

SPECIALIZED CHILD WELFARE SUBJECT MATTER

Native American Families

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Policy

There are federally recognized Tribes in Connecticut (the Mashantucket Pequot and Mohegan), as well as in surrounding states. At the outset of any case, the social worker shall inquire whether there is any possibility of Native American heritage and shall document the response in the electronic record.

Federally recognized Native American Tribes and Connecticut-recognized Tribes have certain rights separate and distinct from the rights of the parents, including the right to intervene in child protection cases that involve Native American children.

The social worker shall immediately consult with the area office attorney or Assistant Attorney General if informed that it is possible that a family has Native American heritage so that proper legal notice can be provided to the Tribe.

It is the Tribe's role, and not the Department of Children and Families (DCF), to determine whether a child meets the Tribe's eligibility criteria.

Legal Basis

The Indian Child Welfare Act (ICWA) is a federal law enacted in 1978 in response to the disproportionate number of children removed from Native American families and Tribes. Its purpose is to protect the best interests of Native American children and to promote the stability and security of Native American Tribes and families.

Connecticut law extends ICWA protections to Connecticut-recognized tribes, which include the Schaghticoke, Paucatuck Eastern Pequot, and Golden Hill Paugussett.

Legal references: 25 U.S.C. 1901 et seq., PA 23-113, and ICWA regulations: 25 CFR part 23.

Qualification for Protection Under ICWA

In order for a Native American family and/or tribe to qualify for the protections afforded under ICWA, the child who is the subject of a court petition must be:

- an unmarried person
- under age 18 and either:
 - a member or citizen of a Native American Tribe or
 - eligible for membership or citizenship in a Native American Tribe and is the biological child of a member/citizen of a Native American Tribe.

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Cases Covered by ICWA

ICWA applies to the following types of court cases:

- neglect and other similar issues which may result in foster care
- termination of parental rights
- guardianships and
- adoptions.

Note: ICWA applies in these cases even if the parents are consenting to out-of-home placement.

ICWA does not apply to divorce or custody actions.

Determining if the Child is a Native American Child

The social worker shall make diligent efforts to identify if a child is a member of a Tribe or may be eligible for membership in a Tribe.

The social worker shall inquire of each parent, and the child if applicable, as to their Native American ancestry.

Sometimes, the child or parent may not be certain of their citizenship status in a Tribe but may indicate they are somehow affiliated with a Tribe or group of Tribes. In these circumstances, the social worker shall ask the parent and, if the parent is uncertain, shall ask extended family what Tribe or Tribal ancestral group the parent may be affiliated with. If a specific Tribe is indicated, notice shall be sent in accordance with this policy.

If DCF is unsure that it has contacted all the relevant Tribes, or needs other assistance in identifying the appropriate Tribes, the DCF area office shall contact the Bureau of Indians Affairs (BIA) Regional Office for direction.

Note: If during the pendency of the case, DCF obtains new information which suggests the child may be tribal eligible, notice shall be immediately provided as required below.

Notice to the Tribe

Federal ICWA guideline recommend that in addition to the formal notice, the social worker contact by telephone and/or email, the Tribal ICWA agent, as listed in BIA's most recent list of designated Tribal agents for service of ICWA notice, available on www.bia.gov and published annually in the Federal Register.

For any child who DCF knows is a Native American child or for whom DCF has information that gives reason to believe the child may be Tribal eligible, DCF shall provide written notice when:

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Notice to the Tribe (continued)

- filing Neglect/Uncared for Petitions and
- filing Termination of Parental Rights Petitions.

The notice requires certain information specified by federal and state law. The social worker shall consult with the Legal Division on the ICWA Notification letter template, which includes the required information. (Please see 21-17 - Attachment A for the ICWA Notification letter.) A copy of the petition shall also be included with the notice.

The required notice shall be sent by registered or certified mail with return receipt requested to the applicable recognized Tribe(s) itself. A copy of the notice shall be sent via registered or certified mail with return receipt requested to:

- each parent
- any Native American person who is custodian of the child and
- Eastern Regional Director, BIA, 545 Marriott Drive, Suite 700, Nashville TN 37214. (Notice should not be sent to the BIA for the Connecticut-recognized Tribes listed above.)

Jurisdiction

Federally recognized tribes have exclusive jurisdiction over children who reside on the Tribal reservation. Neither DCF nor the Juvenile Court has any jurisdiction over children who reside on the reservation of a federally recognized tribe unless specifically agreed to by the Tribe.

