tribal courts do not presume that a natural parent is entitled to custody of a child. Grandparents are often considered more appropriate guardians of Indian children.

This common practice explains why ICWA provides certain rights to Indian custodians. In many cases, ICWA gives Indian custodians the same rights as natural parents. We will discuss the rights of Indian custodians in more detail in the next module.

**Show OH1-2:  
Family Orientation**

**Discuss differences in  
family orientation**

Many non-Indian communities do not place the same importance on the role of the extended family as the Indian community does.

The extended family is of paramount importance in the Indian community. It is not unusual for Indians to know every person to whom their grandparents are related, even through marriage. Many elderly Indian people will never use a person's name when talking to or about them. Instead, they refer to an individual by his or her relationship title. For example, grandmothers refer to a small child as "grandchild," or to an "in-law" by a relationship name rather than a personal name.

**Discuss *Means v. Davis***

The Navajo Supreme Court's decision in *Means vs. Davis* contains a discussion of why the knowledge of extended family members is so important. The court noted that the knowledge of one's extended family is necessary both to fulfill one's responsibilities to the family and to prevent one from violating cultural taboos.

**Provide example of Navajo  
peacemaking process**

In the traditional Navajo peacemaking process, the extended family plays a primary role in resolving conflicts. In a dispute between a married couple, the extended families of the spouses work together to resolve the conflict. After consensus is reached on how to resolve the problem, the spouses' respective family members help to support and reinforce the settlement.

**State why it is important  
to understand family orientation**

Understanding clan and extended family ties of certain tribes is also critical to affording due process to Indian families and their children in legal proceedings.

**Provide example**

For example, the term “grandmother” is often used to describe great-aunts or other elder female family members, some of whom are not related by blood to the child. Consider how this might affect cases that involve minor children charged with committing delinquent acts. It is not uncommon for several elderly Indian women to introduce themselves as the grandmother of the same juvenile defendant. They may visit the court or attorney’s office to inquire about the progress of the juvenile’s case. If an attorney refuses to speak to these extended family members, invoking the attorney-client privilege, it invariably creates a rift and the family will likely remove the attorney.

**Show OH1-3: Accountability  
Discuss accountability**

Ingrained in American legal culture is the assumption that a person is individually responsible for his or her actions and should be judged and punished accordingly. In non-Indian communities, parents teach communal responsibility to their children. No other value is more important as children mature and assume careers and families of their own.

Indian people are traditionally communal. As such, the survival of the tribe depends on all members performing their particular role in support of the tribe, its clan relationships, and extended kinship and families ties. The behavior of the individual enhances, supports, or diminishes all of these relationships and the entire tribe.

**Provide example of *Ex Parte***

***Crow Dog***

A famous U.S. Supreme Court case provides an example of this difference in world view. The case is *Ex Parte Crow Dog*. Crow Dog was a leader of the Teton Lakota. The Teton Lakota were a tribal people who relied upon the buffalo hunt to support their economy. The loss of one person affects the entire tribe in this type of society.

Crow Dog killed another leader, Spotted Tail, during a dispute. Instead of punishing Crow Dog, the Teton Lakota resolved that he should be responsible for supporting the family of Spotted Tail by hunting and providing for that family. This would serve the collective whole better than removing Crow Dog from the tribe by imprisoning him.

**Note to instructor:**

**You may wish to mention that this case led to the enactment of the Major Crimes Act. This act permits federal prosecution of Indians who commit certain crimes on Indian reservations. The U.S. government decided against the indigenous legal perspective and attempted to prosecute Crow Dog in federal court. The Supreme Court held that the Indian tribes were left to their own customs and traditions for the punishment of Indian violators and the federal court had no inherent or statutory right to intervene. Congress then enacted the Major Crimes Act.**

**Show OH1-4: Correction**

**Discuss correction**

The final practice that we will discuss is correction. In many non-Indian communities, corporal punishment is an acceptable method of disciplining children.

In Indian communities, storytelling is used to discipline, teach, and reinforce values in children. For example, “Iktomi the Trickster” is a common subject of many stories told to Indian children in the Northern Plains. In these stories, Iktomi is an animal or insect who attempts to cause mischief by tricking others into accepting his point of view. Invariably, Iktomi’s way leads down the wrong path to an end which is harmful to a child or the child’s family.

Every family had at least one storykeeper whose role was to discipline the children by reinforcing values through the telling of tales through characters like “Iktomi the Trickster.”

**Note to instructor:** **If time allows, ask participants to share their knowledge of any other cultural differences in child-rearing practices.**

**Mention *Waterlilly* as a resource**

We have discussed some of the differences between Indian and non-Indian child-rearing practices. The traditions we discussed, as well as other traditions, are described in the novel *Waterlilly*, by Ella Cara Deloria, who is a Standing Rock Sioux. The book is set in the mid-1800s when the Lakota Sioux culture was flourishing. It describes a woman’s life from infancy to old age.

**Restate importance of understanding Indian culture**

It is important for judges, lawyers, social service personnel, and court staff to understand Indian culture and child-rearing practices. This understanding will help us in evaluating the testimony of child welfare workers and qualified expert witnesses in complying with ICWA.

## Module Conclusion

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**Summarize learning** In this module we have discussed:

- The historical, political, and cultural circumstances that led to the enactment of ICWA.
- The effect on Indian tribes and children of removing Indian children from their culture.
- Cultural differences in Indian and non-Indian child-rearing practices.

**Describe HO1-1: *Introduction*** To conclude this module, I am going to distribute an article that provides additional insight into the reasons for and the importance of ICWA. The article was written by Lizbeth Gonzalez, who is an attorney and Director of Legal Services for the American Indian Law Alliance. Her article includes practical suggestions for judges and lawyers.

**Note to instructor:** **Distribute HO1-1: *Introduction*. The handout is located in Appendix B of this Faculty Guide. Make enough copies for all participants before the program begins.**

**Allow five to ten minutes for participants to read the article.**

**Debrief HO1-1** What did you think about the article?

- What did you think about the suggestions Ms. Gonzalez included?
- Does anyone have any additional suggestions for determining whether litigants are Indian?

**Introduce HO1-2: *The Worker and the Court***

I am going to distribute one more article to you. This article will provide you with insight about how Indian child welfare workers work with their clients and with the court. This insight will assist you in evaluating testimony and in working with Indian litigants.

**Note to instructor:** **Distribute HO1-2: *The Worker and the Court*. This handout is located in Appendix C of this Faculty Guide. Make enough copies for all participants before the program begins.**

**If you have time, allow five to ten minutes for participants to read the article. If you do not have time, ask participants to read the article during a break or when they return to their place of work.**

**Ask for questions** Are there any questions about what we have discussed in this module?

**Note to instructor:** **Listen and respond to questions.**

**Transition** Now that we have an understanding of the cultural aspects of ICWA, we are going to discuss the legal requirements of ICWA.



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## ***Module 2***

### ***The Indian Child Welfare Act: A Legal Education Program***





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## **Module 2. The Indian Child Welfare Act: A Legal Education Program**

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### **Module at a Glance**

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- Introduction
- Objectives of the Indian Child Welfare Act (ICWA)
- Sources of ICWA Law
- Applying ICWA
- ICWA Placement Requirements
- ICWA Procedural Requirements
- ICWA Requirements for Voluntary Proceedings
- Module Conclusion

### **Objectives**

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At the end of this module, participants will be able to:

1. Identify the objectives of ICWA.
2. Describe the sources of ICWA law.
3. Identify when and to whom ICWA applies.
4. Explain ICWA placement requirements.
5. Define ICWA's procedural requirements.
6. State ICWA requirements on voluntary proceedings.

## Preparation

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### Things You Need

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- |                             |   |
|-----------------------------|---|
| <b>Equipment</b>            | <input type="checkbox"/> Overhead projector and screen  |
|                             | <input type="checkbox"/> Flip chart (FC), markers, and tape   |
| <b>Instructor material</b>  | <input type="checkbox"/> Faculty Guide, pp. 2-1 through 2-42.   |
|                             | <input type="checkbox"/> Overheads (OHs) 2-1 through 2-25. Refer to Appendix D of this Faculty Guide for copies of the overheads. |
| <b>Participant material</b> | <input type="checkbox"/> Handout (HO) 2-1: <i>The Indian Child Welfare Act</i>  |
|                             | <input type="checkbox"/> Overhead packet (optional)   |

### Things to Do

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- Review pp. 2-1 through 2-42 of this Faculty Guide. Review the corresponding overheads located in Appendix D.
- Read HO2-1: *The Indian Child Welfare Act*, located in Appendix E of this Faculty Guide
- Make copies of HO2-1: *The Indian Child Welfare Act*. You will distribute this handout to participants at the end of the module.
- Prepare FC2-1: Objectives (refer to page 2-4).
- Copy the overheads onto transparency paper. Camera-ready copies of the overheads are contained in Appendix D of this Faculty Guide.
- Copy a set of overheads for each participant (optional).

## Instructor Notes

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This module is a lecture about the legal requirements of the ICWA. This Faculty Guide provides step-by-step instructions for delivering the lecture.

The lecture is based on the article *The Indian Child Welfare Act*, by B. J. Jones.<sup>1</sup> The article is contained in Appendix E of this Faculty Guide. Make copies of the article to distribute to participants at the end of the module.

You may wish to copy a set of overheads for each participant. An overhead packet enables participants to follow more closely during the lecture and provides them with a memory aid to take back to their court. Distribute the packets at the beginning of the module. You may suggest that participants take notes on their set of overheads. Overheads are located in Appendix D of this Faculty Guide.

**Note to instructor:** Because policymaking regarding adoption, in general, and ICWA, in particular, is currently being reviewed, and in some instances debated, at both the state and federal level, it is critical that you research both current legislative developments and judicial decisions in your jurisdiction, state, and the Congress. This is essential for you to ensure that your information as it pertains to this *Guide* is current, accurate, and applicable to your state or jurisdiction.

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<sup>1</sup> B.J. Jones, "The Indian Child Welfare Act: The Need for a Separate Law," *The Compleat Lawyer*, Volume 12, Number 4, Fall 1995. Adapted for use by permission of the author.

## Introduction

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**Provide overview** The ICWA was adopted by Congress in 1978. It applies to child custody proceedings in state courts that involve Indian children. ICWA's provisions are different from the procedural and substantive laws that govern child custody proceedings in most states.

**State purpose of the module** In this module, we are going to discuss the legal requirements of ICWA. It is important to note from the start that there are many nuances to this law. We are going to keep focused on the big picture in order to gain an understanding of the major points.

**Note to instructor:** **Prepare FC2-1 before the workshop by posting the objectives shown below on a piece of flip chart paper. Tape the piece of paper to the wall so that you can refer to it and point out when you have met each objective.**

**Show FC2-1: Objectives**  
**State objectives**

Specifically, during this module, we will:

1. Identify the objectives of ICWA.
2. Describe the sources of ICWA law.
3. Identify when and to whom ICWA applies.
4. Explain ICWA's placement requirements.
5. Define ICWA's procedural requirements.
6. State ICWA's requirements on voluntary proceedings.

**Note to instructor: Distribute the overhead packets (optional).**

**Discuss overhead packets** I am distributing a set of the overheads to each of you. Our discussion will follow these overheads. You may take your copy back with you to use as a memory aid and to distribute to your co-workers who could not attend this session.

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## **Objectives of ICWA**

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**Show OH2-1: Objectives of ICWA**

**Note to instructor: Cover OH2-1 with a sheet of plain paper. Uncover each point as you discuss it.**

**Introduce the discussion on the objectives of ICWA**

Congress enacted ICWA to achieve four principal objectives.

**Preventing the unwarranted removal of Indian children**

The first objective of ICWA is to prevent the unwarranted removal of Indian children from their homes based on vague or subjective premises.

**Describe evidentiary requirements of ICWA**

ICWA requires that a party seeking to remove an Indian child from his or her home show clear and convincing evidence that continued custody would result in serious physical or emotional damage to the child.

This evidence must be supported by the testimony of a person with some knowledge of Indian child-rearing traditions. We will discuss this requirement and the burden of proof later in this module.

**Preserving viability and cultural integrity**

The second objective of ICWA is to preserve the viability and cultural integrity of tribes.

Congress heard testimony from experts who demonstrated that the continued removal of Indian children from their homes was a serious threat to their traditions and culture. In some states, the rates of removal of Indian children were so alarmingly high that some tribes were in danger of extinction.

Based on these studies, ICWA requires that if a child must be removed from his home, he must not be removed from his culture. An Indian child must be placed within his or her own extended family, tribe, or culture. This protects the child's tie to his tribe and vice versa.

**Maximize tribal court decision-making authority**

The third objective of ICWA is to maximize tribal court decision-making authority.

**Describe how ICWA maximizes tribal court authority**

ICWA maximizes tribal decision-making authority in cases involving Indian children by allowing these cases to be transferred back to the tribal court and by allowing tribes to participate in state court proceedings. We will discuss these requirements in more detail later in the module.

**Affirms tribal capacity to provide services to members**

The fourth objective of ICWA is to enhance tribal capacity to provide child welfare services to their members.

**Describe how ICWA affirms tribal capacity to provide services to members**

When domestic relations and child welfare cases are referred back to tribal courts, or tribal members are allowed to participate in state court proceedings, tribal judges and court staff can ensure that tribal members are referred to social service providers who are familiar with their cultural needs. Services such as counseling, early intervention and prevention programs, or mental health and substance abuse treatment are likely to be more culturally relevant and effective when provided by tribal agencies or members.

**Summarize the section**

So, now you have an overview of the objectives of ICWA and how Congress envisioned ICWA meeting those objectives.

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## **Sources of ICWA Law**

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**Explain federal government authority with respect to ICWA**

You may be wondering how the federal government can dictate to state courts and lawmakers in the domestic relations area, which is traditionally relegated to states.

**Ask if anyone can cite the federal government's authority**

Does anyone know by what authority the federal government can enact a law such as ICWA?

**Note to instructor:**

**Pause to allow participants to think and respond. It is likely that participants will mention some of the points you will cover in this section. If some of these points are mentioned by participants, acknowledge their contribution when you discuss those points.**

**Provide answer** Under the United States Constitution, the federal government has the exclusive authority to regulate Indian affairs. This includes legislating to protect Indian families.

