



Strengthening Tribal Courts: Impact of Domestic Violence on Youth

◆ November 20 - 21, 2024 | Hochatown, OK ◆





Coming Up | Unit 1

ICWA 101: Essential Knowledge for Practitioners

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ICWA Overview

ICWA Highlights

Compels the state to perform **active efforts** to keep children with their families or safely reunify with their families.

Includes **heighten standards** to make sure that removal, foster care placement, guardianship placement, or termination of parental rights is actually necessary.

Requires an **expert** to confirm the removal was necessary in the context of a child's tribal culture.

Creates **placement preferences** to keep children connected to relatives, identity and culture.

Recognizes and supports that decisions should be made in the context of a child's community and culture through jurisdiction, intervention & **transfer**.



Levels of Legal Authority

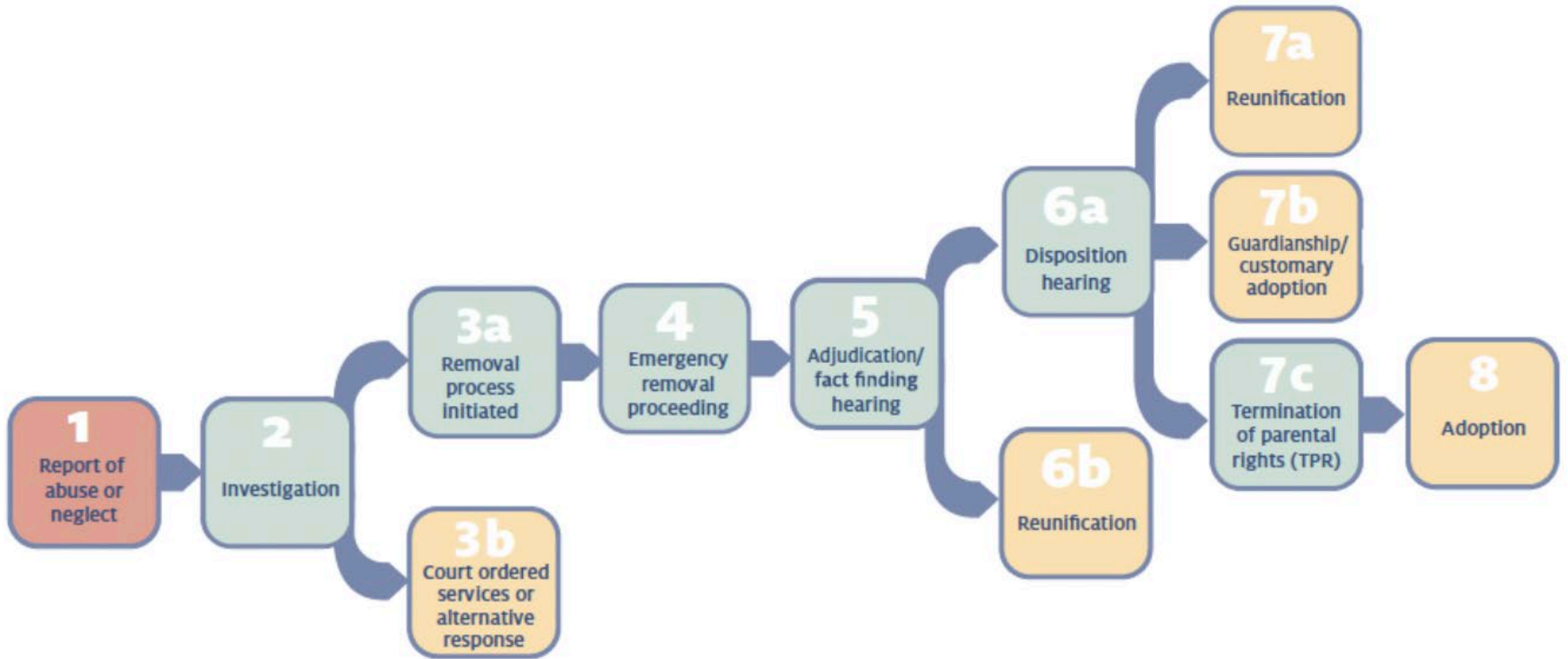
- Federal Law (ICWA)
- Regulations (23 CFR Pt. 23)
- State Laws
- State case law
- Federal case law
- Court Rules
- Federal Guidelines
- Department Policies



