

# INTERSTATE CHILD CUSTODY

## A Practitioner's Guide to the Indian Child Welfare Act (ICWA)

### 25 U.S.C. § 1901 et. seq.

#### WHAT TYPE OF LAW IS IT?

The ICWA is a federal law.

#### WHY WAS IT ENACTED?

The ICWA was enacted in 1978 to protect Indian children and to promote the stability and security of Indian tribes and families. The law was drafted in response to the actions of state courts and child protective services agencies that were removing large numbers of Indian children from their families and placing them in non-Indian foster and adoptive homes. The ICWA was designed to prevent the unwarranted removal of Indian children from their families. When removal is necessary, the ICWA helps ensure that Indian children retain ties to their culture and to the tribes with which the children are affiliated.

#### HOW DOES IT WORK?

The ICWA is a jurisdictional law. It establishes minimum federal standards for the removal of Indian children from their families and grants Indian tribes exclusive jurisdiction in specifically defined child custody proceedings.

#### WHAT ARE THE SIGNIFICANT PROVISIONS RELATED TO DOMESTIC VIOLENCE?

##### Definition of child custody proceedings

Under the ICWA, child custody proceedings include foster care placement, termination of parental rights, preadoptive placement and postadoptive placement proceedings involving Indian children. While the ICWA does not address directly domestic violence, as a matter of practice, many foster care or

termination of parental rights cases stem from domestic violence. In these cases, Indian tribes have exclusive jurisdiction.

***Protection order proceedings and custody proceedings between two parents often involve domestic violence. The ICWA does not govern these types of proceedings. Some experts have suggested that while the ICWA does not govern custody and divorce cases generally, the ICWA's principles of tribal sovereignty should be applied to such cases. See, e.g., Lesley M. Wexler, Tribal Court Jurisdiction in Dissolution Based Custody Proceedings, 2001 U. Chi. Legal F. 613.***

##### Standard to terminate parental rights

No termination of parental rights may be ordered absent a determination, supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

***This provision may raise the issue of whether observing domestic violence is likely to "result in serious emotional or physical damage" to children.***

### **Declining jurisdiction**

When a party in an Indian child custody proceeding before a state court has improperly removed the child from custody of the parent or Indian custodian or improperly retained custody, the court shall decline jurisdiction and return the child to the parent or Indian custodian unless returning the child would subject the child to a substantial and immediate danger or threat.

### **Intersection with other child custody jurisdictional statutes**

The UCCJA does not address whether tribes should be considered states under the UCCJA and does not reference the ICWA (the UCCJA was enacted prior to the ICWA).

The UCCJEA states explicitly that the UCCJEA does not apply to proceedings governed by the ICWA. Moreover, the UCCJEA gives states the option to extend the UCCJEA to custody determinations made by Indian tribal courts.

### **Notice requirements**

When a state court knows or has reason to know that an Indian child is involved in a case, the party seeking the foster care placement or termination of parental rights shall notify the parent or Indian custodian and the Indian child's tribe. If they cannot be found, such notice shall be given to the Secretary, who shall have 15 days to provide the required notice to the parent or Indian custodian and to the tribe. No proceeding shall take place until at least 10 days after receipt of notice, with up to 20 additional days available upon request.