**Show OH2-2: Indian Law as a Basis for ICWA**

**Discuss tribes as sovereign nations**

Federal court decisions have recognized Indian tribes as sovereign nations with unique political relationships with the United States. Often, but not always, these decisions were the result of treaty agreements between tribes and state and federal governments.

**Explain trust responsibility of the federal government**

Because of these federal court decisions, the United States has an obligation, often referred to as a trust responsibility, to protect Indian nations:

This relationship is the basis for ICWA and explains why the definition of “Indian child” under ICWA is always tied into the child’s tribal affiliation. Otherwise, it would be a race-based law and probably unconstitutional.

**Discuss tribes’ authority to regulate domestic affairs**

Because they are sovereign nations, Indian tribes possess the inherent authority to enact their own domestic relations laws and to apply them to their members.

**Introduce discussion of the sources of ICWA law**

ICWA was designed to apply uniformly nationwide. In practice, this has not happened, so each state court should be aware of the state court decisions in that particular jurisdiction. Judges need to know where to look to find the governing law on the ICWA.

**Show OH2-3: Sources of  
ICWA law**

This slide lists the sources of ICWA law.

**Review the sources of ICWA law**

First, look to Federal Statute-25 U.S.C. 1901 *et seq.*

**Mention BIA guidelines**

The Bureau of Indian Affairs (BIA) guidelines do not have the effect of federal regulations. They are merely guidelines for state courts to follow unless the state court concludes that they are inconsistent with the federal statute.

**Mention BIA regulations**

There are also BIA regulations that govern a variety of issues relating to the application of ICWA and other laws affecting Indian tribes, including funding for tribes and tribal organizations.

**Mention state statutes and  
regulations**

Some states have separate state laws implementing ICWA. Sometimes, state laws are more protective of Indian parents' and tribes' rights than the federal law.

**Provide examples**

For example, the states of Minnesota and Washington define an Indian child as any child eligible for membership in a tribe. Other states may give special status to Canadian Indians even though these children are not considered Indian children under ICWA. Michigan is a state that does this.

**Mention case law**

Finally, there are numerous legal decisions regarding ICWA, including one from the United States Supreme Court.

**Ask for questions**

Before, we look at that decision, does anyone have any questions about what we have discussed up to this point?

**Note to instructor:** Listen and respond to questions. Be careful not to let the discussion drift into nuances of ICWA. If someone asks a detailed question, speak with that person at a break.

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## Applying ICWA

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### Show OH2-4: Required Findings for Application of ICWA

#### Discuss required findings

In order for ICWA to apply, a state court must find that the proceeding:

1. Is a “child custody proceeding” that
2. Involves an “Indian child.”

#### Discuss terms

“Child custody proceeding” and “Indian child” are terms of art defined under federal law at 25 U.S.C. 1903(1) and (4), respectively.

#### Transition to next slide

We are going to discuss these definitions in more detail and give examples of some of the proceedings covered and not covered by ICWA. First, let’s discuss how ICWA applies to child custody proceedings.

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## Child Custody Proceedings

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### Cite provisions for voluntary and involuntary child custody

ICWA has provisions that are applicable to both voluntary child custody proceedings and involuntary child custody proceedings. See 25 U.S.C. 1912 for involuntary and 1913 for voluntary.

### Introduce discussion of child custody proceedings

There are four separate types of child custody proceedings to which ICWA applies.

**Show OH2-5: Child Custody  
Proceedings**

**Note to instructor:** **Cover OH2-5 with a sheet of plain paper.  
Uncover each point as you discuss it.**

**Define “foster care placements”**

ICWA applies to foster care placements. A foster care placement is the temporary removal of an Indian child from his parent or Indian custodian for placement in a foster home, institution, or home of a guardian.

The parent or Indian custodian cannot regain custody upon demand. This type of proceeding may be either voluntary or involuntary.

**Cite statutory reference**

See 25 U.S.C. 1903(1).

**Discuss termination of  
parental rights**

The second type of proceeding to which ICWA applies is any legal action that results in the termination of parental rights.

In determining whether ICWA applies, consider the relief being sought by the petitioning party. It does not matter what the grounds of the petition are. For example, it could be the criminal actions of the Indian child.

As with foster care placements, ICWA governs voluntary petitions for the termination of parental rights as well as involuntary ones.

**Mention adoption actions**

Another example of termination of parental rights governed by ICWA is an adoption action where the petitioning party is contending that the consent of a natural parent is not necessary because of abandonment.

**Discuss preadoptive and adoptive placements**

The last two types of proceedings are placement proceedings after parental rights have been terminated.

**Define “preadoptive placement”**

Preadoptive placements are placements made after termination of parental rights, but not in contemplation of adoption.

**Define “adoptive placement”**

Adoptive placements are proceedings that lead to the adoption of a child. ICWA imposes an obligation on both public and private adoption agencies to comply with its provisions.

**Show OH2-6: Examples of ICWA proceedings**

This slide shows some specific examples of ICWA proceedings that fall under the four categories we just discussed.

**Note to instructor:**

**Pause for participants to view the points on OH2-6. Ask if participants are ready to continue.**

**Introduce examples of when ICWA does not apply**

Now let’s look at some examples of child custody proceedings to which ICWA does not apply.

**Show OH2-7: Proceedings to Which ICWA Does Not Apply**

**Discuss custody disputes**

The statute states that ICWA shall not apply to a custody dispute between parents in a divorce proceeding. Legislative history makes it clear that this exclusion extends to custody disputes between the parents of an Indian child born out of wedlock.

**Mention paternity/child support**

ICWA does not apply to paternity or child support actions between the parents of an Indian child.

**Discuss delinquency proceedings** ICWA does not apply to placements made as the result of the Indian child committing an act that would be a crime if committed by an adult.

**Discuss exceptions** The exceptions to this are:

- If the state seeks termination of parental rights, or
- If the basis for the delinquency petition are activities that are not criminal in nature, such as truancy, unruly child, and alcohol offenses.

In these exceptions, ICWA does apply.

**Describe cases that begin as delinquency, but change status**

Sometimes, cases start out as delinquency proceedings, but undergo a conversion to an abuse or neglect or status offense later. For example, a child who is placed in a foster home for delinquent acts is abused or neglected, or commits a status offense. The new events require that ICWA be applied to future placements of the child.

**Mention voluntary placements**

ICWA formalities are not required in cases where a parent voluntarily places the child, such as summer camp or a religious placement, as long as the parent is entitled to custody on demand. However, if the party who gained custody refuses to return the child and commences an action in court, ICWA governs that proceeding.

**Ask for questions** Are there any questions about child custody proceedings governed by ICWA?

**Note to instructor:** Listen and respond to questions. Be careful not to let the discussion drift into nuances of ICWA. If someone asks a detailed question, speak with that person at a break.

**Transition to discussion of  
“Indian child”**

As I stated earlier, to apply ICWA a state court must find that a proceeding is a “child custody proceeding” involving an “Indian child.” We just discussed the child custody requirement. Now, let’s discuss the definition of “Indian child.”

**Who Is an Indian Child?**

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**State importance of the  
definition**

The definition of “Indian child” is an extremely important definition under the law. It emphasizes the requirement that a child must have some tribal affiliation for ICWA to apply.

**Show OH2-8: Who is an Indian  
Child?**

This slide summarizes the criteria for determining whether a child is an Indian child.

**Discuss effect of marriage:** The child must be unmarried and under the age of 18. If an Indian child marries, ICWA ceases to apply to that child.

**Mention membership in a tribe**

The child must be a member of a federally recognized Indian tribe. We will discuss how to determine membership in more detail a little later.

**Mention eligibility**

If not a member of a tribe, the child must be eligible for membership and the biological child of a member of a tribe. This is intended to capture those children who are removed at an early age before they are able to become members of a tribe.

**Define “federally recognized tribe”**

In order for ICWA to apply, the child’s tribe must be one that is eligible for services from the United States Department of the Interior (DOI). Every year DOI publishes a list in the *Federal Register* of tribes that are eligible for services.

**Discuss status of Canadian tribes**

Canadian tribes are not considered Indian tribes under the definition because the United States does not maintain a special relationship with Canadian tribes. However, there are treaties that guarantee certain benefits and services to American Indians who are born in Canada. For example, the Jay Treaty, which was signed by the United States and Great Britain in 1794, protects Canadian born American Indians’ right to live and work in the United States. In 1928, the United States Supreme Court (8 U.S.C. 1359) affirmed these rights, extending them to persons who possess 50 percent or higher blood quantum of an American Indian tribe.

**Mention exceptions**

Also, some states with large populations of Canadian Indians may have additional regulations that apply to ICWA, including granting tribes the right to participate in proceedings involving their children. This is why it is important to be familiar with the specific state statutes.

**Discuss terminated tribes**

In the 1950s, some tribes were terminated under specific federal statutes that dictated that federal laws would no longer apply to them. ICWA may not apply to children who belong to these tribes.

**Note to instructor:** ~~Some of the tribes whose status was~~ terminated were later reinstated and are now covered by federal laws and the ICWA. For example, children belonging to the Kalamaths and Menominees, tribes that were previously terminated, are now protected by ICWA. Caution participants to thoroughly investigate the status of any tribe they believe may have been terminated at the local, state, and federal level.

**Transition to discussion of  
Indian parents**

Another issue in applying ICWA is identifying Indian parents and custodians.

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**Identifying Indian Parents and Custodians**

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**Introduce discussion**

ICWA provides certain rights to Indian parents. Therefore, it is useful to know how Indian parents and custodians are identified under ICWA.

**Show OH2-9: Identifying  
Indian Parents and Custodians**

**Define “parents”**

For a person to be considered a parent of an Indian child under ICWA, that person must be the biological parent, or an Indian adoptive parent, of a child who is either a member or eligible for membership in an Indian tribe.

**Describe status of non-Indian  
adoptive parents**

Non-Indian adoptive parents do not qualify and thus do not have the rights of an Indian parent under ICWA.

**Discuss status of fathers of children born out of wedlock**

For a father of an Indian child born out of wedlock to be considered a parent, he must have either acknowledged the child or been adjudicated by a court to be the father.

**Describe problems with this definition**

There are several problems with this definition:

1. Despite the fact that a father of an Indian child may not be considered a parent under ICWA, he may still have due process rights to notice of the proceedings involving his putative child under *Stanley vs. Illinois*.
2. If a mother asserts that a particular person is the father, it is incumbent upon the court to determine that issue if it is relevant to the question of whether the child is Indian. In other words, if the father's blood would make the child eligible for membership in a tribe, the court must resolve the issue of parentage.

In these cases, the court should treat the child as Indian for purposes of ICWA, even though the putative father would not have the rights of a parent under ICWA until he either acknowledges paternity or is adjudicated the father.

**Define "Indian custodian"**

The term "Indian custodian" is defined as an Indian person who has legal custody of the child under state laws, the traditions of the tribe, or to whom temporary physical custody has been transferred.

This person is typically a relative, but does not have to be. The custodian must be Indian. If a person is determined to be an Indian custodian, he or she has all the rights of a parent under ICWA except the right to veto a transfer to tribal court.

**Summarize learning**

We have just discussed when and to whom ICWA applies.

- We reviewed the types of child custody proceedings covered by ICWA,
- We defined “Indian child” for purposes of ICWA, and
- We identified Indian parents and custodians as defined by ICWA.

**Transition to discussion of ICWA placement requirements**

Now let’s discuss ICWA’s placement requirements.

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**ICWA’s Placement Requirements**

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**Overview the discussion**

There are two areas of ICWA placement requirements that we will discuss:

1. Requirements for obtaining a placement order, and
2. Placement preferences.

First, let’s discuss ICWA’s requirements for obtaining a placement order.

## **ICWA Requirements for Obtaining a Placement Order**

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### **Show OH2-10: Comparison**

**Discuss OH2-10** This slide summarizes what a party, usually a county or state social services agency, must show to obtain either a foster care placement or a termination of parental rights.

**Note to instructor:** **Pause to give participants time to read the slide.**

**Discuss remedial services** A party petitioning a court for foster placement or the termination of parental rights must show that an active effort has been made to provide remedial and rehabilitative services to the child's family. The petitioning party must also show that despite aid and intervention of social service providers, the child's family is still unable to care for the child.

Again, all other ICWA requirements pertaining to alternative placements (i.e., extended family, clan, or tribe) for the child must be considered before the child can be placed in foster care, including the intervention of remedial and rehabilitative services.

### **Reiterate compliance with state law**

It is important to remember that in any decision, the court must comply with state law in addition to ICWA requirements. State law may require showings that are unique and distinct from ICWA. For example, state law may require that the party show that the placement or termination is the least restrictive alternative for the child. Most courts have held that those showings must be established under the state law standard.

**Describe ICWA standard in showing possible harm**

The ultimate question in obtaining a placement order is whether serious emotional or physical harm will befall the child if a placement is not obtained. This ground must be proven by the ICWA standard. Let's discuss that standard in more depth.

**Mention burdens of proof**

ICWA requires different burdens of proof than what most state court judges are accustomed to in child custody proceedings.

**Show OH2-11: Burdens of Proof**

This slide shows the required burdens of proof.

**Discuss foster care**

A foster care placement can only be ordered if the state judge concludes that the petitioning party has established that the continued custody of the child by the parent or Indian custodian would result in serious emotional or physical harm to the child.

The petitioning party must establish this with clear and convincing evidence supported by the testimony of a qualified expert witness (QEW).

If the parent did not have custody before the filing of the petition, the question is whether a return of custody would result in such harm.

**Discuss termination proceedings**

Terminations require similar evidence, but the burden of proof is elevated to "beyond a reasonable doubt," similar to the criminal burden of proof.

**Discuss QEW** I stated that ICWA requires the testimony of a QEW to support the showing that serious emotional or physical harm will befall an Indian child. This requirement is intended to bridge the cultural gap that may exist in state courts, where the parties involved may not understand traditional native child-rearing practices.

The testimony of a QEW is required only in involuntary cases. It does not apply to voluntary proceedings.

**Describe BIA guidelines for QEW**

The BIA provides guidelines for QEW's. These guidelines attempt to obtain the testimony of people who are knowledgeable about traditional values and mores. These persons may not qualify as experts under the legalistic standard created by most courts, but have to be used in ICWA proceedings.