**Indian Child Welfare Act
Facts & Fiction**

NCJFCJ
NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES
WWW.NCJFCJ.ORG

Where state law is applicable and provides a higher standard of protection for parents than ICWA, the higher standard applies.



Child Welfare Overview

When does ICWA apply?

In State Court

Not in tribal court

Indian Child

Under 18 at start of case;

Unmarried; and

Member of tribe; or
Eligible for membership and one bio parent is a member

Child Custody Proceeding

Emergency Proceeding

Involuntary Proceeding

Status Offense Proceeding

Voluntary Proceeding

Identifying an “Indian child”

§ 23.107 How should a State court determine if there is reason to know the child is an Indian child?

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an “Indian child,” the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an “Indian child” in this part.

When does ICWA apply?

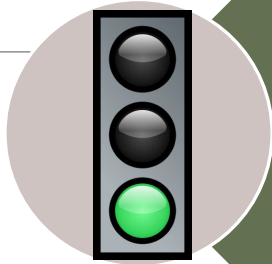
§ 23.103 When does ICWA apply?

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No EIFE

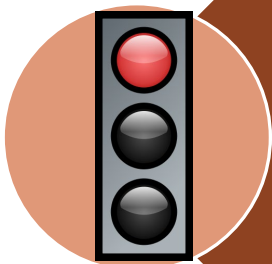
(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of “Indian child,” then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court **may not** consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.



