



NICWA

National Indian Child Welfare Association

Protecting our children • Preserving our culture

ICWA and ASFA: Making the Laws Work for American Indian and Alaska Native Children

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ASFA Summary

- Provide that health and safety be the paramount concern in child welfare decisions.
- Various mechanisms encouraged to achieve this goal including criminal background checks of foster and adoptive parents.
- Reasonable efforts to reunify a family not required when family has a pattern of abusive and/or criminal behavior.
- Incentive payments for adoption.

ASFA Summary

- Expedited permanent placements by mandating the filing of TPR petitions, encouraging concurrent planning, expedited permanency hearings, removing jurisdictional barriers, and modifying reasonable efforts requirements.
- Regulations published on January 25, 2000 (see discussion of application for Indian children on page 4029 – Part III, Section G. Special Populations).

ICWA Summary

- No resource more vital to the integrity of Indian tribes than their children
- United States has a direct interest, as trustee, in protecting Indian children
- Alarming high percentage of Indian children removed from their homes by public and private agencies and placed in homes, many non-Indian
- Tribal governments not involved in decisions that affect their children and families in child welfare system

ICWA Summary

- Requirements to prevent removal, place in culturally appropriate homes and provide rehabilitative services to families.
- Tribal governments required to get notice of proceedings, be able to intervene, and petition to transfer jurisdiction to tribal court.
- Funding provided to tribal governments to facilitate development of tribal child welfare systems.

ICWA Must Be Applied Under ASFA

- ASFA amended laws that do not specifically address or override/amend the ICWA.
- The ASFA and its legislative history do not specifically address the ICWA.
- Rules of statutory construction - general enactments (ASFA) do not override specific enactments (ICWA) typically.
- Regulations affirm that states must comply with ICWA and ASFA regulations do not supersede ICWA.

Reasonable/Active Efforts

ASFA

- R.E. may not be required in some circumstances.
- Aggravated circumstances (state defines),
- No R.E. - place child and finalize permanent placement

ICWA

- A.E. required for all Indian families or custodians. This focuses on preventing removal and helping families rehabilitate so children can be returned.

Integration: RE and AE

- States not prohibited from making either reasonable or active efforts.
- State should refrain from making a determination to cease reasonable/active efforts, unless state can meet ICWA legal standards for TPR or child is in permanent placement that does not require a TPR (i.e. guardianship).

Termination of Parental Rights

ASFA

- TPR must be filed:
in care 15 of last 22 months (timeline can vary), child has been abandoned, or serious crimes against child.
- Exceptions: in relative care, not in best interests, or case plan services not achieved.
- Locate adoptive family when exceptions do not apply.

ICWA

- TPR should only occur when legal standards met:
Evidence beyond a reasonable doubt, including expert witness testimony, continued custody by parent and serious harm, and active efforts made.

Integration: TPR

Case-by-case determination

- ICWA preferred placement is extended family (in relative care).
- ICWA legal standards for TPR - if not met, grounds to avoiding filing (not in best interests).
- Active efforts not provided - grounds to avoiding filing (case plan services not provided).
- Progress being made by parent (not in best interests).
- Indian child is not in relative care and ICWA's requirements have been met - greater hesitance to engage in lengthy reunification efforts

Permanency Hearings

ASFA

- Within 12 months after child has entered foster care. Entering foster care defined as earlier of
- 1) judicial finding of abuse or 2) 60 days after child was removed.
- Within 30 days after determination that reasonable efforts not required.

ICWA

- No comparable provision.
- Tribe, parents and Indian custodians should receive notice and chance to participate at hearing (ICWA).

Integration: Permanency Hearing

- Hearing will take place within ASFA timelines, but decisions regarding permanency plan should be governed by ICWA.
- 12 month hearing is not a “cut-off” date for parental rights.
- If parent(s) have made little progress within 12 months, it is likely that a permanency plan other than reunification will be presented to the court.

Cross Jurisdictional Placements

ASFA

- States may not delay or deny placement of a child for adoption when an approved family is available outside of jurisdiction responsible for handling the case.
- Delay or deny risks having Title IV-E funds reduced.

ICWA

- Tribally-licensed home equivalent to state licensed home.
- Preferred placements.
- Transfer of adoption proceedings to tribal court.

Integration: Cross Jurisdictional

- Placements outside of the jurisdiction of the state would include tribal jurisdiction.
- Locating an ICWA preferred placement could be grounds for delaying or denying placement.
- Petition to transfer proceeding to tribal court could be justification to delay the placement.
- If a state or county delays or denies the placement of an Indian child with an approved tribal family they could be in violation of this requirement.