**Show OH2-12: Qualified Expert Witness**

**Discuss OH2-12**

This slide shows some of the BIA guidelines for a person to be considered a QEW in ICWA proceedings.

A QEW could be a member of the child's tribe who is knowledgeable about tribal child-rearing practices, or a non-Indian person who has substantial knowledge and experience in working with Indian families.

The BIA guidelines leave intact the ability of the petitioning party to use the testimony of commonly accepted expert witnesses (e.g., child psychologists, medical doctors, licensed clinical social workers, or Indian child welfare specialists) in ICWA cases.

Some courts have concluded that the failure of a parent or custodian to object to the lack of QEW testimony is a waiveable issue.

**Transition** We have just discussed ICWA's requirements for obtaining a placement order. If a placement order is obtained, the court must place the child according to the placement preferences specified by ICWA.

## **Placement Requirements of ICWA**

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**Introduce discussion** One of the objectives of ICWA is to place Indian children in homes that reflect their unique cultures and values. ICWA's placement provisions are an attempt by Congress to preserve Indian culture by restricting a state court's authority to place a child in a home that does not reflect his or her culture.

These provisions apply to both voluntary and involuntary placements.

### **Show OH2-13: Placement Decisions**

**Discuss placement requirements** ICWA contains specific placement preference provisions, which we will cover in a minute. In general, the placement provisions require the court, in the absence of "good cause" to the contrary, to place Indian children in foster and adoptive homes that comply with the law.

**Point out that each placement must comply**

As the slide shows, each placement of the child must comply with the placement provisions. In other words, a state or county cannot place a child in an Indian home to comply with ICWA and then remove the child the next week for placement in another home without notifying the tribe and parties and without complying to the placement preferences.

**Mention that tribes can alter placement preferences**

ICWA permits tribes to alter the ICWA placement preferences. State courts must comply with the altered placement preference scheme. You must investigate with each tribe you encounter the order of its particular preference scheme.

**Transition to discussion of placement preferences**

Let's look now at the placement preferences required by ICWA.

**Show OH2-14: Placement Preferences**

**Discuss OH2-14**

This slide summarizes ICWA's placement provisions for both foster care placements and adoptions.

**Discuss extended family**

A member of the child's extended family need not be a member of the Indian extended family. This person may be a member of the non-Indian extended family. The state court must confer with the tribe to determine who the extended Indian family members are.

**Discuss importance of communication with tribe**

It is imperative that the court communicate with the tribe regarding placement decisions. The tribe can clarify its placement preferences, help identify extended family members, and help determine whether there are any tribally licensed homes available in the area.

**Discuss deviation from placement provisions**

ICWA permits the court to deviate from the placement preference requirements if the party requesting the deviation can show “good cause.”

The BIA has established guidelines for what constitutes “good cause.” Keep in mind that these “good cause” grounds are advisory only.

**Show OH2-15: Good Cause to Deviate**

**Describe OH2-15**

This slide shows some of the guidelines established by the BIA.

**Discuss parental preference**

The guidelines give a parent the right to request a placement. Many courts have held that a parental request is sufficient grounds to place a child in a home that does not comply with ICWA placement preferences. However, some courts have disagreed with this guideline.

**Discuss needs of child**

The second “good cause” ground, extraordinary physical or emotional needs of the child, is rarely proven. The child would have to have a serious physical or emotional malady that could not be accommodated in the home of a family member or other member of the tribe. This would need to be established by the testimony of a QEW.

**Discuss diligent search**

Another “good cause” ground is the determination, after a diligent search, that a “suitable” family is not available.

**Discuss bonding issues** Bonding is not supposed to be a legitimate consideration in determining placement issues. ICWA recognizes that a child's ties to his or her tribe are just as important as ties to custodians.

**Transition to procedural requirements** Now that we have discussed placement requirements, let's talk about the procedural requirements of ICWA.

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## ICWA's Procedural Requirements

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**Introduce discussion** One of the objectives of ICWA is to allow maximum participation by the tribe in court proceedings involving its children. Therefore, the provisions of ICWA require that lawyers adhere to numerous specific procedures. We will discuss how these procedures affect the following areas:

- Determining membership in a tribe
- Notification procedures
- Tribal representation in court
- Jurisdictional provisions

Let's begin with a discussion about determining membership in a tribe.

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## Determining Membership in a Tribe

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**State the importance of making an early determination** Before the court conducts any proceedings, it must determine whether the child is a member of an Indian tribe. Many cases have resulted in controversy as a result of the failure to make an early determination that an Indian child was involved in the proceeding.

## **Show OH2-16: Determining Membership**

### **Discuss tribal authority**

Indian tribes have the inherent authority to determine their own membership and their determinations must be given conclusive effect by a state court. A tribe will typically assert that a child is a member or eligible for membership when it intervenes in a proceeding. The court must honor this assertion.

### **Discuss BIA determination**

If the relevant tribe does not respond to notice of an ICWA proceeding, nor indicates whether the child is a member or eligible for membership, the state court should then turn to the BIA to make a determination. The BIA's determination, absent a tribal determination, is conclusive on the issue.

### **Point out new regulations**

New regulations promulgated in 1994 require each party commencing a child custody action involving an Indian child to send a copy of the notice to the pertinent BIA area office listed in those regulations. The regulations are published at 25 C.F.R. 23.11.

### **Discuss state court determination**

If neither the tribe nor the BIA makes a determination of tribal membership, the burden of resolving the child's membership falls on the state court. The state court makes a determination based on any information it has, including the governing documents of the tribe and the testimony of involved parties.

### **Discuss different tribes with an interest in a child**

In the rare case, a child may be a member of two different tribes, or eligible for membership in several different tribes. In these cases, the court must determine which tribe has a more substantive history of contact with the child.

**Introduce discussion of ways tribes determine membership**

It is useful for state courts to know how tribes determine membership. Keep in mind, however, that different Indian tribes determine membership in different ways.

**Ways Tribes Determine Membership**

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**Show OH2-17: Ways Tribes Determine Membership**

**Note to instructor:** Cover OH2-17 with a sheet of plain paper. Uncover each point as you discuss it.

**Explain enrollment**

The most common way that tribes determine membership is through enrollment. Through the enrollment process, a person applies to become a member of the tribe. The tribe determines eligibility based on blood quantum. Typically, a person must have at least one-quarter American Indian blood to be eligible for membership.

**Make distinction between membership and enrollment**

It is important to note that there is a distinction between membership and enrollment. In many tribes, membership is not synonymous with enrollment.

**Describe how to verify**

There are a variety of ways to determine membership; no single method applies to all tribes. The tribe is the first line of authority for determining any child's membership eligibility. The best place to start is by contacting the enrollment officer or the clerk of the tribe and asking him or her to investigate and document the child's eligibility.

**Discuss lineal ancestry**

Some tribes have other definitions for determining membership. For example, a tribe may define eligibility according to matrilineal or patrilineal ancestry. These tribes consider any person a member who can demonstrate that he or she is a descendant of a person who was on a tribal membership roll prepared by the federal government some time ago. For example, this a primary method used by the Cherokee Indians of Oklahoma to determine membership eligibility for their tribe. Another example—one based on matrilineal ancestry—is that of the Iroquois Nation. According to the *Constitution of the Iroquois League*, women are the progenitors of their nation; the status and property of tribal members descends from mothers, not fathers.

**Mention adoption**

Other tribes permit non-Indians who are adopted by tribal members to become members of the tribe, even if the adopted person is not ethnically Native American.

**Transition to evidence of tribal membership**

A frequent issue that arises in ICWA cases is the use of documentary evidence to demonstrate membership or eligibility for membership in a tribe and the degree to which that evidence should be subjected to the usual foundation and evidentiary rules.

**Show OH2-18: Evidence of Membership**

**Discuss tribal court authority and cite statute**

If a tribal court enters an order concluding that a child is either a member or eligible for membership, that order is entitled to full faith and credit under the provisions of 25 U.S.C. 1911(d).

**Discuss tribal intervention** If a tribe enters a motion to intervene in a proceeding or to transfer jurisdiction of case involving a child to its tribal court based on assertion that the child is a tribal member or is eligible for membership, that assertion is entitled to conclusive effect.

**Describe when the court must take evidence** The court must take evidence on the issue when the tribe does not participate, or does not make a conclusive determination, and the BIA is unable to make the determination.

**Discuss types of evidence** One piece of documentary evidence is a “Degree of Indian Blood” document. This is an official government record from the DOI. State courts should routinely accept this document if it is certified by the custodian as an accurate copy of the original.

State courts should subject other types of evidence, such as affidavits and testimony, to the regular foundation and evidentiary rules of the court.

**Ask for questions** Are there any questions before we continue?

**Transition to requirements of the courts** Next we are going to discuss ICWA’s notification requirements.

## **Notification Requirements**

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**Introduce discussion** Remember that one of the objectives of ICWA is to maximize tribal court participation and decision making in ICWA proceedings. To accomplish this objective, ICWA contains specific requirements for notifying Indian tribes of proceedings that involve their children.

## **Show OH2-19: Notification Requirements**

**Note to instructor:** Cover OH2-19 with a sheet of plain paper. Reveal each requirement as you discuss it.

### **Discuss notification requirements**

ICWA requires that a party give notice of involuntary proceedings by registered mail to any Indian tribe with which the child may have an affiliation. Parties must also give notice to the BIA.

Notice must be completed at least ten days before the proceedings advance.

### **Discuss notice in voluntary cases**

ICWA mandates notification in involuntary cases only. However, it is a good practice to notify tribes of voluntary proceedings as well. This allows the tribe to assist in finding placement for the child and will help answer questions about where the child is domiciled. There was legislation pending in Congress last year that would mandate notice to tribes in voluntary cases. The bill was passed in the House, but not in the Senate. We will discuss recent changes and challenges to ICWA in the next module.

### **Discuss notification to all tribes**

The court must provide notice to any and all tribes that may have some affiliation with a child. It is improper for a state court to make an initial determination of which tribe is the child's tribe and then provide notice to that tribe only. Each tribe that may be affiliated to a child must be individually notified so that each tribe may present evidence to claim the child as one of its members. Once the state court has notified all tribes of the proceedings, the court must determine which tribe is the Indian child's tribe.

**Discuss intervention** The Indian child's tribe has the absolute right to intervene in the proceedings, at any stage.

**Discuss right to counsel** Parents and Indian custodians of an Indian child are entitled to court-appointed counsel by the state court. If state law does not mandate the appointment of counsel, which frequently happens for Indian custodians, the state court may seek reimbursement for attorney's fees from the BIA under 25 C.F.R. 23.11.

The appointment of counsel for the tribe and the child are not mandatory.

**Discuss right to discovery** A tribe is entitled to discover all relevant matters a party is relying upon in filing and prosecuting a petition.

**Ask for questions** Are there any questions about the notification requirements of ICWA that we have discussed?

**Note to instructor:** Listen and respond to questions.

**Transition** Now let's move on and discuss ICWA's requirements for tribal representation in court.

## **Tribal Representation**

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**Introduce discussion** Many Indian tribes are impoverished and cannot afford to retain legal counsel in every state where a case involving one of their children arises. Some tribes, such as the Navajo and the Oglala Sioux, may have cases that arise in every state in the country.

**Show OH2-20: Representation of Tribe**

**Discuss OH2-20** This overhead summarizes the ways in which a tribe may represent itself in court.

- Discuss tribal advocates** Many tribes appear in court pro se through a non-lawyer representative, such as a social worker or tribal advocate. If a state or local rule prohibits a corporation, which many tribes are, from appearing through a representative, ICWA preempts that rule.
- Discuss tribal judges** In many cases, tribal judges will appear and argue a case for the tribe. Some tribal judges are law trained, but some are not. Nevertheless, the state court should be liberal in allowing tribal representatives to argue a case for the tribe in order to permit maximum participation by the tribe.
- Discuss urban Indian organizations** Other tribes, particularly those in urban areas, have agreements with urban Indian organizations that serve as advocates for their interests.
- Mention independent agreements with states** Some states have agreements with Indian tribes about child custody proceedings. These agreements govern the representation of tribes in state court.
- Provide tip for judges** To ease any concerns that the court may have, the judge may ask the advocate about his or her background and experience in representing the interest of the involved tribe.
- Transition to jurisdictional provisions** Another way that ICWA encourages maximum participation by the tribe is through its jurisdictional provisions.

## Jurisdictional Provisions

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### **Show OH2-21: Jurisdictional Provisions**

#### **Discuss cases over which tribes have exclusive jurisdiction**

The jurisdictional provisions of ICWA promote tribes and tribal courts as the best forums for the adjudication of child custody proceedings involving Indian children. ICWA gives tribal courts exclusive jurisdiction (i.e., no other entity has the authority to overrule the court's decisions) over cases that involve:

- Indian children domiciled on the reservation, and
- Wards of the tribal court.

#### **Describe emergency jurisdiction**

The only time a state court can take jurisdiction over an Indian child domiciled on the reservation is when the child is found off the reservation in an emergency situation. For example, if the child is found alone in a potentially dangerous situation.

#### **State notification requirement**

In cases such as these, the state court must immediately notify the tribal court of the situation so the tribe can retrieve the child.

#### **Discuss cases in which child lives off the reservation**

If an Indian child lives off the reservation, the state court may exercise jurisdiction over a child custody proceeding involving that child. However, the state court must transfer jurisdiction to the tribal court upon an appropriate petition, unless relevant ICWA conditions are met. We will discuss transfer of jurisdiction in more detail in a few minutes.

**Discuss state-tribal agreements**

States and tribes are permitted to enter into agreements addressing jurisdictional issues, and many have. This is another example of why it is important to research the particular provisions in your state.

**Show OH2-22: Public Law 280**

**Note to instructor:**

**Cover OH2-22 with a piece of plain paper. Reveal each point as you discuss it.**

**Discuss Pub.L. 280 states and concurrent jurisdiction**

Enacted by Congress in 1953, Pub.L. 280 gives tribes that reside in Pub.L. 280 states concurrent jurisdiction with the states in civil and criminal matters. Under Pub.L. 280, courts in Minnesota, California, Oregon, Nebraska, Wisconsin, Washington, and Idaho are among those states that were given jurisdiction over Indian reservations to fill vacuums in law enforcement.

There can be exceptions within these states, for example, the Red Lake Chippewa Indians of Minnesota retain exclusive jurisdiction over their reservation.