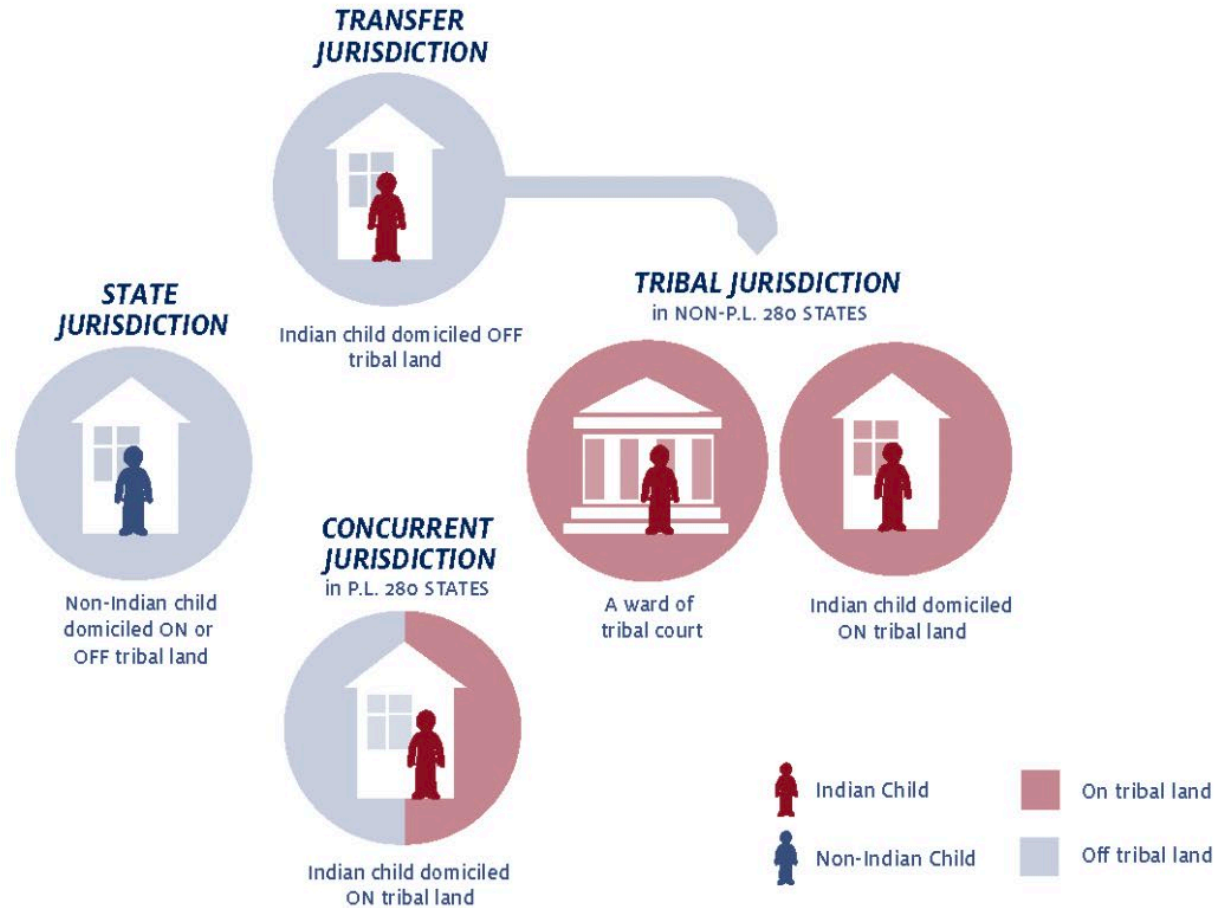
Child Custody Proceeding

- An involuntary proceeding;
 - Emergency; Foster Care; TPR; Pre-adoptive; Adoption
- A voluntary proceeding that could *prohibit* regaining custody upon demand;
 - Relinquishment; Adoption; Safe Haven
- A proceeding involving status offenses if it results in the need for out-of-home placement



