

INDIAN CHILD WELFARE ACT

All Indian parents should be aware of the Indian Child Welfare Act. The Indian Child Welfare Act is a federal law passed by Congress in 1978 to protect Indian families and tribes from the removal of their children in state court proceedings. Congress found that state social workers and court systems did not understand or consider the unique culture of Indian families and the importance of tribal relations. The very existence of Indian tribes and culture was threatened by the wholesale removal of Indian children from their homes, and placement in non-Indian settings. The Indian Child Welfare Act is designed to preserve Indian tribes and families.

This article explains how the Indian Child Welfare Act works and who it applies to. If you are an Indian parent facing removal of your children in state court, we suggest you immediately contact Michigan Indian Legal Services. The staff at MILS can determine if the Indian Child Welfare Act applies to your situation and what steps must be taken to protect your interests.

WHEN DOES THE INDIAN CHILD WELFARE ACT APPLY?

The Indian Child Welfare Act applies to cases in state court where a non-parent seeks to remove an Indian child from the home or control of its parents or Indian custodians. In Michigan, this typically occurs when Protective Services files a petition in probate court charging the parents with neglecting, abusing or abandoning their children. Foster care or adoptive placement is often sought in these situations. The Act also applies when the child is charged with wrongdoing which would not be considered criminal if done by an adult, such as truancy or runaway.

WHEN WON'T THE INDIAN CHILD WELFARE ACT APPLY?

The Indian Child Welfare Act does not apply to custody disputes between parents so long as child custody is awarded to one of the parents. The Act does not apply to cases where minors are charged with criminal wrongdoing.

WHO DOES THE ACT APPLY TO?

The Act applies to Indians, Indian children, Indian custodians and Indian tribes. An Indian is defined as a person who is a member of an Indian tribe. An Indian child is defined as an unmarried person under eighteen who is a member or eligible for

membership in an Indian tribe. An Indian custodian means an Indian person who is caring for an Indian child with the parents' consent or by tribal law or custom, or under state law. To make sure the Act is applied to your case, you should tell the social workers you are Indian when you first talk to them.

WHAT RIGHTS DO THE PARENTS HAVE UNDER THE ICWA?

The Act requires that before separating an Indian child from its parents, all other methods of solving the family's problems must have been tried without success. The state must make active efforts to provide the services necessary to prevent the family's break-up before any court action is taken. The court cannot order removal unless these services have been provided and have proven unsuccessful.



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Except for emergencies, a child may not be taken from its Indian parents unless the child will suffer emotional or physical harm if left with its parents. This must be shown by clear and convincing evidence including testimony of expert witnesses who are knowledgeable in Indian customs, social relations and child rearing.

Parental rights cannot be terminated (the rights to the child permanently lost) unless the court finds beyond a reasonable doubt that the child will be physically or emotionally harmed by staying with its parents. This must be shown by testimony of expert witnesses knowledgeable in Indian customs, social relations and child rearing.

The state court must tell Indian parents or custodians that they have a right to an attorney, and that the court will appoint an attorney for them if they cannot afford one.

WHAT RIGHTS DOES THE CHILD'S TRIBE HAVE UNDER THE INDIAN CHILD WELFARE ACT?

If a state court is asked to remove a child from the care of an Indian parent and it has reason to believe that the child is Indian, it must notify the child's tribe of the proceedings. If the tribe is not known, the court must notify the regional office of the Bureau of Indian Affairs to find out the child's tribal membership. The notice must be in writing, indicating the tribe's right to become a party to the case and allowing ten days after delivery for the tribe to respond. The tribe may have an additional twenty days if it so requests.

The child's tribe may either take control of the case itself, or continue as a party in the state court proceeding. If the tribe stays in state court the tribe's arguments and desires must be considered by the state court, and the state court must follow strict guidelines to maintain the child's cultural environment.

WHERE IS AN INDIAN CHILD TO BE PLACED WHEN PLACEMENT IS NECESSARY?