**Note to instructor:**

**Pub.L. 280 cases can be fraught with complications involving state, tribal, and social service agency issues. Caution participants to thoroughly research and investigate the law as it relates to their states and tribes. You should also determine in advance of presenting this program how Pub.L. 280 affects jurisdictional issues and Indian child custody cases.**

**Define jurisdictional provisions  
of Pub.L. 280 states**

In certain rare circumstances, some Pub.L. 280 state courts can exercise jurisdiction over child custody proceedings involving reservation-domiciled Indian children, but may later be required to transfer jurisdiction over these children to the tribal court.

Following the enactment of Pub.L. 280, many tribes mistakenly interpreted that the law gave state courts jurisdiction over tribal courts, and therefore, disbanded their tribal courts.

Nevertheless, ICWA experts contend this is why Congress, in Section 1918 of ICWA, granted tribes—with or without tribal courts—the right to assert jurisdiction over custody proceedings involving Indian children, if necessary, by petitioning intervention from the secretary of the interior.

**Transition to transfer of  
jurisdiction**

ICWA provides tribal courts with transfer jurisdiction over Indian children domiciled off the reservation. This is a complicated area in which much litigation between state and tribal officials occurs. Let's spend some time discussing this area.

**Discuss tribal court cases**

If a child has been the subject of an ongoing tribal court case, the tribal court retains exclusive jurisdiction over that child, regardless of where the child has moved.

## **Transfer of Jurisdiction**

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### **Introduce discussion**

As I stated, if the Indian child is domiciled off the reservation, the state court may exercise jurisdiction over the proceeding.

However, the party invoking state court jurisdiction must, in an involuntary proceeding, notify the tribe and the BIA of the pending state court action.

### **State that parties must petition**

To obtain a transfer to the tribal court, the tribe, parent, or Indian custodian must petition the state court.

### **State that a hearing is required**

A state court must convene a hearing when a transfer request is made to permit all parties to either concur or object to the request.

### **Show OH2-23: Transfer of Jurisdiction**

#### **Note to instructor:**

**Cover OH2-23 with a piece of plain paper. Reveal each point as you discuss it.**

### **State when state court should not transfer jurisdiction**

The state court transfers jurisdiction upon the petition of the tribe, the parent, or the Indian custodian unless:

- One of the parents objects to the transfer,
- The tribal court declines the case, or
- The state court finds good cause to deny transfer.

**Provide details of parental rights**

Parents have an unqualified right to veto a transfer. Parents have this right regardless of the gravity of the allegations against that parent or the parent's involvement with that child. Indian custodians do not share this right.

**Rights of guardian ad litem**

A guardian ad litem for an Indian child is entitled to argue for or against transfer, even though the ICWA does not give the child an absolute right to veto a transfer request.

**Describe tribe's right to decline**

A tribal court may decline a transfer of jurisdiction. It is a good idea for a state court to inquire whether the tribal court wishes to accept a transfer of jurisdiction before it convenes a full-blown transfer hearing and enters an order transferring jurisdiction.

**Mention foster care and termination proceedings**

Under ICWA, foster care placements and termination proceedings can be transferred to tribal courts. Many preadoptive and adoptive placement proceedings are commenced as foster care and termination proceedings and are thus also routinely transferred to tribal courts.

**Transition to good cause denials**

Transfer can be denied for good cause. "Good cause" is not defined in ICWA for purposes of denying a transfer motion. We'll discuss some of the grounds that state courts have adopted.

**Show OH2-24: Good Cause to Deny Transfer**

**Note to instructor:** Cover OH2-24 with a sheet of plain paper. Reveal each point as you discuss it.

- Discuss burden of proof** When a transfer is denied, the party contesting transfer must establish good cause by clear and convincing evidence.
- Mention BIA grounds** The BIA has developed several possible grounds for denying transfer in its guidelines for state courts. Other courts have adopted other grounds.
- Discuss no tribal court** A tribe does not need to have a conventional court system in order to accept a transfer of jurisdiction. A panel of elders that resolves disputes is acceptable.
- Indian child objects** Another good cause for denying transfer of a case can be asserted by the child who is the focus of the proceeding, providing the child is older than age 12. If the child in question objects to the transfer of the case because, for example, he or she does not wish to be removed from his or her current residence, this objection must be taken in to consideration by the courts. The child's objection, however, is not a determining factor because the child's objection is promoted by BIA guidelines rather the provision of ICWA.
- Discuss late request** If the proceedings are at an advanced stage and a party requests a transfer, a state court can deny the request to prevent "forum shopping" and a prolonged stay in foster care for a child.
- Discuss inconvenient forum** The inconvenient forum problem could be resolved by the state court allowing the tribal court to conduct proceedings in the state court.

- Discuss best interest** One controversial ruling that courts have used to deny transfer requests has been a “best interest of the child” standard. State courts are divided over whether this is a proper consideration in a transfer hearing.
- Mention states that agree** Montana, South Dakota, Nebraska, South Carolina, California, Arizona, and Indiana hold that the best interest standard is a proper consideration.
- List states that do not agree** Illinois, Colorado, and Minnesota have held that the best interest standard is not a legitimate consideration for denying transfer.
- Conclude discussion/transition** Because ICWA does not define “good cause” for purposes of transfer of jurisdiction, it is imperative that you become familiar with the guidelines that apply to your jurisdiction.
- Ask for questions** Are there any questions about ICWA’s jurisdictional provisions?
- Note to instructor** **Listen and respond to questions.**
- Transition** One last issue to discuss before we close this lecture is the ICWA regulations on voluntary proceedings. We have touched on this issue already, but we have primarily been discussing involuntary proceedings.

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## Voluntary Proceedings

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**Introduce discussion** To proscribe abuses associated with the “voluntary” placements of Indian children, ICWA regulates how Indian parents can voluntarily place their children or consent to termination or adoption.

**Show OH2-25: Voluntary Proceedings**

**Review requirements for notice** As we discussed, ICWA does not mandate that the court give notice to the child’s tribe in voluntary proceedings. However, providing notice in voluntary proceedings is a good policy. Among other reasons, the tribe’s assistance is helpful in ensuring compliance with ICWA’s placement provisions.

**Provide example** There have been cases in which Indian parents have given up their children to state agencies, but do not wish for their tribe to know because of the shame or stigma attached to such a decision. This places the court in the difficult situation of attempting to respect the wishes of the parents while adhering to the placement provisions of ICWA.

*In Mississippi Band of Choctaw Indians v. Holyfield*, young Indian parents gave up infant twins off the reservation in violation of ICWA. If the state court had notified the tribe, the controversy could have been avoided.

**State the requirements for  
voluntary placement**

Consent to voluntary placement or termination must meet the following requirements:

- The child must be at least ten days old.
- Consent must be executed in writing before a judge of competent jurisdiction (state or tribal judge).
- The court must explain, in a language the person can understand, the consequences of his or her actions and his or her rights after consent.

**Describe when consent may  
be revoked**

Consent may be revoked at any time before entry of a decree terminating parental rights or a decree of adoption. The child must then be returned to the natural parent.

**Ask for questions**

Are there any questions about ICWA's requirements for voluntary placements?

**Note to instructor:**

**Listen and respond to questions.**

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## Module Conclusion

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**Summarize learning** In this module we have examined the major legal requirements of ICWA. Specifically, we have addressed:

- Objectives of ICWA
- Sources of ICWA law
- Applying ICWA
- ICWA's placement requirements
- ICWA's procedural requirements
- ICWA's requirements for voluntary proceedings

**Describe HO2-1: *The Indian Child Welfare Act***

I am going to distribute an article to you that summarizes what we have covered in this module. The article, by B. J. Jones, is entitled *The Indian Child Welfare Act: The Need for a Separate Law*. It was published in *The Compleat Lawyer*, Fall 1995.

**Note to instructor:** **Distribute HO2-1 to participants. The handout is located in Appendix E of this Faculty Guide. Make copies for all participants before the program.**

**Ask for questions** Are there any questions about what we have discussed?

**Note to instructor:** **Listen and respond to questions.**

**Conclusion** Thank you all for your attention and participation during this module. ICWA is a complex law that contains many nuances. Its provisions are different from the procedural and substantive laws that govern child custody proceedings in most states.

**Transition** Not only is ICWA different and complex, it is controversial. Our next module will focus on recent changes and challenges to ICWA.

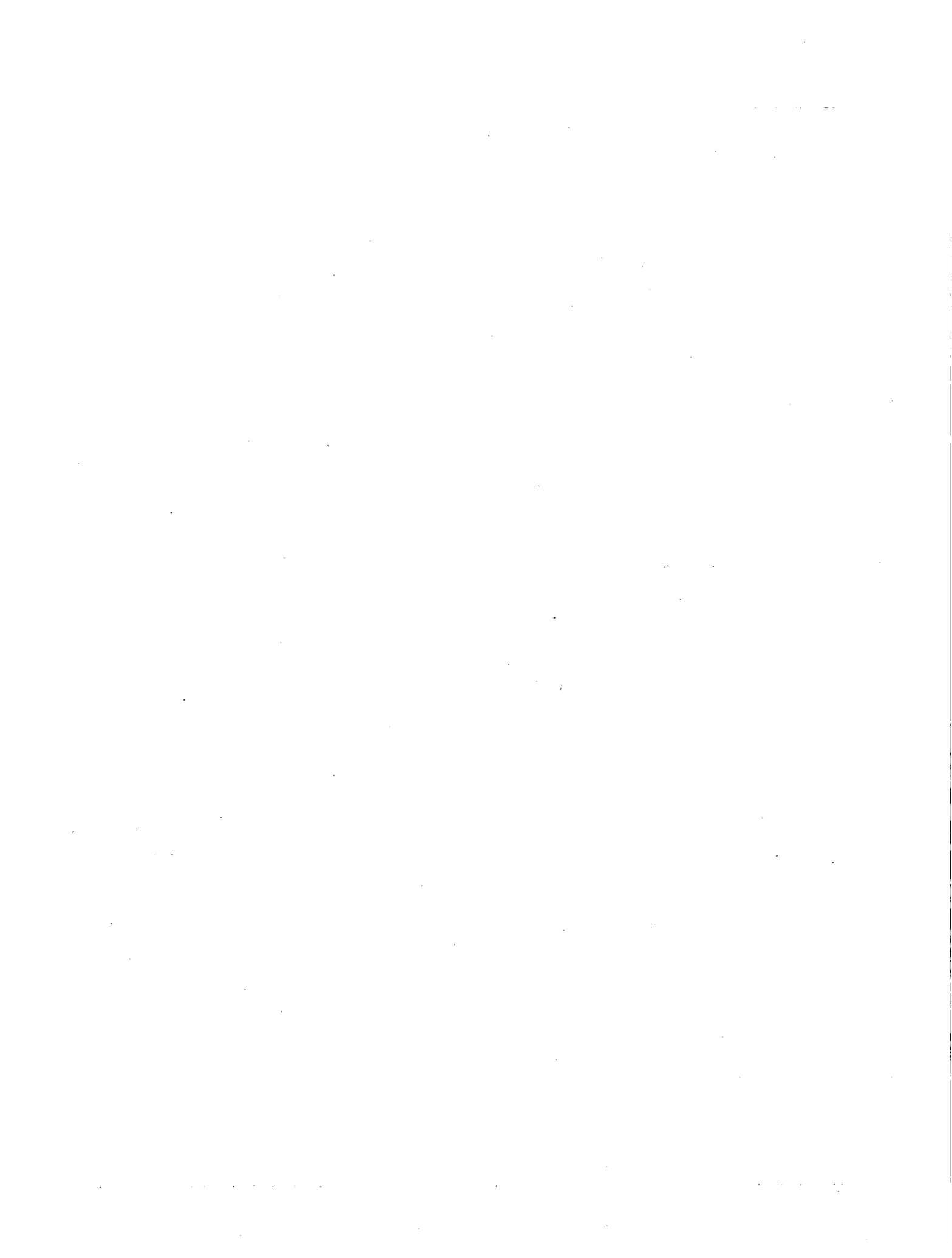


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## ***Module 3***

### ***Recent Changes and Challenges to the Indian Child Welfare Act***





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## Module 3. Recent Changes and Challenges to ICWA

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### Module at a Glance

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- Introduction
- H. R. 3286 and S. 1962
- Module Conclusion

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### Objectives

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The purpose of Module 3 is to provide information about recent legislative developments and judicial decisions that may affect ICWA.

It is critical that the instructor research recent developments so that information as it pertains to this module is both accurate and current.

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### Preparation

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#### Things You Need

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|----------------------------|---|
| <b>Equipment</b>           | <input type="checkbox"/> Flip chart (FC), markers, and masking tape |
| <b>Instructor material</b> | <input type="checkbox"/> Faculty Guide, pp. 3-1 through 3-7.        |

### **Things to Do**

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- Review pp. 3-1 through 3-7 of this Faculty Guide.
- Prepare FC3-1: Recent Challenges to ICWA. Refer to page 3-3.
- Prepare FC3-2: NCAI Proposal. Refer to page 3-5.

### **Instructor Notes**

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The purpose of this module is to provide updated information about the status of ICWA. Information includes recent legislative developments and judicial decisions.

**Note to instructor:** **Because policymaking regarding adoption, in general, and ICWA, in particular, is currently being reviewed, and in some instances debated, at both the state and federal level, it is critical that you research both current legislative developments and judicial decisions in your jurisdiction, state, and the Congress. This is essential for you to ensure that your information as it pertains to this *Guide* is current, accurate, and applicable to your state or jurisdiction.**

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## Introduction

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- Provide overview of controversy** ICWA is by no means an uncontroversial law. Some members of Congress believe that ICWA is being applied too often to children with very little Indian blood, to the detriment of potential adoptive parents and the children involved.
- There has been a recent concerted effort by some members of Congress to amend the act.
- State purpose of module** In this module, we will examine recent legislative developments and judicial decisions that may affect ICWA.

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## H.R. 3286 and S. 1962

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**Note to instructor:** Prepare FC3-1: Recent Challenges to ICWA by posting the bullet points, below, on a piece of flip chart paper.

- **Uniform Adoption Act**
- **Existing Indian Family Exception**
- **California Court of Appeals Decision**
- **H.R. 3286**
- **S. 1962**

- Mention the Uniform Adoption Act** The Uniform Adoption Act, insofar as it attempts to facilitate adoptions, may affect ICWA and how it is applied.