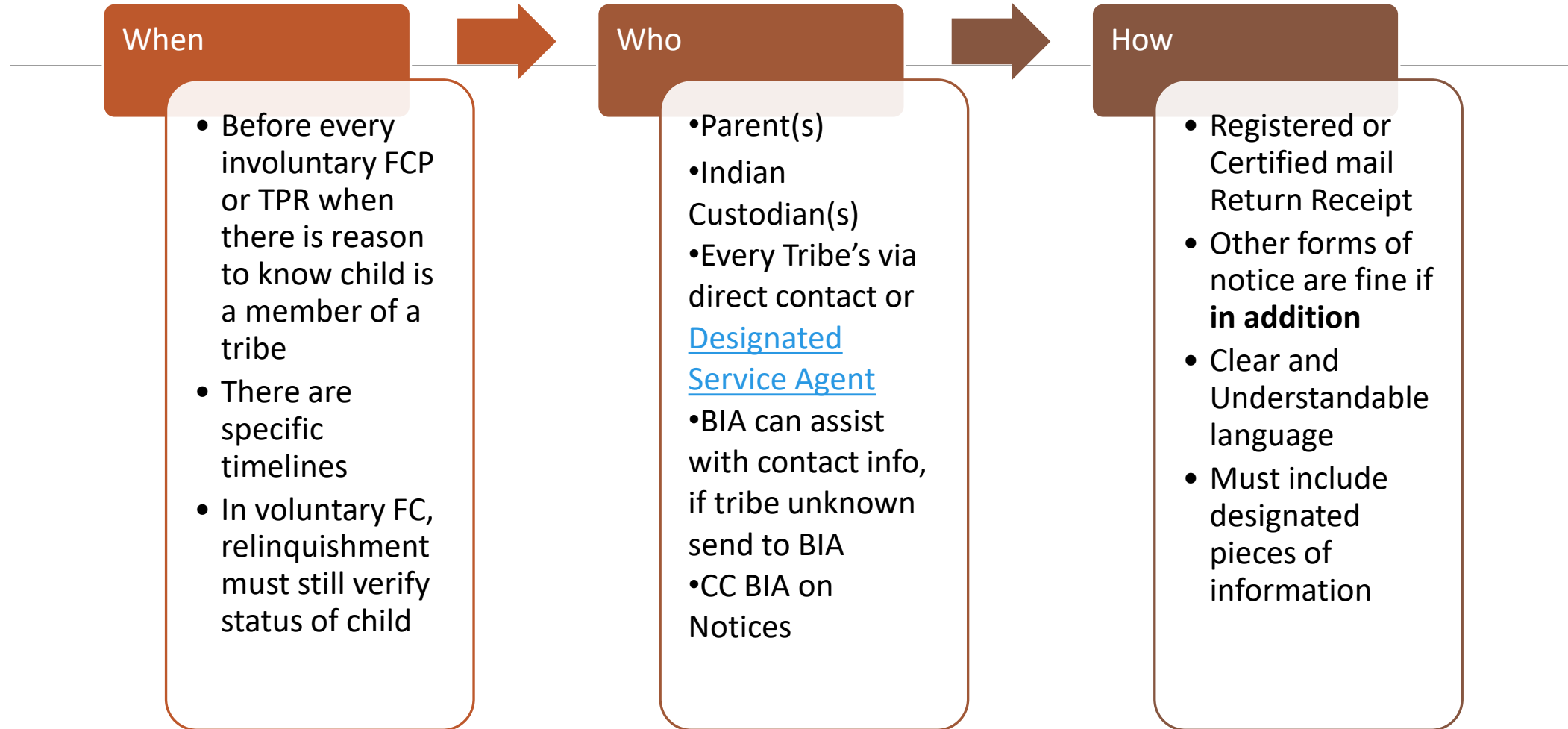
Not a Child Custody Proceeding

- Divorce/Custody Proceeding
- A voluntary placement that parents chose of their free will, without a threat of removal by a State agency, and does not prohibit regaining custody upon demand
- Proceeding involving criminal/delinquent act (non-status offense)
- Intra-family dispute