In cases in which a Native American child does not reside on the reservation of a federally recognized Tribe, the Juvenile Court may exercise jurisdiction subject to a transfer to a Tribal Court.

A request from a tribe or Native American party to transfer a case to tribal court must be granted by the Juvenile Court unless:

- a parent objects
- the Tribal Court declines to accept jurisdiction or
- the court finds good cause not to transfer.

Good cause exists when:

- the Tribe has no court
- the proceeding is in an advanced stage and the party requesting the transfer delayed making the request after receiving the required notice
- presentation of evidence in Tribal Court would cause undue hardship to the parties or witnesses
- the child who is the subject of the litigation is over 12 years of age and objects to the transfer or

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Jurisdiction (continued)

- the child who is the subject of the litigation is over five years of age, has had little contact with the Tribe, and the child's parents are unavailable.

Note: DCF has existing agreements with the Mashantucket Pequot Tribal Nation and the Mohegan Tribe.

Legal Reference: 25 USC section 1911, 25 CFR sections 23.115 - 23.119

Burdens of Proof

For neglect cases in which the Tribe has been given proper notice and declined jurisdiction, DCF must prove the following for foster placements:

- the child has been neglected by clear and convincing evidence (as opposed to a fair preponderance of evidence) and
- continued custody of the child by the parent or Native American custodian is likely to result in serious emotional or physical damage to child.

For termination of parental rights cases, the above must be proven beyond a reasonable doubt as opposed to by clear and convincing evidence.

In all cases, DCF must present expert testimony from someone knowledgeable about Tribal customs. 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. Poverty, alcohol abuse or non-conforming social behaviors do not by themselves 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.

In all cases, the court must be satisfied that active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of the family and that such efforts were unsuccessful.

Federal law defines "active efforts" as affirmative, active, thorough and timely efforts intended primarily to maintain or reunite a Native American child with the child's family. Active efforts in a child custody proceeding must involve assisting the Native American parent or custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Native American child's Tribe and should be conducted in partnership with the child and the child's parents, extended family members, custodians and Tribe.

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Burdens of Proof (continued)

In cases of consensual out-of-home placement or consensual termination the following applies:

- the consent must be executed in the presence of a judge
- the judge must issue a certificate stating that certain criteria have been met
- the parent or custodian may withdraw the consent at any time prior to a final decree of termination and
- an adoption may be vacated within two years on the grounds of fraud or duress.

In cases where a Native American child is placed out of home, the law requires that the following preferred placements be utilized, in this order, whenever possible:

- extended family members
- a foster home approved by the Tribe
- a licensed Native American foster home or
- an approved Native American institution.

In determining which preferred placement is appropriate, DCF and the court must consider the following criteria:

- the proposed placement is the least restrictive setting
- the proposed placement is within reasonable proximity to the child's home
- the child's special needs
- preference of the parents and
- parent's request for anonymity.

Note: ICWA permits the federally recognized Tribe to establish a different preference order at its discretion. All other exceptions must be for good cause.

Legal references: 25 U.S.C. section 1915, 25 CFR sections 23.121 & 23.2, PA 23-113

Adoptions of Native American Children

Any state court or DCF must furnish a copy of the final adoption decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information, in an envelope marked "Confidential":

- birth name and birthdate of the Native American child and Tribal affiliation and name of the Native American child after adoption
- names and addresses of the biological parents
- names and addresses of the adoptive parents

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Adoptions of Native American Children (continued)

- name and contact information for any agency having files or information relating to the adoption
- any affidavit signed by the biological parent or parents asking that their identity remain confidential and
- any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

If a Native American child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Native American child's Tribe whenever:

- a final decree of adoption of the Native American child has been vacated or set aside or
- the adoptive parent has voluntarily consented to the termination of parental rights to the child.

If an adoption is vacated or set aside, or the adoptive parent voluntarily consents to TPR, the law provides certain rights to the biological parent or prior Native American custodian.

Upon application by a Native American child who has reached age 18 who was adopted, the court that entered the final decree of adoption must inform such individual of the Tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

BIA is adding information to its website (www.bia.gov) to assist adult adoptees who are looking to reconnect with their Tribes.

Legal references: 25 CFR sections 23.136 - 23.140, 23.2