**Discuss the “existing Indian family exception”**

The “existing Indian family exception” refers to a series of state court decisions that hold that ICWA should not apply in a case where a child is not being removed from an existing Indian family.

This existing family exception refers to situations where a child has lived primarily with a non-Indian parent, or in a non-Indian foster home, and has had very little contact with his or her Indian family and tribe.

**Discuss California Court of Appeals decision**

The California courts have carried this further by holding that such an exception is constitutionally required. Another California court has extended this exception to cases where the parents of the child have had little contact with their tribe.

**Discuss H.R. 3286**

In 1996, the House of Representatives passed, in a provision of the Adoption Promotion and Stability Act, an amendment to ICWA. This amendment:

- Excludes the application of ICWA to an Indian child who lives off the reservation and whose parents do not maintain significant ties to an Indian tribe.
- Restricts the right of tribes to determine membership of a child.

**Discuss S. 1962** S. 1962 offers more narrow amendments to ICWA than H.R. 3286. The intent of this bill is to reduce delay in custody proceedings while protecting tribal sovereignty. One of the strengths of S. 1962 is that it was developed with the input of Indian tribes and experts in the field of Indian adoption.<sup>1</sup>

**Show FC3-2: NCAI Proposal**

**Note to instructor:** Prepare FC3-2 by posting the following points on a piece of flip chart paper:

- **Notice to tribes for voluntary proceedings**
- **Time lines for tribal intervention**
- **Criminal sanctions**
- **Withdrawal of consent**
- **Application of ICWA in Alaska**
- **Open adoptions**
- **Duty to inform of rights under ICWA**
- **Tribal membership certification**

**Discuss NCAI proposal** S.1962 incorporates alternative amendments that were developed by Indian tribes at the National Congress of American Indians (NCAI) Mid-Year Conference in June 1996. The points included in the NCAI proposal are listed on the flip chart.

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<sup>1</sup> Information about S. 1962 was adapted from "Congress Considers ICWA Amendments," by Jerry Gardner. *The Tribal Court Record*, Spring/Summer 1996.

<b>Discuss notice to tribes</b>	Notice to Indian tribes for voluntary proceedings would provide that timely and substantive notice be given to the tribe at the earliest stage to minimize later intervention.
<b>Discuss time lines</b>	Time lines for tribal intervention provides a deadline for tribal intervention.
<b>Discuss criminal sanctions</b>	This part of the bill proposes that attorneys and adoption agencies that knowingly violate ICWA face severe criminal sanctions.
<b>Discuss withdrawal of consent</b>	This point sets a time limit on the biological parents' withdrawal of adoption consent.
<b>Discuss application in Alaska</b>	This provision includes Alaska Native villages under the term "reservation" in the act.
<b>Discuss open adoptions</b>	Open adoptions allow biological parents to maintain contact with the child even if the state law prohibits such activity.
<b>Discuss duty to inform of rights</b>	This point requires agencies and attorneys to inform Indian parents of their rights under ICWA.
<b>Discuss tribal membership</b>	This point maintains the right of tribes to determine their own membership.
<b>Provide follow-up to S. 1962</b>	<p>The resolution was submitted by Senator McCain and passed the Senate (142 CONG.REC.S11455, S11456. Daily ed. Sept. 26, 1996). Later, Senator McCain added a provision that would have explicitly rejected the existing Indian family exception (See S.1962, 104th CONG., 2d Sess., S.Rep. No. 335 at 12. Lexis 1996).</p> <p>The congressional term ended before the House had the opportunity to address the bill.</p>

**Note to instructor:** **Ensure that this information is still current by researching recent legislative developments or judicial decisions that may affect ICWA.**

**Ask for questions/comments** Does anyone have questions or comments about what we have discussed?

**Ask if anyone has any new information** Is anyone aware of any new legislative developments or judicial decisions that may affect ICWA?

**Note to instructor:** **Facilitate a discussion about new developments.**

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## Module Conclusion

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**Restate program purpose** The purpose of this program was to increase awareness and understanding of the cultural and legal aspects of ICWA. This increased knowledge will assist us in applying ICWA appropriately and effectively.

**Ask for further comments or questions** Are there any further comments or questions about what we have discussed?

**Note to instructor:** **Listen and respond to comments and questions.**

**Conclusion** Thank you all for attending and participating in this program. Think about how you can apply what you have learned here in your court.



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# *Appendix A*

## *Module 1 Overheads*





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## Appendix A. Module 1 Overheads

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### Contents

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This appendix contains the camera-ready overheads for Module 1 of *The Indian Child Welfare Act: A Cultural and Legal Education Program*. Photocopy these camera-ready hard copy overheads onto transparency paper before the program.



# Parenting

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## *Non-Indian:*

- ◆ Parents morally obliged to raise own children

## *Indian:*

- ◆ Parents part of extended family
- ◆ All members of extended family share responsibility

# Family Orientation

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## *Non-Indian:*

- ◆ Nuclear family most important

## *Indian:*

- ◆ Extended family of primary importance
- ◆ Indian children will be responsible for providing for extended family

# Accountability

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## *Non-Indian:*

- ◆ Individual responsibility for actions

## *Indian:*

- ◆ Individuals are part of collective whole
- ◆ Actions judged by value to group

# Correction

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## *Non-Indian:*

- ◆ Spare the rod and spoil the child

## *Indian:*

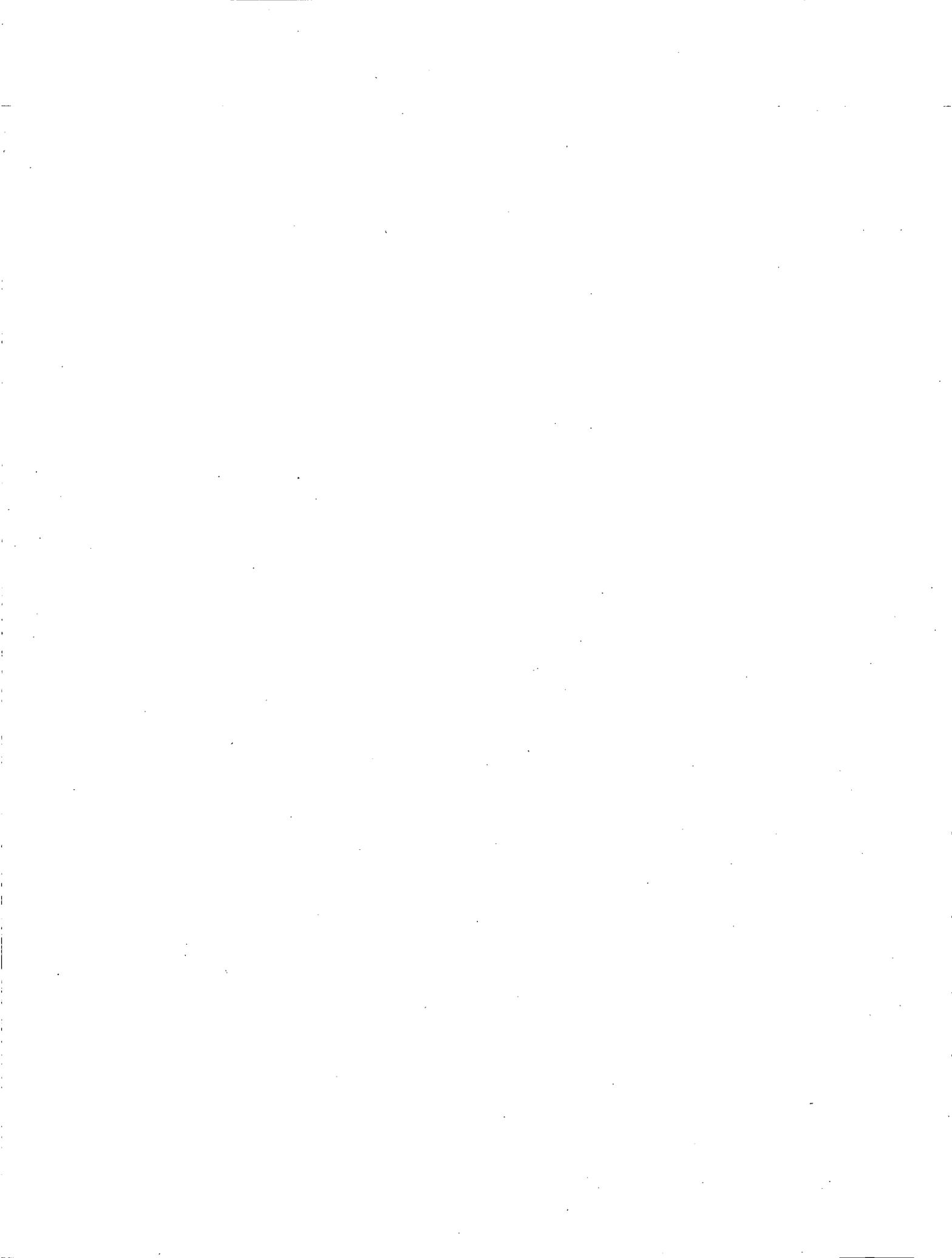
- ◆ Storytelling such as “Iktomi the Trickster”

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# *Appendix B*

## *Handout 1-1: Introduction*





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## Appendix B. Handout 1-1: *Introduction*

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### Contents

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This appendix contains Handout 1-1: *Introduction*. This article was written by Lizbeth Gonzalez, Attorney at Law. Ms. Gonzalez is the Director of Legal Services of the American Indian Law Alliance.

You will distribute this handout during the program. Make enough copies for all participants before the program.

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## Handout 1-1: Introduction

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### Introduction

*Lizbeth Gonzalez*

Attorney at Law, Director of Legal Services of the  
American Indian Law Alliance

Many Native people lack faith in this country's legal system. Native communities have lost land, languages and loved ones because of treaties, laws and policies of the United States defined and revised by economic, racial, and political considerations. Indian lands have been both legally and illegally confiscated, and Native religious practices outlawed. In the past, American Indian children were shipped to faraway boarding schools and punished for speaking their original languages. Today, Native images are legally expropriated and satirized by baseball teams and iced tea companies.

Those of us trained to negotiate, advocate, litigate or adjudicate as attorneys and judges in our federal and state courts generally believe that, because due process, *stare decisis*, and shared notions of fairness and decency undergird our system of jurisprudence, justice ultimately prevails. While admittedly no system is perfect, we trust that our own personal integrity and hard work as officers of the court contribute to ensure that equity is done.

Nonetheless, although much important legislation has been passed, including the American Indian Religious Freedom Act, 42 U.S.C.A. 1996 (protection and preservation of traditional religions of Native Americans); American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C.A. 1996a (authorization of traditional Native religious use of peyote); Native American Graves Protection and Repatriation Act, 25 U.S.C.A. 3002 (protection and return of human remains and sacred objects); Native American Languages Act 25, U.S.C.A. 2901 (right to speak Native languages); Indian Tribal Justice Support Act, 25 U.S.C.A. 3601 (recognition that, because the United States has a government-to-government relationship with each Indian tribe, Indian nations possess the inherent authority to establish their own form of government, including tribal justice systems), and the Indian Child Welfare Act of 1978, 25 U.S.C.A. 1901 (exclusive jurisdiction given to tribal courts so Indian children can be placed in Indian homes where feasible), the fact remains that much remains to be done before the First Peoples of this continent have equal rights as U.S. citizens.

Past assimilation policies of the United States caused many Native children to be placed in non-Indian foster or adoptive homes. This policy caused many Native children to become estranged from their people and culture. Thus, many adopted Native adults between the ages of twenty and

forty who were placed before the enactment of the Indian Child Welfare Act of 1978, are now turning to Native organizations such as the American Indian Law Alliance for assistance in recovering their Indian identities. In some cases, these Native persons learned that they were Indian when their adoptive parents died. These lost members of the Native community are usually many miles removed from their birthplace. Numerous - and painful - inquiries are often required to identify the birthplace and adoption agency before any petition to open birth records can be filed in the proper jurisdiction.

Although adoption records and birth certificates can establish that a person is an American Indian, they are inconclusive in recovering cultural identity. Generally speaking, enrollment is the preferred option to reunite a Native adoptee with his or her people, although reintegration into the community can take place in other ways. Enrollment is not easy to achieve. There is no clearinghouse which accepts applications. Far from being a monolithic culture, the Native community is composed of many Indigenous nations with distinct, although sometimes overlapping traditions, languages, and governing bodies. Each tribe has its own protocol governing enrollment in the community. It is essential to know the tribe, band, and even the reservation, if any, of both the birth mother and birth father since some Indigenous nations are matrilineal whereas others determine membership through the father's line. Getting a copy of a birth certificate is just the first step.

- Mark<sup>1</sup> lives in New York City. For eight years he has tried to get a copy of his original birth certificate. Mark accidentally learned that he was Native American while rummaging through family papers after his adoptive father died. An old friend confided that the family doctor had arranged the adoption in Boston. Apparently Mark's grandmother worked for the doctor and Mark's adoptive mother was a patient. With the help of his adoptive mother, Mark made contact with his birth mother and family. This will greatly assist him in the enrollment process since the Indigenous nation to which his mother belongs traces descent through the maternal line. Although his Native family supports his desire to enroll, Mark must first get a copy of his birth certificate before the elders will consider the possibility of his enrollment.
- Nancy lives in Florida. Although she was born in South Dakota, her adoption took place in New York City through a private adoption agency that, in the past, placed many Indian children in non-Indian homes. (Three unrelated Indian children were adopted by Nancy's family through this agency.) Nancy is trying to obtain a copy of her birth certificate and adoption records. She recently learned the tribe and band of her mother and may be able to enroll in her mother's nation, even though descent is normally traced through the paternal line.

Why is enrollment so important? Enrollment validates one's identity and determines who can participate in the community's decision making process and its spiritual life. It can have certain economic benefits, such as the right to live on Indigenous territory, the right to apply for academic scholarships, or the right to exhibit as a Native artist. Most importantly, enrollment for an adopted person means that he or she can finally come home.

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<sup>1</sup> Names have been changed to protect identities.

Why is enrollment so difficult? On the one hand, some New Age practitioners have discovered a sudden affinity for American Indians while other "wannabees" hope to cash in on profits generated by gambling revenues. In truth, an "application" for enrollment is scrutinized on many levels. The consensus process which governs most Indigenous nations is traditionally deliberate and deeply spiritual, often involving community members, clan mothers (in matrilineal tribes), chiefs, elders and/or tribal councils.