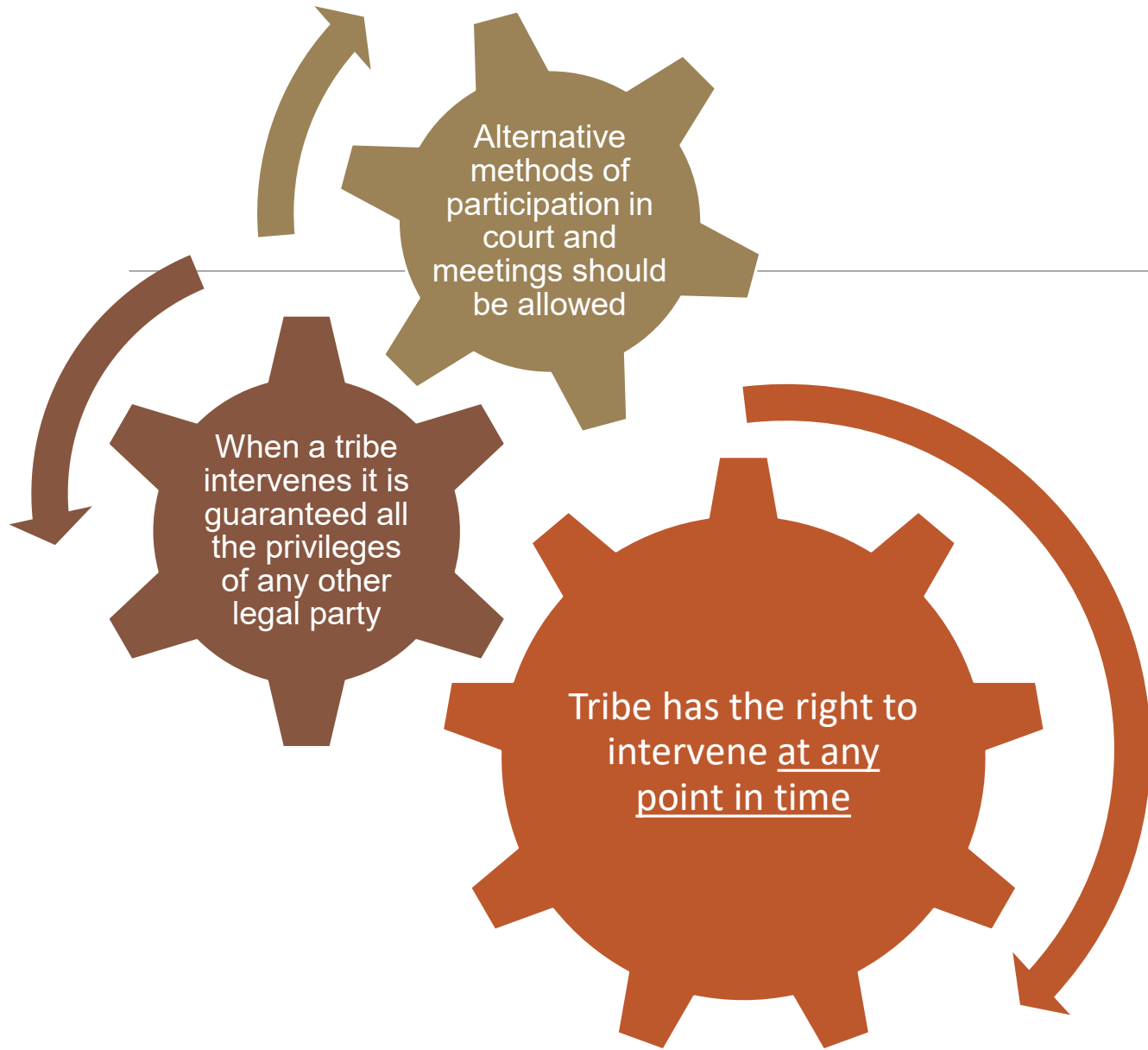


Jurisdiction

Notice



Intervention



Transfer

Request

- Either parent, the Indian custodian, or the Tribe may request transfer
- Right to request a is available at any stage in each foster-care or termination-of-parental-rights proceeding
- Can be done orally or in writing

Notify Tribe

- Must notified the Tribe in writing of the transfer petition.
- May request a timely response regarding declination of the transfer.

Don't Transfer if

- Tribal Declination
- Parent Objection
- Good Cause

Otherwise Transfer

Good Cause to Deny Transfer

F.5 Good cause to deny transfer.

Regulation:

§ 23.118 How is a determination of “good cause” to deny transfer made?

(c) In determining whether good cause exists, the court must not consider:

- (1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child’s parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
- (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- (3) Whether transfer could affect the placement of the child;
- (4) The Indian child’s cultural connections with the Tribe or its reservation; or
- (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

Emergency Removal or Placement



MAKE A FINDING ON THE RECORD THAT THE EMERGENCY REMOVAL IS NECESSARY TO PREVENT IMMINENT PHYSICAL DAMAGE OR HARM TO THE CHILD



HOLD A HEARING WHENEVER NEW INFORMATION INDICATES THAT THE EMERGENCY SITUATION HAS ENDED



TERMINATE EMERGENCY REMOVAL WHEN PLACEMENT IS NO LONGER NECESSARY DUE TO TRANSFER, COMMENCEMENT OF AN ICWA-COMPLIANT ADJUDICATION, OR REUNIFICATION.

Emergency Removal or Placement (Show Cause)

C.1 Emergency proceedings in the ICWA context

Regulation:

§ 23.2 *Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

C.2 Threshold for removal on an emergency basis

Regulation:

...necessary to prevent imminent physical damage or harm to the child. *See* § 23.113(b)(1), above.