The Indian Child Welfare Act commands the state court follow certain placement priorities for Indian children. If placement out of the home is necessary, the court must first attempt to place the child with a member of its extended family, such as a grandparent, aunt, uncle or other close relative. The court may consider other alternatives only if a relative is not available. The court's second choice is to place the child with a member of the child's tribe or in a tribally approved foster home. When a foster home specified by the tribe is not available, the State must place the child in an Indian foster home which is state approved. If none of these placements can be made, placement in an Indian operated institution is permitted. These priorities apply to both foster care and adoptive placement.

In making its decision regarding placement, the court must consider only the Indian community standards of a suitable home and not the standards of the non-Indian community. This is to prevent the state court from finding that an Indian home is inadequate because it is not similar to a white middle-class home.

DOES THE INDIAN CHILD WELFARE ACT APPLY WHEN INDIAN PARENTS VOLUNTARILY PLACE THEIR CHILDREN IN FOSTER CARE?

Because many Indian parents may not fully understand the effect of placements, the Act provides that consent to a voluntary placement must be explained to the Indian parents in court and the judge must determine that the parents understand the affect of their consent. Indian parents may withdraw their voluntary consent to foster care placement at any time, and their children must be immediately returned.

Currently, the Act does not require the Court to give the child's tribe notice in cases of voluntary placement. Therefore, it is important for the Indian parent to contact its tribe before voluntarily placing the child, so that the cultural heritage of the child can be protected.

DOES THE ACT APPLY WHEN INDIAN PARENTS VOLUNTARILY CONSENT TO ADOPTION?

Under the Act, any consent to adoption given before the birth of the child, or ten days after the birth, is not valid. Consent to adoption may be withdrawn at any time prior to the entrance of a final court order of adoption. If the adoption consent was obtained through trick or pressure, the adoption can be set aside if less than two years has passed since the date of the adoption.

CONCLUSION

The Indian Child Welfare Act is a very important law. It can be of great benefit to Indian tribes and individuals who seek to prevent the breakup of Indian families and the loss of tribal culture. However, the Indian Child Welfare Act can only be helpful if it is used at the right time by a person skilled in its use. It is critical for Indian parents to tell their lawyers, the judge, and social workers that they are a member of an Indian tribe, and that their child is a member of, or eligible for membership in, an Indian tribe. If you do not have an attorney when you go to court, hire one as soon as possible. Make sure your attorney knows about the Indian Child Welfare Act. If you

cannot afford an attorney, contact Michigan Indian Legal Services as soon as you learn you might be involved in a case where you could lose custody of your child.

The Indian Child Welfare Act can only be effective if courts enforce its provisions. If you are an Indian parent facing separation from your children you can contact:

**Michigan Indian Legal Services
814 Garfield Ave Suite A
Traverse City, Michigan 49686**

**(231) 947-0122
(800) 968-6877**

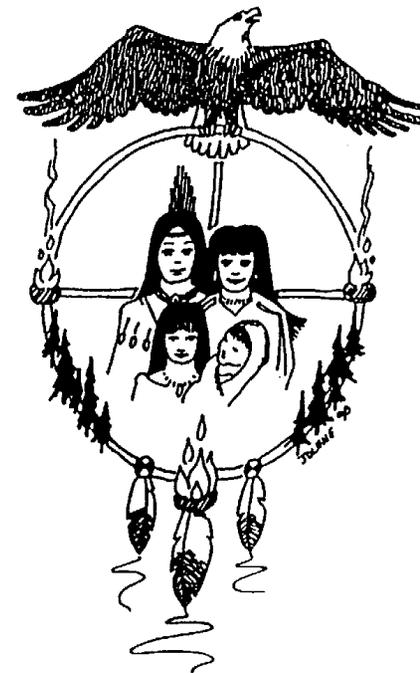
Michigan Indian Legal Services may be able to handle your case, work with your attorney, or provide you a referral. It is important to get legal assistance as soon as you are faced with court action that may result in the removal of your children.



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