The anguished experiences of this "lost generation" of Indian adopted men and women must never be repeated. For this reason, it is imperative that the strictures of the Indian Child Welfare Act be properly observed. Since many Indian people do not trust the legal system, it is especially important that judges and practitioners make relevant queries to determine whether the litigants in a foster care or adoption proceeding are Indian in order to avoid placing Native children in non-Native settings. Here are some suggestions.

1. Be aware that many Native people are often soft spoken.
2. Many family issues are framed within a spiritual context and traditional people do not discuss their religious beliefs. Don't treat silence as a negative response.
3. In the context of a foster care proceeding, recognize that some Native parents will not order their children to undertake certain actions because children must learn to be responsible for their own decision-making.
4. Recognize that some Native people will not self-identify as Indians in a public setting. Set the tone in your courtroom so attorneys, court officers and other court personnel treat litigants respectfully and decently regardless of ethnicity.
5. Advise litigants that the Indian Child Welfare Act was passed by Congress to ensure that Native American children are placed with Indian families to protect their cultural identity. In this context, ask litigants whether they or their grandparents are American Indians.
6. If a litigant affirmatively states that he or she is Indian, ask counsel to construct a family tree to determine the litigant's quantum of Indian blood.

There is no resource more vital to the continued existence and integrity of Indian tribes than their children.<sup>2</sup> In the same measure that the United States, as trustee, has a direct interest in protecting Indian children who are members of or are eligible for membership in an Indian tribe, we as officers of the court have a direct stake in complying with the Indian Child Welfare Act to ensure that the interest of Native boys and girls are adjudicated in tribal courts that can properly place them, if need be, in Indian foster and adoptive homes. In time, our adherence to the rule of law may foster a climate which will truly merit the respect of Indian people.

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<sup>2</sup> 25 U.S.C.A. 1901(3).

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# *Appendix C*

## *Handout 1-2: The Worker and the Court*





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## Appendix C. Handout 1-2: *The Worker and the Court*

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### Contents

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This appendix contains Handout 1-2: *The Worker and the Court*.

You will distribute this handout at the end of Module 1 of *ICWA: A Cultural and Legal Education*. Make enough copies for all participants before the program.

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## **Handout 1-2: *The Worker and the Court***

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### **THE WORKER AND THE COURT**

#### **Introduction**

Once the investigation indicates that protective services are appropriate and that the parents are unwilling to accept services on a voluntary basis, the worker initiates court action. This is usually done through filing a petition for the court to hear the matter. It is the role of the court to hear the matter. It is the role of the court to examine the evidence, rule on the validity of the allegations, and finally to impose consequences. Consequences may include in-home supervision, foster placement, and/or treatment. It is the role of the worker to provide to the court the information necessary to make this decision and to recommend a plan of action. The worker provides information on the facts of the investigation, a summary of the assessment, and a tentative case plan. The following information is designed to help the worker fulfill this role.

#### **Preparing for Court<sup>1</sup>**

The worker has two means of sharing information with the court: first, in the form of a written report and second, by direct testimony. The process of preparing for the court begins in the investigation.

If workers use the following step-by-step process, they will accumulate all information necessary to make an accurate case decision. In addition, the information gathered will be adequate for use in court.

The worker should focus on the allegations in the report. The allegations are the reason for the investigation; the information gathering focuses on discovering whether they are true or false. Also the worker should list additional allegations of abuse or neglect as a result of the investigation.

The worker should determine the evidentiary facts obtained in the investigation that support or refute the allegations in the report and/or additional allegations of abuse or neglect determined by the investigator. Facts are not opinions or judgments. If, for example, a mother says she locks her two year old in the closet when he misbehaves, the evidentiary fact would be "mother reports locking her two year old child in the closet when he misbehaves." Saying that "mother's discipline is inappropriate" is an opinion based on measuring the mother's behavior against the investigator's standards of appropriate child rearing.

The worker should list the information that substantiates the evidentiary facts. Evidence can be in the form of statements of parents or other people interviewed during the investigation, the observations of the investigator, records, photographs, and x-rays. The

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<sup>1</sup> Adapted from "Child Protective Services: A Guide for Workers," pp. 46-48.

more “contestable” or “subjective” a fact is, the more evidence that will be required to prove it.

In many cases, the worker conducting the investigation will reach conclusions concerning the existence of abuse or neglect that represent a professional judgment. The fact that some of these judgments may not be supported by “hard evidence” should not preclude the worker from making them or even including them in the record. However, it is most important that judgments or conclusions be clearly labeled as such. Such opinions are usually not admissible as evidence in court.

### **The Court Report<sup>2</sup>**

A report to the court must also be a reasonable document for parents and for other professionals. It should be brief and to the point. Remember, the parents will probably receive a copy. The following guidelines are recommended:

- Use clear and precise language. The language of the report should reflect what is usually happening in the family, and should be understandable to the family.
- Conceptualize problems in terms that suggest solutions. The purpose of an assessment is to eventually lead to change. The statements in an assessment report, therefore, should indicate the changes that treatment can reasonably effect.
- Avoid labeling of situations, behaviors, and especially of people as much as possible. Labeling can be both misleading and self-fulfilling. Description is more effective since labeling limits the directions treatment can take. For example, rather than describing Mrs. G. as psychotic, a worker would state, “Mrs. G. frequently hears voices when no one is talking.”
- Identify all judgments as such. Judgments should be supported by whatever facts and examples the worker has collected to support them.
- Include in the report your recommendations for the case, including long- and short-range goals for intervention.

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<sup>2</sup> Ibid., p. 55.

FIGURE 1

## Court Report

The Court report should include:

- Identifying information such as names, addresses, whereabouts of family members, ages, and relationships
- A description of the complaint, the allegation, source of the referral (if appropriate)
- Family situation:
  - A. physical conditions of home
  - B. economic situation
  - C. marital situation
- Client's view of the problem, and recommendations
- Contacts in the investigation (evidence to be offered):
  - A. school reports.
  - B. psychological reports
  - C. police reports
  - D. medical reports
  - E. prior abuse/neglect
  - F. history
- Social work assessment summary:
  - A. relating to the problem
  - B. evaluation of parents and child(ren)
- Agency recommendation:
  - A. alternatives (foster placement, in-home supervision, relative placement)
  - B. case plan
  - C. long- and/or short-range goals
  - D. financial support

## Evidence<sup>3</sup>

In preparation for court, the Indian child welfare worker should be familiar with the following four types of evidence that qualify as competent or conform to the rules of evidence.

### **Direct Evidence**

Provides factual information without requiring the proof of any other facts—witness' own conversations with the parent and/or child, or the witness' own observations.

### **Real or Demonstrative Evidence**

Actual proof, such as child in court with injuries, the instrument that caused the injuries, or x-rays or photographs of the injuries.

### **Circumstantial Evidence**

Proof of circumstances which may imply another fact. For instance, proof that a parent kept a broken appliance cord may connect the parent to infliction of unique marks on the child's body. Only direct observations may be presented.

### **Opinion of Expert Evidence**

Provided by a witness who has a special expertise, skill or knowledge that is beyond that of the average person. An example would be the pediatrician who diagnosed the child's injuries. The witness must first be qualified as an expert based on education, training, job experience, and/or writing in the field of expertise.

## **Guidelines For Testifying in Court<sup>4</sup>**

The protective service worker is frequently called as a witness in child abuse or neglect hearings. If possible the worker should talk with an attorney (tribal, state, etc.) prior to the hearing to find out what questions will be asked and what documents may be needed at the hearing. Some guidelines for effective testimony are:

- The worker should present a professional appearance and attitude in court. A witness' manner of dress, tone of voice, and facial expression all contribute to the judge's perceptions of the testimony.
- The worker should be thoroughly prepared and as objective as possible regarding the case. Testimony should be limited to the facts, unless the witness is specifically asked for a professional opinion. For example, the worker should testify: "I visited the family on Tuesday and Thursday of last week," rather than "a couple of days last week;" "I arrived at 12:30 p.m.,"

<sup>3</sup> Ibid., pp. 78-79.

<sup>4</sup> Ibid., pp. 80-81.

rather than “around noon,” and “food and dishes were scattered all over the kitchen,” rather than “the house was dirty.”

- The worker should be aware of the general rules of evidence before testifying and should answer only the question asked and should not volunteer additional information. It is important for the witness to understand the question asked and not to guess at an answer. All statements must be as accurate as possible.
- The worker should take time to think both the question and the answer through thoroughly before responding. If a yes or no answer is requested, but cannot be accurately given, the worker should explain that this would be a misleading response and that the question cannot be answered in that way. Usually, the witness will be given an opportunity to explain the response more completely. Remember that witnesses have rights too. Help can be requested in the form of a question to the judge if the witness feels the answer being sought would be misleading or untrue.
- During cross-examination, an attorney may try to confuse the worker in order to make the testimony appear inaccurate or biased. The worker should never respond to this angrily or in haste, but should remain calm and answer the question as clearly and accurately as possible. If a witness becomes flustered, it is possible that inaccurate or misleading information may be given, and the best interests of the child may not be served. Ask the judge for help if the questions or manner of an attorney are confusing.

### **Periodic Court Reviews**

Cases which come under the jurisdiction of the state or tribal court are subject to periodic review. Preparation for these reviews is essential. Case progress should be clearly documented. A well written case plan provides an excellent basis for providing information to the court on the progress of the case. In addition, a case plan outlines specific goals and objectives agreed upon by the worker and the client.

### **The Indian Child Welfare Worker and the State Court**

Even if an Indian child welfare worker does not have direct responsibility for protective services, they will often become involved in Indian child welfare cases before the state court. Sometimes her or his role will be in support of the state intervention. Other times the role will be that of advocate for the family and tribe.

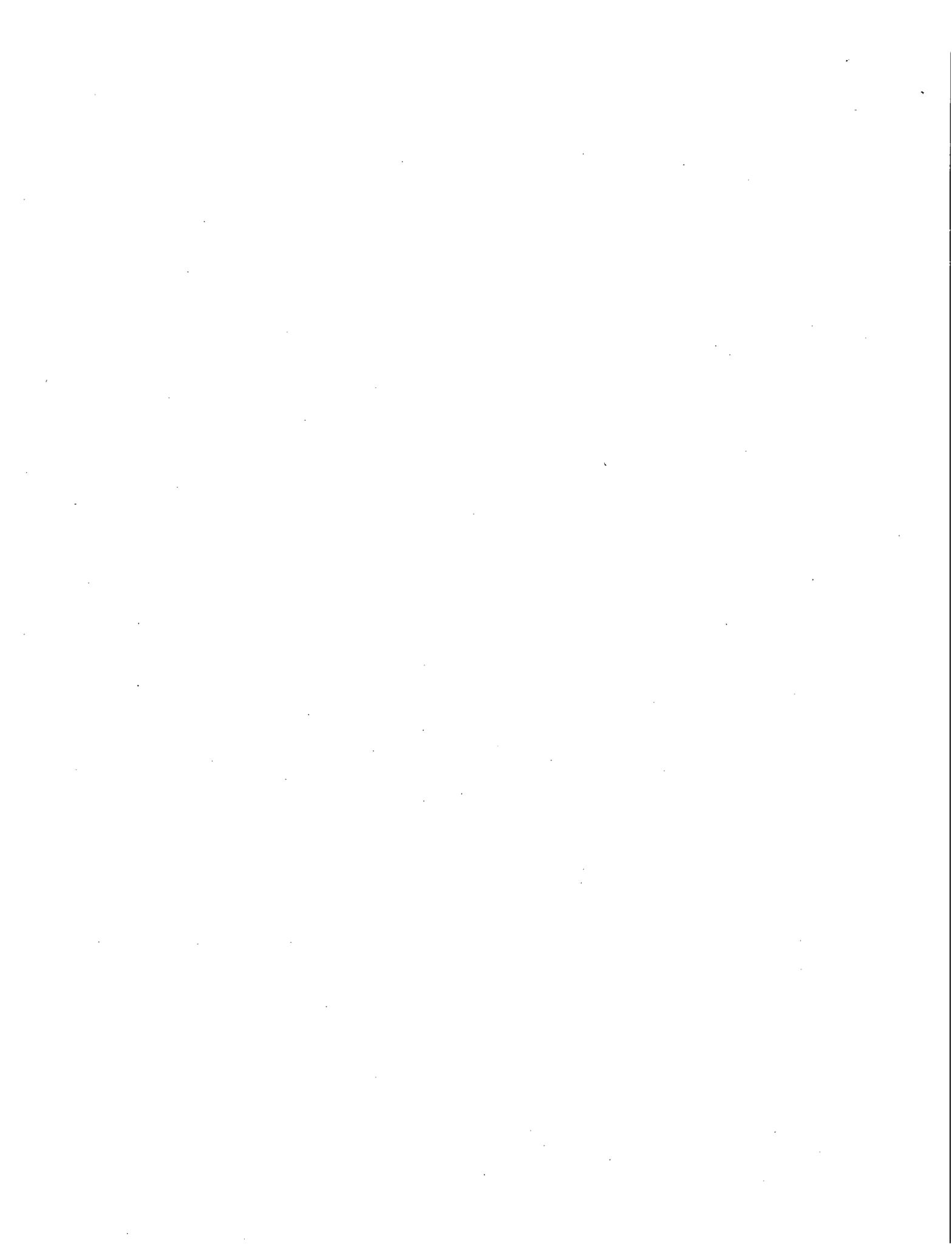
In either situation, the Indian child welfare worker attempts to work cooperatively with the state worker, assisting in the development of an appropriate case plan. It is essential that the Indian child welfare worker be familiar with the protective services process and the state of the state courts as a competent worker. The skills involved in investigation, assessment, and presentation of information will assist the worker in gaining this recognition.

## Summary

The Indian child welfare worker must be able to gather, evaluate, and present information in a way which is both clear and sensitive. Blending the legal responsibility with the helping role is one of the greatest challenges of protective services. This blend of authority and helping begins with the first contact. The court process must be conducted with the respect for the dignity of the client in mind, if the worker is to continue to help the client successfully. The next section deals with the helping process.