Adjudicatory Standards

State must provide:

Clear &
Convincing Ev.
Of

Serious physical or
emotional damage

Active Efforts

Incl. Qualified
Expert Witness

Serious Physical or Emotional Damage: Causal Connection

G.1 Standard of evidence for foster-care placement and TPR proceedings

Regulation:

§ 23.121 What are the applicable standards of evidence?

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

Active Efforts

Must be provided to prevent removal and to promote reunification

Must involve assisting the parent through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.

Should be provided in partnership with the tribe

Should be provided in a manner consistent with the prevailing social and cultural standards conditions and the way of life of the child's tribe

E.4 Examples of active efforts

Regulation:

§ 23.2... Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

- (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
- (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
- (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
- (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
- (6) Taking steps to keep siblings together whenever possible;
- (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
- (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
- (9) Monitoring progress and participation in services;

Examples

- (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
 - (11) Providing post-reunification services and monitoring.
-

Qualified Expert Witness

Must be qualified to testify to the child's continued custody and the likelihood of serious emotional or physical harm

May NOT be the social worker assigned to the case

Must be qualified to testify to the prevailing social and cultural standards of the child's tribe

Tribe or BIA may be able to assist in finding QEW

May be designated by the tribe

Disposition (Placement)

1) Threshold questions:

- Least restrictive setting
- Most approximates family
- Reasonable proximity to home

2) Placement preferences (absent “good cause”)

- Extended family
- Tribal foster home/home approved by tribe
- Native foster home licensed by state
- Treatment program approved by tribe/run by Indian organization



Placement Preferences-Good Cause

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

- (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
- (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
- (3) The presence of a sibling attachment that can be maintained only through a particular placement;
- (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
- (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

Placement Preferences – Good Cause

§ 23.132 How is a determination of “good cause” to depart from the placement preferences made?

...(d) A placement may **not** depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may **not** depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Termination of Parental Rights Proceedings

State must provide:

Evidence
Beyond a
Reasonable
Doubt of

Serious physical
or emotional
damage

Active Efforts

Incl. Qualified
Expert Witness

Placement Preferences- Adoption

Placement Preferences (absent good cause)

- Extended Family
- Family from Child's Tribe
- Another Indian family

Unless the tribe has a different order of preference



Voluntary TPR/Adoption

- Consent must be obtained by BOTH parents
 - If voluntary consent cannot be obtained from both parents then the rights of the non-consenting parent must be terminated by involuntary procedures
- An unwed father must be treated as a father if he has acknowledged or established paternity:
 - Establishment can be based on tribal law or custom as well as state law
 - Acknowledging paternity in the proceeding at hand
 - DNA testing
- Consent can be withdrawn at anytime before the final order is entered
 - **If consent given under fraud or duress, or where ICWA was not properly followed, parents may petition the court to vacate the adoption decree up to two years after the adoption**
- ICWA status must be verified with the tribe

Voluntary Proceedings

§ 23.124 What actions must a State court undertake in voluntary proceedings?

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in § 23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

...



What happens if ICWA is not properly applied?

When ICWA is not followed, proceedings can be **invalidated**.



Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HAALAND, SECRETARY OF THE INTERIOR, ET AL. v. BRACKEEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21–376. Argued November 9, 2022—Decided June 15, 2023*

This case arises from three separate child custody proceedings governed by the Indian Child Welfare Act (ICWA), a federal statute that aims to keep Indian children connected to Indian families. ICWA governs state court adoption and foster care proceedings involving Indian children. Among other things, the Act requires placement of an Indian child according to the Act’s hierarchical preferences, unless the state court finds “good cause” to depart from them. 25 U. S. C. §§1915(a), (b). Under those preferences, Indian families or institutions from any tribe (not just the tribe to which the child has a tie) outrank unrelated non-Indians or non-Indian institutions. Further, the child’s tribe may pass a resolution altering the prioritization order. §1915(c). The preferences of the Indian child or her parent generally cannot trump those set by statute or tribal resolution.

