NATIONAL CENTER TO ADVANCE PEACE
for Children, Youth, and Families



The Indian Child Welfare Act (ICWA) 101

A Primer for Advocates

TOOL 1

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What Is ICWA?

The **Indian Child Welfare Act (ICWA)**[1] is a federal law passed by Congress in 1978. It is widely regarded as the "gold standard" in child welfare practice because it established **enhanced requirements** for courts and state agencies (such as higher standards of process and services) when the child involved is an American Indian or Alaskan Native child.

ICWA was designed to protect the rights of American Indian and Alaska Native (AI/AN) children and their Tribes by ensuring that child custody proceedings involving AI/AN children reflect the best interests of the child as a Tribal citizen – not only as an individual, but as a member of a sovereign Nation.

Why Was ICWA Passed? The Historical Context

Before 1978, state child welfare systems removed AI/AN children from their families at alarming rates and placed them almost entirely in non-Native homes and institutions.

25–35%	85%+	83%
of ALL AI/AN children removed from homes before 1978	of removed children placed in non-Native homes or institutions	of school-aged AI/AN children in federal Boarding Schools by 1926

Even prior to this, there was a historic precedent for AI/AN child removal. The **Indian Boarding School Era**, in which AI/AN children were forcibly removed from their families and Tribes, violently assimilated into Anglo-Christian culture, punished for speaking their languages, and frequently abused, was a direct instrument of federal policy aimed at the eradication of Native peoples from their land. Children were renamed, separated from parents and siblings, and stripped of their cultural identity.

ICWA was Congress's response to this documented pattern of state-sanctioned family destruction. **This response did not come automatically — it was the direct result of years of sustained advocacy, organizing, and lobbying by Tribal Nations and Tribal leaders who documented the harm and demanded federal action.**

Why This Matters for DV Advocates: Your AI/AN clients may have deep, historically grounded reasons to distrust child welfare systems. Understanding this history helps you serve these families with the cultural humility and informed advocacy they deserve.

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[1] Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963. Federal regulations: 25 C.F.R. Part 23. See also BIA Guidelines (2016) at bia.gov/icwa.

When Does ICWA Apply?

ICWA applies when there is a **"child custody proceeding"** involving an **"Indian child."** Both terms are defined by law. An "Indian Child" is defined as a child who is:

- **Under 18 years old and unmarried**, AND
- Either **enrolled in a federally recognized Tribe** OR **eligible to be enrolled** in a federally recognized Tribe AND has at least one **biological parent who is a tribal member**.[2]

ICWA covers these types of proceedings (25 U.S.C. § 1903(1)):

- Foster care placement
- Termination of parental rights (TPR)
- Pre-adoptive placement
- Adoptive placement

ICWA does NOT apply to: divorce/custody proceedings between two parents, juvenile delinquency proceedings, or cases in tribal court (Tribes have their own sovereign child welfare laws).

Tip for Advocates: A child does not have to currently be enrolled with a Tribe; eligibility to enroll is enough. If you are working with an AI/AN family and a child welfare case is filed, always ask: "Is the child enrolled in or eligible for enrollment in a federally recognized Tribe?" Don't assume the family will know to raise ICWA. Use Tool 2 for a step-by-step checklist.

The Three Key Provisions of ICWA

Provision 1: Notice[3]

Under ICWA, the following parties must receive formal notice of **every** child custody proceeding:

- The child's parents or **Indian custodian** — defined as any Native person with legal custody under tribal law or custom, state law, or to whom the parent has transferred temporary physical care or custody.[4]
- The child's Tribe (sent to the Tribe's designated ICWA worker or social services program.)
- The Bureau of Indian Affairs (BIA) — if the Tribe cannot be identified.[5]

Notice must be sent by registered or certified mail, return receipt requested. A copy must be filed in the court record. No proceeding (except emergency removals) may be held until notice has been received in compliance with the regulations. The Tribe may intervene at any point and retains the right to notice of all subsequent hearings even if it does not intervene.