## FOR FURTHER DISCUSSION

- In your community, which court is responsible for hearing protective services cases? How does the process for sharing information with the court compare with that described in this section?
- Given your experiences with the court, how useful are your case records, i.e., documentation, in preparing for testimony? How could they be improved?
- Consider the task of giving testimony in court; what is the most difficult aspect? What suggestions do you have to help prepare?



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# *Appendix D*

## *Module 2 Overheads*





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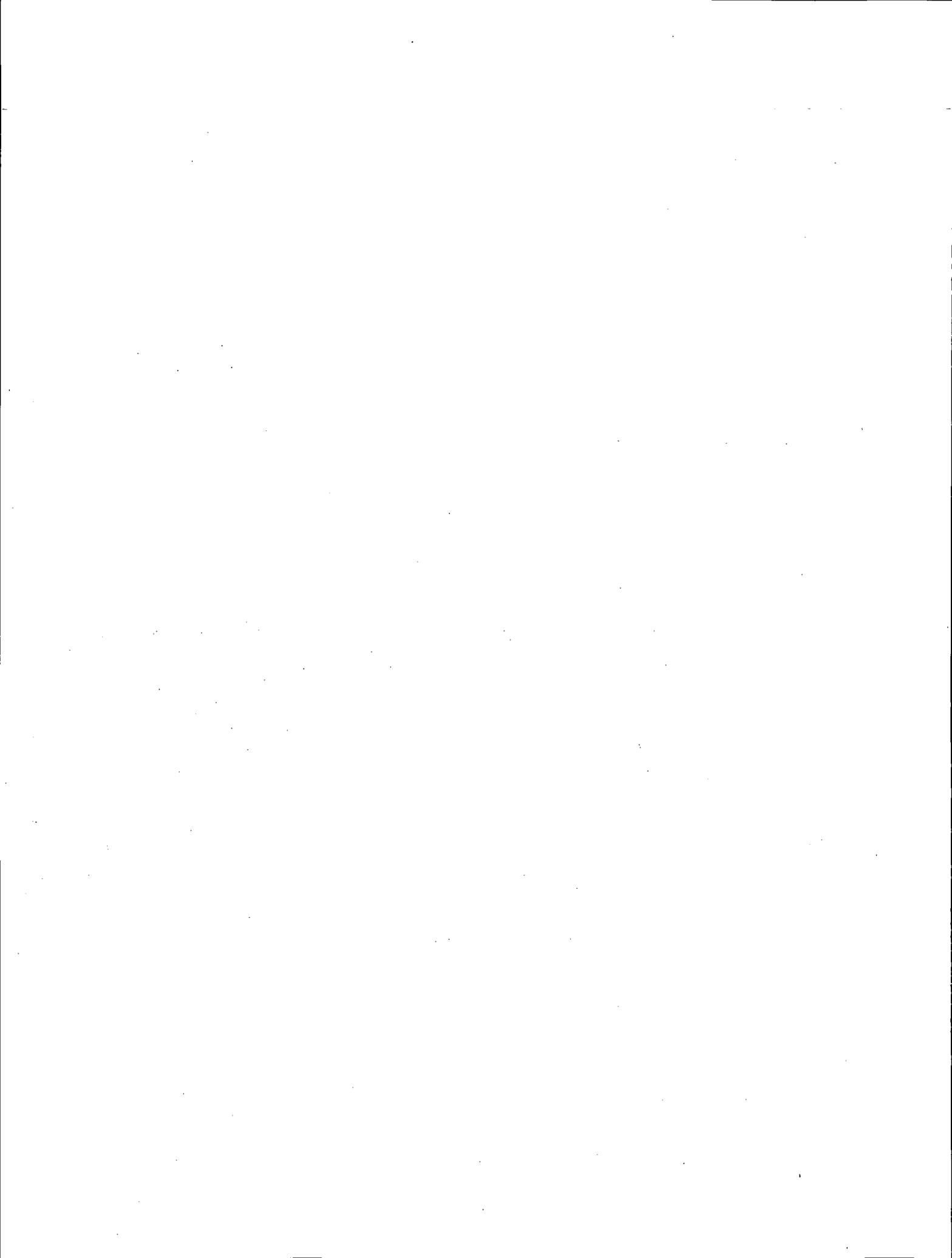
## Appendix D. Module 2 Overheads

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### Contents

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This appendix contains the camera-ready overheads for Module 2 of *The Indian Child Welfare Act: A Cultural and Legal Education Program*. Photocopy these camera-ready, hard copy overheads onto transparency paper before the program.



# Objectives of ICWA

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1. To prevent unwarranted removal of Indian children from their homes
2. To preserve the viability and cultural integrity of tribes
3. To maximize tribal court decision-making authority
4. To enhance tribal capacity to provide child welfare services

# Indian Law as a Basis for ICWA

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Because tribes are recognized as sovereign nations:

- ◆ Trust responsibility of U.S. government
- ◆ Authority of tribes to regulate domestic affairs

# Sources of ICWA Law

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- ◆ Federal Statute - 25 U.S.C 1901 *et seq.*
- ◆ BIA guidelines for state courts
- ◆ BIA regulations
- ◆ State statutes and regulations
- ◆ Case law

# Required Findings for Application of ICWA

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- ◆ Must be a child custody proceeding
- ◆ Proceeding must involve “Indian child”

# Child Custody Proceedings

---

- ◆ Foster care placements
- ◆ Termination of parental rights
- ◆ Preadoptive placements
- ◆ Adoptive placements

# Examples of ICWA Proceedings

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- ◆ Abused and neglected child
- ◆ Child in need of supervision (CHINS)
- ◆ Emotionally disturbed child
- ◆ Status offenses (e.g., truant, unruly, incorrigible, alcohol offenses)
- ◆ Intrafamily disputes
- ◆ Stepparent adoptions
- ◆ Termination proceedings
- ◆ Adoptions (public and private)

# ICWA Does Not Apply

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- ◆ Custody disputes between parents
- ◆ Paternity or child support actions
- ◆ Delinquency proceedings, unless:
  - State seeks termination of parental rights
  - Basis for petition is not criminal
- ◆ Voluntary placements where child may be regained upon demand

# Who Is an Indian Child?

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- ◆ Unmarried and under the age of 18
- ◆ Member of federally recognized Indian tribe
- ◆ Eligible for membership and the biological child of a member
- ◆ Tribe must be eligible for services from DOI
- ◆ Canadian tribes and terminated tribes not included

# Indian Parents and Custodians

---

- ◆ Biological parent of Indian child
- ◆ Indian adoptive parent
- ◆ Indian custodian
  - ▶ Indian person who has legal custody under state or tribal laws
  - ▶ Indian person who has temporary physical custody

# Showings Required to Obtain Placement Order

---

## *Foster Care :*

- ◆ Effort to provide remedial services
- ◆ State grounds
  - ▶ Prove according to state law
- ◆ Serious emotional or physical harm

## *Termination:*

- ◆ Unsuccessful effort to provide remedial services
- ◆ State grounds
  - ▶ Prove according to state law
- ◆ Serious emotional or physical harm

# Burdens of Proof

---

- ◆ Foster care placement:
  - Clear and convincing evidence
  - Supported by testimony of qualified expert witness (QEW)
  
- ◆ Termination:
  - Beyond reasonable doubt
  - Supported by testimony of QEW

# Qualified Expert Witness

---

- ◆ Member of child's tribe
- ◆ Non-Indian with substantial knowledge and experience in working with Indian families
- ◆ Commonly accepted expert witness

# Placement Decisions

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*For voluntary and involuntary placements:*

- ◆ Each placement must comply with ICWA placement preferences
- ◆ Tribes can alter placement preferences

# Placement Preferences

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## *Foster Care:*

- ◆ Member of child's extended family
- ◆ Tribally licensed foster home
- ◆ Licensed Indian foster home
- ◆ Tribally approved institution

## *Adoption:*

- ◆ Member of child's extended family
- ◆ Other members of child's tribe
- ◆ Other Indian families

# Good Cause to Deviate

---

- ◆ Preference of parent or child
- ◆ Extraordinary physical or emotional needs of child
  - ▶ Established by testimony of QEW
- ◆ Inability to comply after diligent search
- ◆ Bonding issue
  - ▶ Not supposed to be legitimate consideration

# Determining Membership

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- ◆ Tribal determination conclusive
- ◆ In absence of tribal determination, BIA determination is conclusive
- ◆ In absence of both, state court must determine
- ◆ Different tribes with an interest in a child

# Ways Tribes Determine Membership

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- ◆ Enrollment

- Enrollment officer or tribal clerk

- ◆ Lineal ancestry

- Matrilineal - Patrilineal

- Federal membership roll

- ◆ Adoption by tribal members

# Evidence of Membership

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- ◆ Tribal court enters order
  - ◆ Tribal assertion in a motion to intervene or a transfer motion
  - ◆ If court takes evidence:
    - Degree of Indian Blood document routinely accepted
    - Affidavits
    - Testimony
- Subject to foundation and evidentiary rules

# Notification Requirements

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- ◆ By registered mail
- ◆ To any and all Indian tribes with which the child may have affiliation
- ◆ To BIA
- ◆ Completed at least 10 days before proceeding
- ◆ Must include statement of
  - ▶ Tribe's right to intervene
  - ▶ Right to court-appointed counsel for parents and Indian custodian
  - ▶ Right to discovery

# Representation of Tribe

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- ◆ Pro se, through non-lawyer representative
  - State or local law requiring representation by counsel preempted
- ◆ Tribal judge
- ◆ Urban Indian organizations
- ◆ Independent agreements with states

# Jurisdictional Provisions

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- ◆ Exclusive tribal jurisdiction:
  - Indian children domiciled on reservation
  - Wards of tribal court
- ◆ Tribes may establish jurisdiction over:
  - Indian children domiciled off reservation
- ◆ State has emergency jurisdiction over:
  - Indian children domiciled on reservation who are found off reservation in emergency
- ◆ Agreements between states and tribes

# Public Law 280

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- ◆ Established state-tribal concurrent jurisdiction:
  - Civil and criminal matters
  - Fill vacuums in law enforcement
  - Investigate Pub.L. 280 in your state
- ◆ Pub.L. 280 can affect custody proceedings:
  - State jurisdiction over reservation-domiciled children
- ◆ Spirit of Section 1918 of ICWA

# Transfer of Jurisdiction

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- ◆ Upon petition of tribe, parent, or Indian custodian unless:
  - Parent vetos transfer (Indian custodians do not have absolute right to veto, but may argue for veto)
  - Tribal court declines case
  - State court finds good cause to deny transfer

# Good Cause to Deny Transfer

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## *BIA Guidelines:*

- ◆ No tribal court
  - ▶ Panel of elders that resolves disputes is acceptable
- ◆ Objection by child over age 12
- ◆ Late request
- ◆ Inconvenient forum
- ◆ Best interest standard

# Voluntary Proceedings

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- ◆ Good practice to provide notice
- ◆ No need to show remedial or rehabilitative services
- ◆ Child must be at least 10 days old
- ◆ Consent must be executed in writing before judge of competent jurisdiction
- ◆ Court must explain consequences in language the person can understand
- ◆ Consent may be revoked before entry of decree

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# ***Appendix E***

## ***Handout 2-1: The Indian Child Welfare Act***





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## Appendix E. Handout 2-1: *The Indian Child Welfare Act*

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### Contents

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This appendix contains Handout 2-1: *The Indian Child Welfare Act: The Need for a Separate Law*. This article was written by B. J. Jones and was published in *The Compleat Lawyer*, Volume 12, Number 4, Fall 1995. Adaptation of article for use in this *Guide* is provided courtesy of the author.

You will distribute this handout during the program. Make enough copies for all participants before the program.

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## **Handout 2-1: *The Indian Child Welfare Act: The Need for a Separate Law***

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### **The Indian Child Welfare Act The Need For Separate Law**

***B. J. Jones***

Director

Northern Plains Tribal Judicial Training Institute

Because few federal laws govern the disposition of state court cases involving adoption, guardianship, and abuse and neglect, the existence of the Indian Child Welfare Act (25 U.S.C. § 1901 *et seq.*) may come as a surprise to lawyers handling Indian child custody cases for the first time.

The Indian Child Welfare Act (ICWA), which was adopted by Congress in 1978, applies to child custody proceedings in state courts involving “Indian” children—children of Native American ancestry. The provisions of the ICWA represent a dramatic departure from the procedural and substantive laws that most states have enacted to govern child custody proceedings. Because Indian children are treated uniquely in the legal system, and because there is an increasing number of court proceedings involving Indian children, the need for lawyers to understand the ICWA is fast becoming imperative. (Since the ICWA was enacted, more than 250 state and federal court decisions have been rendered.)

A look at history reveals why Congress determined a special law was needed to protect the rights of Indian children and their parents. Before 1978, as many as 25 to 35 percent of the Indian children in certain states were removed from their homes and placed in non-Indian homes by state courts, welfare agencies, and private adoption agencies. Non-Indian judges and social workers—failing to appreciate traditional Indian child-rearing practices—perceived day-to-day life in the children’s Indian homes as contrary to the children’s best interests.

In Minnesota, for example, an average of one of every four Indian children younger than one was removed from his or her Indian home and adopted by a non-Indian couple. A number of these children were taken from their homes simply because a paternalistic state system failed to recognize traditional Indian culture and expected Indian families to conform to non-Indian ways.

Other children were removed because of the overwhelming poverty their families were facing. Although, admittedly, poverty creates obstacles to child rearing, it was used by some state entities as evidence of neglect and, therefore, grounds for taking children from their homes.

It was not only the high number of children being removed from their homes, but also the fact that 85 to 90 percent of them were being placed with non-Indians that caught the attention of Congress. Congress was actively promoting the continued viability of Indian nations as separate sovereigns and cultures at that time. By enacting the substantive placement preferences in ICWA—which require that Indian children, once removed, be placed in homes that reflect their unique

traditional values (25 U.S.C. § 1915)—Congress was acknowledging that no nation or culture can flourish if its youngest members are removed. The act was intended by Congress to protect the integrity of Indian tribes and ensure their future.