In involuntary proceedings, the Act mandates that the Indian child’s parent or custodian and tribe be given notice of any custody proceedings, as well as the right to intervene. §§1912(a), (b), (c). Section 1912(d) requires a party seeking to terminate parental rights or to remove an Indian child from an unsafe environment to “satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent breakup of the Indian family,” and a court cannot order relief unless the party demonstrates, by a heightened burden of proof and expert testimony, that the child is

*Together with No. 21–377, *Cherokee Nation et al. v. Brackeen et al.*, No. 21–378, *Texas v. Haaland, Secretary of the Interior, et al.*, and No. 21–380, *Brackeen et al. v. Haaland, Secretary of the Interior, et al.*, also on certiorari to the same court.

Haaland v. Brackeen

No. 21-376

Released June 15, 2023

A full copy of the opinion is
available here:

https://www.supremecourt.gov/opinions/22pdf/21-376_7148.pdf

Hot Take

In this 7-2 opinion (Alito and Thomas dissent) the Supreme Court **rejected all of the challengers' arguments**, and:

Upheld Congress' Constitutional authority to protect Indian children

Demonstrated a strong understanding of the principles of Indian law

Recognized the sovereignty of tribal nations.



Overview

ICWA is deemed consistent with Congress' Constitutional Authority under Article I.

Claims that ICWA's active efforts requirement (§ 1912(d)) and placement preferences (§ 1915) violated the principles of anti-commandeering are rejected on the merits.

No party before the Court had standing to raise equal protection challenges to ICWA's placement preferences (§ 1915).