Provision 2: Active Efforts[6]

Before removing an Indian child, the state must demonstrate that it made **"active efforts"** to prevent the breakup of the Indian family. This is a **higher standard** than the "reasonable efforts" required in non-ICWA cases.

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[2] **25 U.S.C. § 1903(4)**
[3] **25 U.S.C. § 1912(a)**
[4] 25 U.S.C. § 1903(6)
[5] 25 C.F.R. § 23.11(b)
[6] **25 U.S.C. § 1912(d); 25 C.F.R. § 23.2**

Active Efforts vs. Reasonable Efforts

"Reasonable efforts," the standard applied in non-ICWA cases, generally allows a state to satisfy its obligation by referring a family to services and documenting that the family had the opportunity to engage with them. ICWA requires more. Under 25 U.S.C. § 1912(d), any party seeking foster care placement or termination of parental rights to an Indian child must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that those efforts proved unsuccessful. Federal regulations define active efforts as affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with their family, not merely to offer a referral list and document non-engagement (25 C.F.R. § 23.2).

Examples of active efforts (25 C.F.R. § 23.2) include, but are not limited to:

- Conducting a comprehensive assessment of the family's circumstances, with a focus on safe reunification as the primary goal
- Identifying appropriate services and helping the family overcome barriers to accessing them (e.g., transportation, childcare, scheduling)
- Identifying, notifying, and inviting representatives of the child's Tribe to participate in providing support and services
- Conducting or requesting the child's Tribe to conduct a diligent search for extended family members for placement
- Taking steps to keep siblings together where possible
- Requesting participation of the Tribe's designated representative to identify culturally appropriate services and to ensure ICWA compliance

Active efforts must be tailored to each family's specific circumstances, must begin before removal is sought, and, where the agency is involved, must include actively assisting the parent through the steps of the case plan, not just directing them to it. If active efforts have not been made, the child must be returned home. Active efforts to reunify must continue even after removal, for as long as the case remains open.

For DV Advocates: If a survivor's child is in a custody proceeding, check whether the agency documented active efforts. Failure to make active efforts is a legal basis to challenge a removal or prevent termination of parental rights.

Provision 3: Placement Preferences[7]

If a child is removed and the case remains in state court, ICWA mandates a specific preference order for placement. These preferences apply even if the Tribe does not intervene, and even in proceedings after parental rights have been terminated. A Tribe may set its own preference order, which the court must follow.

[7] **25 U.S.C. § 1915**

1st	Member of the child's extended family
2nd	Foster home licensed, approved, or specified by the child's Tribe
3rd	Indian foster home licensed or approved by the state or other non-Native licensing authority
4th	Institution for children approved by an Indian Tribe or operated by an Indian organization that meets the child's special needs

Is ICWA a "Race-Based" Law?

No. ICWA is based on an AI/AN child's **political status**, not a racial one. This distinction is legally critical.

The U.S. Supreme Court has long recognized that Congress has a special, nation-to-nation relationship with federally recognized Tribal Nations. Laws affecting tribal members are based on their **political status as citizens of sovereign nations**, not on race. This is grounded in the Indian Commerce Clause (U.S. Const., Art. I, § 8) and in nearly 200 years of federal Indian law.

Current Legal Status: In Brackeen v. Haaland (2023), the U.S. Supreme Court ruled 7–2 that challengers lacked standing and ICWA survived constitutional challenge. ICWA is currently in full force and effect. Monitor nicwa.org/icwa for updates.

Why the Federal Law Matters Even When Your State Has an ICWA Law

18 states have enacted their own state-level Indian child welfare laws (see Tool 4 for a full list). These laws often go further than the federal floor and provide additional protections.

However, state ICWA laws operate within the framework created by the federal law. **States do not have a nation-to-nation relationship with Tribal Nations; the federal government does.** If the federal act were struck down, state laws alone could not fill that gap.

Advocate Note: Pointing to your state's ICWA law as "enough" misses the point. Tribal advocates are fighting to preserve their Nations' sovereign right to exist — that is a federal obligation, not a state one.

Key Resources: National Indian Child Welfare Association (NICWA) | Bureau of Indian Affairs — ICWA | Child Welfare Information Gateway

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