### *When Does the ICWA Apply?*

The ICWA applies to four types of Indian child custody proceedings:

1. *Foster care placements.* The ICWA applies to the temporary removal of an Indian child from his or her home, for placement in a foster home or institution, when the parent or Indian custodian (defined as an Indian person with custody of a child under tribal or state law or who has the child pursuant to a parental placement) cannot regain custody upon demand (25 U.S.C. § 1903(1)). The latter provision exempts ICWA application from voluntary religious or school placements, as well as voluntary placements with private or public agencies where the parent or custodian can regain custody at any time. However, the ICWA *would* apply to a guardianship in which a child is placed with a nonparent, as this fits the definition of a foster care placement.

Be aware that certain state courts have limited the applicability of the ICWA by holding that the law does not apply to proceedings involving the removal of an Indian child from a non-Indian family: for example, a case that involves an Indian child raised by a non-Indian mother. Known as the “existing Indian family” exception, the exception has generated some controversy. Refer to your own state’s law to determine its status in your state.

2. *Termination of certain rights.* The ICWA applies to any proceeding that may result in the termination of the parental rights of the Indian child’s parents or the custodial rights of the child’s Indian custodian, including stepparent adoption proceedings and delinquency proceedings that lead to an attempt to terminate parental rights. (These generally are not governed by the ICWA.)

3. *Preadoption placements.* The ICWA applies to the temporary removal of an Indian child from his or her home, for placement in a foster home or institution, after termination of parental rights, but prior to or in lieu of adoptive placement.

4. *Adoption placements.* The ICWA applies to proceedings that lead up to and culminate in the adoption of an Indian child. It imposes an obligation on both public and private adoption agencies to comply with its provisions.

The ICWA does not apply to custody disputes between divorcing parents or custody disputes related to any other proceedings, nor does it apply to delinquency proceedings involving an Indian child who has committed an act that would constitute a crime if it were committed by an adult (except where the state is using the delinquent act as the basis for termination of a parental rights petition). However, it would apply if the act committed by the child did not constitute a crime, e.g., an act of truancy or incorrigibility.

### *Is the Child an Indian?*

To apply the provisions of the ICWA to a particular child custody proceeding, the court must first determine that the child is an Indian. Much litigation has ensued over this distinction. The ICWA defines “Indian child” as a child who is a member of a federally recognized Indian tribe, or is eligible for membership in such a tribe and the biological child of a member (25 U.S.C. § 1903(4)). Parties to a state court proceeding must defer to Indian tribes on questions of membership.

There are a variety of ways Indian tribes determine membership, ranging from blood quantum requirements to residency requirements; no set formula applies to all tribes. At present, there are more than four hundred Indian tribes and Alaskan native villages that are recognized by the U.S. Department of the Interior and, therefore, governed by the provisions of the ICWA. (A list is published annually in the *Federal Register*.) Children who are members of Canadian tribes or tribes that have state government recognition only, are not governed by the act.

The provisions of the ICWA require that lawyers adhere to numerous specific procedures. First and foremost, because the act vests Indian tribal courts with *exclusive* jurisdiction over Indian children who live on Indian reservations (25 U.S.C. § 1911(a)), state courts, with limited exceptions, cannot exercise jurisdiction over child custody proceedings that involve such children or children whose custodial parents were living on a reservation immediately prior to a foster care or adoption placement. These types of proceedings must be adjudicated through the tribal court of the relevant tribe.

If the Indian child lives off the reservation, the state court may exercise jurisdiction over the child custody proceedings, but the party invoking the state court’s jurisdiction must comply with certain procedures. If the proceeding involves the involuntary removal of a child, the petitioning party must notify the Indian child’s tribe and the Department of the Interior by certified mail of the tendency of the state court action if the party knows or has reason to believe that the child is Indian.

When a child’s tribal affiliation is unknown, the party must notify all tribes that may have some connection to the child as well as the Department of the Interior, which may have information that would help determine the child’s tribal status. If the proceeding is voluntary—e.g., the mother is voluntarily seeking to terminate her rights so she can place the child for adoption—notice may not be necessary; need will be dictated by the court decisions of the particular jurisdiction.

In situations where notice is required, notice must be completed at least ten days before the state proceedings may advance and it must apprise the tribe of: its unconditional right to intervene in the state court proceeding, its right to examine all relevant documents, and its right to request that the start of the proceeding be delayed. Notice also must inform the tribe of its right, and the right of the child’s parent(s) or Indian custodian, to request a transfer of the proceeding to the tribal court. The law requires that state courts grant such requests except when one of the following occurs: one of the parents objects to the transfer, the tribal court declines the transfer, or the state court finds good cause not to transfer.

Much of the case law interpreting the ICWA has arisen from situations in which one of the parties to a state court child custody proceeding claims “good cause” for not transferring the case to a tribal court. Although “good cause” is not defined under the law, its meaning is made somewhat

clear in the guidelines for state courts enacted by the Department of the Interior (44 Fed. Reg. No. 228, p. 67584 (Nov. 26, 1979)). The guidelines state that a party opposing a transfer to tribal court has the burden of showing good cause by clear and convincing evidence.

Examples of good cause grounds to deny a transfer request include: the absence of a tribal court for the tribe in which the Indian child is a member, an objection by the Indian child to a transfer (if he or she is older than age 12), a history of minimal contact between the child and the Indian tribe and reservation, a situation in which the request for transfer is not timely and the proceedings are at an advanced stage, and evidence that a transfer would impose hardship on the parties and witnesses because of the distance to the tribal court (*forum non conveniens* ground).

In addition, some state courts have adopted a “contrary to the best interest of the child” standard when deliberating a transfer request—even though such a standard is not included in the law or guidelines—and have invoked it as grounds to deny a transfer when the Indian child has already “bonded” to his or her foster caretaker(s). (Be aware that some other state courts have condemned that use of this standard to deny a transfer.)

### *More Procedures*

Whatever the reason, if transfer to a tribal court is denied and the case remains in state court, various other procedural protections of the ICWA will apply. For example, a party attempting to achieve the involuntary foster-care placement of an Indian child must establish, by showing clear and convincing evidence, that: (1) an active effort has been made to provide remedial and rehabilitative services to the child’s family and that it was successful, and (2) continued custody by the parent(s) or Indian custodian likely will result in serious emotional or physical damage to the child.

The latter showing must be supported by the testimony of one or more “qualified” expert witnesses, persons who have substantial knowledge of traditional Indian child-rearing practices or substantial experience working with Indian children. In states with small Indian populations, finding such a person may be problematic, but the alternative—allowing the child’s future to ride on the opinion of experts who may be ignorant and, therefore, biased against Indian parents—is more problematic.

When the petitioning party’s objective is the termination of parental rights to an Indian child, the party has the burden of demonstrating *beyond a reasonable doubt* that serious emotional or physical harm will befall the child if parental rights are not terminated, and that active efforts to provide remedial and rehabilitative services have been unsuccessful. Again, the findings must be supported by the testimony of a qualified expert witness, one who is versed in the ways of traditional Indian child-rearing practices.

In recognition that a substantial number of Indian children have been removed from their homes under the guise of “voluntary placements,” the ICWA regulates the voluntary placement of Indian children and the voluntary termination of parental rights for adoptions. Its stringent requirements on parties who seek voluntary placements represent an attempt to abolish a longtime pattern by many public and private agencies of abusing the rights of Indian parents.

The act mandates that the valid placement of an Indian child in foster care, or the valid termination of parental rights, requires the consent of the Indian parent in writing before a judge of competent jurisdiction (either a state court judge, if the child is domiciled off the reservation, or a tribal court judge) who certifies that he or she has explained to the parent the consequences of his or her actions in a language the parent understands, or has had the consent translated into a language the parent understands.

A consent to the termination of parental rights cannot be executed until after the child is ten days old. If the consent is not obtained pursuant to the provisions of the ICWA, the termination will not be legal. The party obtaining custody will be barred from invoking a state court's jurisdiction to further place the child and the child will be ordered returned to the parent, *unless* returning the child would subject him or her to immediate danger.

An Indian parent or custodian can revoke his or her consent at any time during the foster care placement and before the decree of termination or adoption has been entered. After doing so, he or she will be entitled to the automatic return of custody of the child. In the case of an adoption, however, if the court has already entered an order accepting the voluntary termination of parental rights, the parent cannot revoke his or her consent. In cases where an Indian child has been in the home of an Indian custodian, not only must there be a termination of the parental rights, but also a termination of the custodial rights before the adoption will be legal.

### *Placement Provisions*

A second, and equally important, goal of Congress in enacting the ICWA was to ensure the placement of Indian children in homes that would reflect the unique values of Indian culture. This was achieved by the placement provisions of the ICWA, which govern both voluntary and involuntary placements of Indian children and define placement preferences that public and private agencies must follow. (Note that Indian tribes are permitted under the ICWA to change the order of the act's placement preferences, so you must investigate with each tribe you encounter the order of its particular preference scheme.)

According to the ICWA, when an Indian child is placed in foster care, the placement agency or party must place the child—in the absence of good cause to deviate—with: (1) a member of the Indian child's extended family (including non-Indian members of the family), (2) a foster home licensed or approved by the child's tribe, (3) an Indian foster home licensed or approved by a non-Indian agency or authority, or (4) an institution for children that has the approval of an Indian tribe.

To determine which placement option best meets the intent of the ICWA, the placement agency must consider the need to approximate the child's family setting as closely as possible, to keep the child as near as possible to his or her family's home, and to place the child in the least restrictive environment.

When an Indian child is placed for adoption, the ICWA requires that, in the absence of good cause to deviate, the child should be placed with: (1) a member of his or her extended family, (2) other members of his or her tribe, or (3) other Indian families. In this situation, too, it is necessary to determine whether the tribe involved has altered the standard preference scheme.

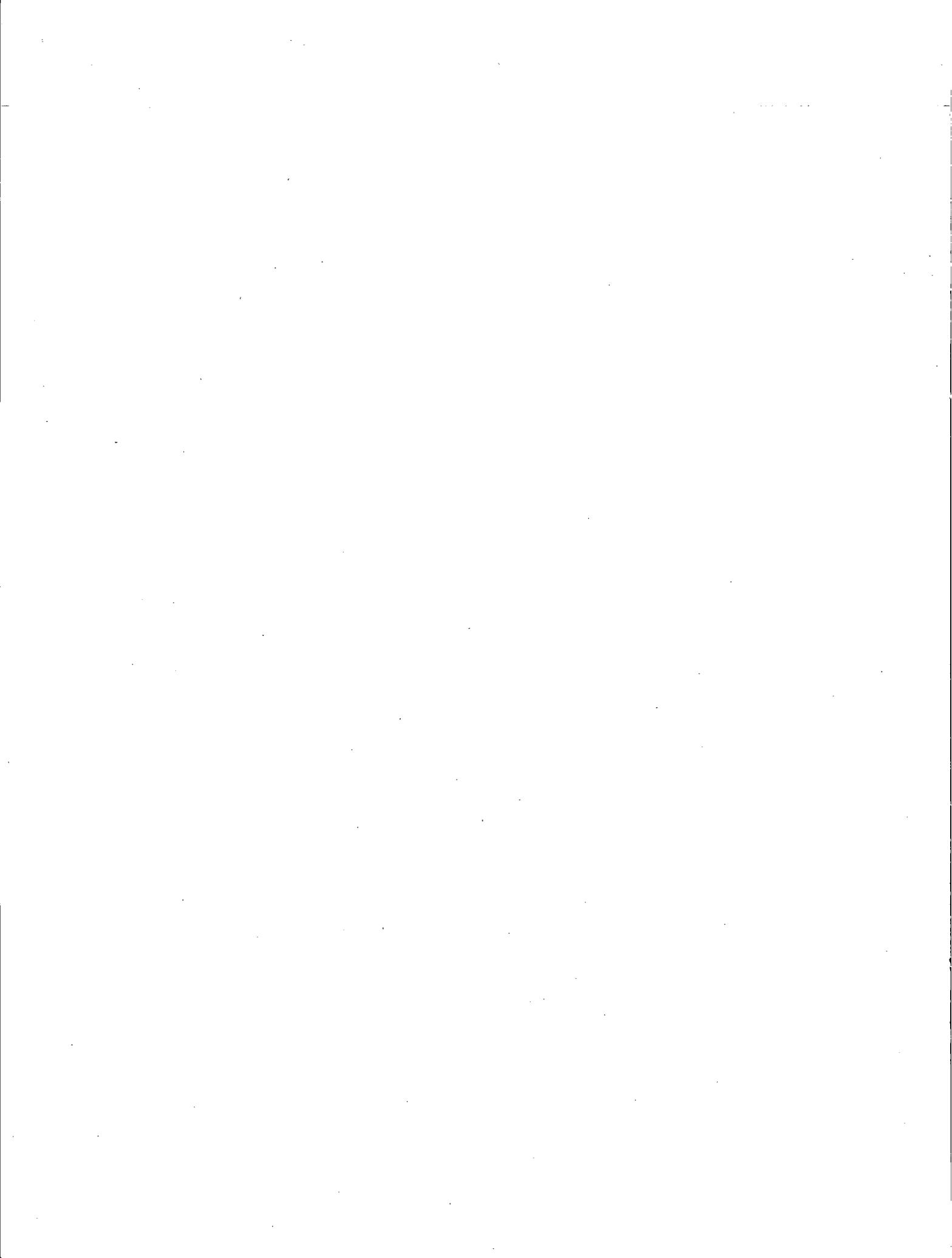
In either a foster care or adoption placement, if the party advocating a deviation from the placement preferences demonstrates good cause to deviate, the state court can sanction a placement that does not conform to the standard placement criteria.

The Department of the Interior's guidelines for state courts lists the following as examples of good grounds to deviate: (1) a request to deviate that comes from the biological parents or the child (provided he or she is of "sufficient" age), (2) extraordinary physical or emotional needs of the child (as established by qualified expert testimony), and (3) the determination—after a diligent search for a family that meets the placement preferences—that a "suitable" family is not available.

### *Is It Working?*

The standard by which any law should be judged is whether it has achieved its stated legislative objective. The ICWA was enacted to prevent the continued removal by state agencies, courts, and private agencies of large numbers of Indian children from their families and—equally important—their culture.

At the very minimum, the existence of the act has brought attention to the unique needs of Indian children and provided state agencies and judges with a valuable, cross-cultural educational tool. Although the removal of Indian children from their homes continues to occur at an alarming rate, the ICWA mandates a process that, if adhered to over time, will eventually ensure the survival of Indian tribes and cultures well into the future.



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# *The National Center for State Courts*

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