ICWA's History

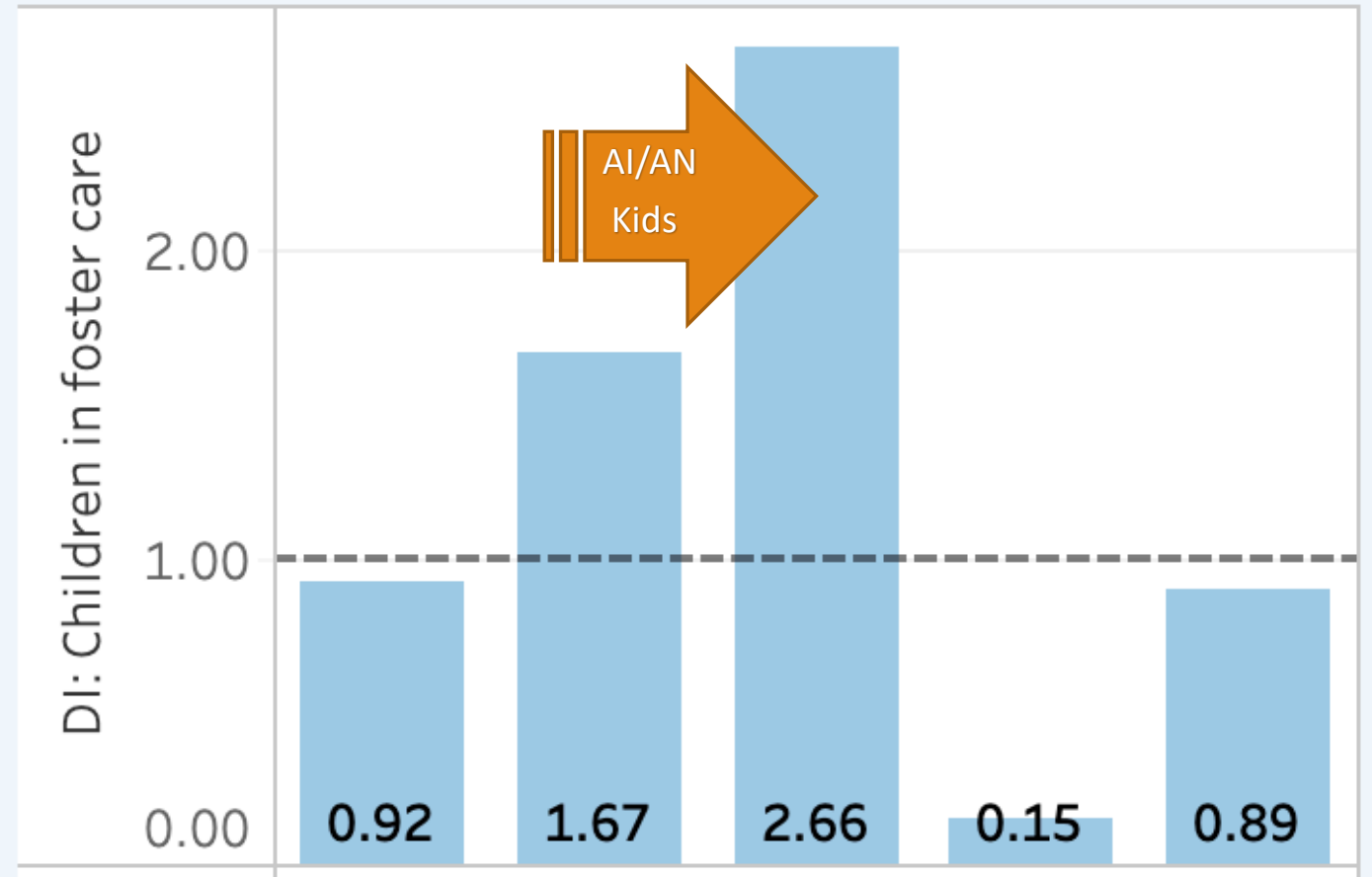


- ❖ Civilization Act of 1819
- ❖ Boarding Schools
- ❖ Indian Adoption Project
- ❖ Child Welfare Overreach Recorded by AAIA

ICWA' legislative history shows:

- ❖ High rates of removal by state and federal child welfare workers:
 - ❖ Rough estimates showed that between 1 in 4 and 1 in 3 Native children were being removed from their homes
- ❖ No Due Process
 - ❖ Parents were not provided notice of proceedings
 - ❖ Parents were not told why children were removed
 - ❖ Parents were not informed where their children were being placed
 - ❖ Minimal judicial oversight
- ❖ No Tribal Involvement
 - ❖ Tribal governments and jurisdiction were ignored (for the most part)
- ❖ Problematic Adoption Processes
 - ❖ Withholding of government assistance until children were relinquished
 - ❖ Consent to relinquishment or adoption while under anesthesia or in the middle of child birth

Disproportionality Index: Children in, entering, and exiting foster care
Year=2019, State=All



The overrepresentation or underrepresentation of a group in the child welfare system compared with its percentage in the total population.

Child Welfare Policy Broadly

Current U.S. child welfare policy has been criticized by international bodies for its over-emphasis on **removal** and high levels of **surveillance**, both of which are exacted with severe **disproportionality** on racial and ethnic minorities.

ICWA is **not remedial**, in that it is not intended to repair or restore historical harms.

ICWA is **forward-looking**. It is child welfare policy aimed at addressing the very critiques of disproportionality and community-void child welfare policies.

Child Welfare v. Voluntary Adoptions

About 135,000 children are adopted in the United States each year.

- Of non- stepparent adoptions, about 59% are from the child welfare system, 26% are from other countries, and 15% are voluntarily.
- On any given day, there are nearly 424,000 children in foster care in the United States.
 - In 2019, over 672,000 children spent time in U.S. foster care.

Major Cases of Note:

- *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30 (1989).
- *Adoptive Couple v. Baby Girl*, 570 US 637 (2013).
- *Haaland v. Brackeen*, No. 21-376 (2022)

Questions?



**Lunch Break! We will
see everyone in
1-hour**





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